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A TREATISE
ON
PLEADING AND PRACTICE

IN COURTS OF RECORD IN
CIVIL CASES IN THE STATE OF
OKLAHOMA

WITH FORMS

BY ARTHUR B. HONNOLD

OF THE OKLAHOMA BAR

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STAFF OF THE WEST PUBLISHING COMPANY

IN THREE VOLUMES

VOLUME II

KANSAS CITY, MO.
VERNON LAW BOOK COMPANY

1922

115
630K
124

14-7736

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(HON. PL. & PRAC.)

MAY 3 1922

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A TREATISE
ON
PLEADING AND PRACTICE
IN COURTS OF RECORD IN CIVIL CASES
IN THE STATE OF OKLAHOMA

VOLUME 2

v.2 HON.PL.& PRAC.

(802A)*

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DIVISION I.—PREPARATION FOR TRIAL

§ 889. Genuineness of writings—Admission

"Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper or document material to the action, and request an admission, in writing, of its genuineness. If the adverse party, or his attorney, fail to give the admission in writing within four days after the request, and if the party exhibiting the paper or document be afterward put to any costs or expense to prove its genuineness, and the same be finally proved or admitted on the trial, such costs and expenses, to be ascertained at the trial, shall be paid by the party refusing to make the admission, unless it shall appear to the satisfaction of the court that there were good reasons for the refusal."¹

§ 890. Documents—Preliminary inspection

"Either party, or his attorney, may demand of the adverse party an inspection and copy, or permission to take a copy of a book, paper or document in his possession or under his control, containing evidence relating to the merits of the action or defense therein. Such demand shall be in writing, specifying the book, paper or document with sufficient particularity to enable the other party to distinguish it, and if compliance with the demand, within four days, be refused, the court or judge, on motion and notice to the adverse party, may, in their discretion, order the adverse party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of such book, paper or document; and on failure to comply with such order, the court may exclude

¹ Rev. Laws 1910, § 5094.

the paper or document from being given in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party, by affidavit, alleges it to be. This section is not to be construed to prevent a party from compelling another to produce any book, paper or document when he is examined as a witness."²

§ 891. Copy of writing

"Either party, or his attorney, if required, shall deliver to the other party or his attorney, a copy of any deed, instrument or other writing whereon the action or defense is founded, or which he intends to offer in evidence at the trial. If the plaintiff or defendant shall refuse to furnish the copy or copies required, the party so refusing shall not be permitted to give in evidence, at the trial, the original of which a copy has been refused. This section shall not apply to any paper, a copy of which is filed with a pleading."³

The foregoing statute does not apply to public documents or records equally accessible to all parties.⁴

§ 892. Duty to furnish evidence

"If freight, addressed to a place beyond the usual route of the common carrier who first received it, is lost or injured, he must, within a reasonable time after demand, give satisfactory proof to the consignor that the loss or injury did not occur while it was in his charge, or he will be himself liable therefor."⁵

It is, by statute, "made the duty of every foreign corporation doing business in the state of Oklahoma in any action pending in any court of record within the state, wherein the state of Oklahoma or any of its officers in their official capacity are parties, upon the application of the state or said officers, and upon the order of the presiding judge of said court, authority for which is hereby con-

² Rev. Laws 1910, § 5095.

³ Rev. Laws 1910, § 5096.

⁴ *Incorporated Town of Sallisaw v. Chappelle* (Okla.) 171 P. 22.

It is error to reject certified copies of recorded deeds or of other records, equally accessible to both parties, offered by defendant, when the originals were never in his possession or control, solely on the ground that copies had not been furnished plaintiff under a written demand therefor, since Code, § 369, does not apply to copies of records of this character. *Hammerslough v. Hackett*, 1 P. 41, '30 Kan. 57.

⁵ Rev. Laws 1910, § 846.

ferred, upon reasonable notice, at a time and place within the state to be fixed by said court, to cause to appear for examination and inspection any of its officers, agents, books and papers.”⁶

§ 893. Misconduct—Falsifying evidence

“Any person who, upon any trial, proceedings, inquiry or investigation whatever, authorized by law, offers in evidence, as genuine, any book, paper, document, record, or other instrument in writing, knowing the same to have been forged, or fraudulently altered, is punishable in the same manner as the forging or false alteration of such instrument is made punishable by the provisions of the Code.”⁷

§ 894. — Fraud or deceit to witness

“Any person who practices any fraud or deceit, or knowingly makes or exhibits any false statement, representation, token or writing, to any witness or person about to be called as a witness, upon any trial, proceeding, inquiry or investigation whatever, proceeding by authority of law, with intent to affect the testimony of such witness, is guilty of a misdemeanor.”⁸

§ 895. — Preparation of false evidence

“Any person guilty of falsely preparing any book, paper, record, instrument in writing, or other matter or thing, with intent to produce it, or allow it to be produced as genuine upon any trial, proceeding or inquiry whatever, authorized by law, is guilty of a felony.”⁹

§ 896. — Destruction of evidence

“Any person who, knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, proceeding, inquiry or investigation whatever, authorized by law, wilfully destroys the same, with intent thereby to prevent the same from being produced, is guilty of a misdemeanor.”¹⁰

§ 897. — Keeping witness from attending

“Any person who wilfully prevents or dissuades any person who has been duly summoned or subpoenaed as a witness from attend-

⁶ Rev. Laws 1910, § 1342.

⁷ Rev. Laws 1910, § 2226.

⁸ Rev. Laws 1910, § 2227.

⁹ Rev. Laws 1910, § 2228.

¹⁰ Rev. Laws 1910, § 2229.

ing pursuant to the command of the summons or subpoena is guilty of a felony.”¹¹

§ 898. — Bribery of witness

“Any person who gives or offers or promises to give to any witness or person about to be called as a witness in any matter whatever, including contests before United States land officers or town-site commissioners, any bribe upon any understanding or agreement that the testimony of such witness shall be influenced, or who attempts by any other means fraudulently to induce any witness to give false testimony is guilty of a felony; but if the offer, promise, or bribe is in any way to induce the witness to swear falsely, then it shall be held to be subornation of perjury.”¹²

DIVISION II.—RECEPTION OF EVIDENCE

§ 899. Oral examination—Objections

“An oral examination is an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness. Where any party desires to object to any question put to a witness, either before a court or tribunal or upon the taking of depositions upon notice, the ordinary objections of incompetency, irrelevancy or immateriality, shall be deemed to cover all matters ordinarily embraced within such objections and it shall not be necessary to specify further the grounds of such objections or to state the specific reasons whereby the question is so objectionable; but the court or opposing counsel may inquire of the objector wherein the question is so objectionable and the objector shall thereupon state specifically his reasons or grounds for such objections.”¹³

§ 900. Exclusion of witnesses

The fact that a witness has disobeyed an order of the court to remain outside the courtroom while the other witnesses are testifying is no ground for excluding the testimony of such witness,

¹¹ Rev. Laws 1910, § 2230.

¹² Rev. Laws 1910, § 2231.

¹³ Rev. Laws 1910, § 5070.

though he may be punished for disobeying the order to remain outside.¹⁴

The court, by permitting the husband of plaintiff to remain with her in the courtroom during the trial, does not abuse its discretion, though he is a witness in her behalf.¹⁵

The principal officer of a railroad company who becomes a witness in an action against it may be excluded from the courtroom as other witnesses.¹⁶

§ 901. Offer of proof

In order to enable a trial court to determine whether facts sought to be proven by a witness are admissible in evidence, it is proper to make an offer to prove the facts which the party assumes his question will elicit.¹⁷

Where the question asked of a witness, considered in connection with the other proceedings, fails to show that its answer would be relevant, its rejection can be assigned as error only when the court has been informed as to the nature of the testimony sought to be elicited.¹⁸

A litigant's offer of testimony is properly rejected where the materiality of the lost instrument about which he proposes to testify is not disclosed.¹⁹

Where counsel offering an instrument in evidence states the

¹⁴ *State v. Falk*, 26 P. 1023, 46 Kan. 498; *Barber v. Emery*, 101 Kan. 314, 167 P. 1044.

¹⁵ *First Nat. Bank v. Knoll*, 52 P. 619, 7 Kan. App. 352.

¹⁶ *Missouri, O. & G. Ry. Co. v. Hayden*, 31 Okl. 21, 119 P. 581.

¹⁷ *Eagon v. Eagon*, 57 P. 942, 60 Kan. 697.

Where an objection to evidence is sustained, and it is not apparent that such question is proper, the ruling will not be deemed erroneous unless it is made to appear by offer of proof or otherwise what facts are expected to be elicited by such question. *Judy v. Buck*, 82 P. 1104, 72 Kan. 106.

¹⁸ *Marshall v. Marshall*, 80 P. 629, 71 Kan. 313.

A ruling sustaining an objection to a question which might have been held to be directed to an issue not made by the pleadings cannot be reversed because it was susceptible of an answer which would have been competent upon another matter, where no statement was made of the character of the evidence sought to be elicited. *Hager v. Donovan*, 88 P. 637, 75 Kan. 43.

The exclusion of questions asked a witness upon objection will not be deemed erroneous where no testimony was given, no offer of proof made, and the question did not clearly indicate the nature of the testimony sought to be elicited. *Harper v. Harper*, 113 P. 300, 83 Kan. 761.

¹⁹ *Work v. Work*, 136 P. 236, 90 Kan. 683.

purpose thereof, and it is inadmissible for that purpose, its rejection is not reversible error, though it might have been admissible for another purpose.²⁰

§ 902. Restricting to special purpose

Evidence, admissible to establish one phase of a case, and not of another, may be received, and its application limited in the instructions to the purpose for which it is competent.²¹

Where evidence is incompetent as original testimony, but competent as impeaching testimony, it is not error to admit it as impeaching testimony, though it is objected to as incompetent.²²

§ 903. Withdrawal of evidence

Where certain evidence is offered and objection thereto overruled, and after the jury have retired, and before a verdict is reached, the court, on reflection, concludes that the evidence was improper, and calls the jury into open court and by a written instruction withdraws the evidence, if such evidence was improper, the action of the court in withdrawing the same is not reversible error.²³

§ 904. Limiting number of witnesses

The court in its discretion, and with proper notice to the parties, may limit the number of witnesses to be introduced on each side to prove plaintiff's general reputation for honesty and integrity,²⁴ and may likewise limit the number of expert or opinion witnesses.²⁵

²⁰ Spaulding v. Beldleman, 60 Okl. 183, 160 P. 1120.

²¹ State v. Cowan, 164 P. 183, 100 Kan. 180.

²² Jones v. Inness, 4 P. 95, 32 Kan. 177.

²³ Long v. Kendall, 87 P. 670, 17 Okl. 70.

²⁴ Haag v. Cooley, 6 P. 585, 33 Kan. 387.

²⁵ On the trial of a suit to enjoin county commissioners from purchasing a poor farm, where the principal issue was as to whether an election, at which it was decided to purchase a poor farm, was valid, the court limited the number of witnesses who might testify as to the value of the land purchased by the county board for a poor farm to six on each side. Such limitation is not erroneous. State v. Board of Com'rs of Pratt County, 42 Kan. 641, 22 P. 722.

§ 905. Order of proof

The order in which evidence shall be received is largely within trial court's discretion.²⁶

Thus evidence admissible in chief may be introduced out of its regular order, where the court believes such course proper in facilitating the dispatch of business,²⁷ or the court may reopen the case after both sides have closed.²⁸

A defendant, having the burden of proof, is entitled to first produce his testimony;²⁹ but this right may be waived by delay in claiming same.³⁰

Where, in an action to recover a balance due on a written contract, defendant confessed the contract and original liability, but pleaded defenses other than payment, and at the commencement of the trial the court ruled that the burden was on defendant, it was not error, on defendant's failure to establish his defenses, but on its proof that the amount due was less than the amount claimed by plaintiff, to permit plaintiff to testify as to the amount due.³¹

§ 906. Preliminary proof

When it is necessary to prove that the husband of plaintiff was her agent in order to render him competent, he may testify to a preliminary question that he acted as her agent, and after such tes-

²⁶ *McKee v. Jolly* (Okl.) 178 P. 656; *Wilson v. Moran* (Okl.) 197 P. 1051; *Barricklow v. Boice*, 50 Okl. 260, 150 P. 1094; *McBride v. Steinweden*, 83 P. 822, 72 Kan. 508; *Standifer v. Sullivan*, 30 Okl. 365, 120 P. 624; *Ackerman v. C. C. Chapell Hardware Co.*, 137 P. 349, 41 Okl. 275; *Rains v. Weiler*, 101 Kan. 294, 166 P. 235, L. R. A. 1917F, 571; *Lamont Mercantile Co. v. Piburn*, 51 Okl. 618, 152 P. 112.

²⁷ *Stetler v. Boling*, 52 Okl. 214, 152 P. 452.

²⁸ *Winfield v. State* (Okl. Cr. App.) 191 P. 609; *Fellce v. State* (Okl. Cr. App.) 194 P. 251.

²⁹ *Wilson v. Moran* (Okl.) 197 P. 1051.

³⁰ *Congdon v. McAlester Carriage & Wagon Factory*, 56 Okl. 201, 155 P. 597. Where defendant failed, until after opening statements were made and introduction of some evidence, to claim his right to submit his evidence first, the question of granting or refusing his request rested in the court's discretion. *Id.*

Where defendant, in the course of his testimony, offers a tax deed, and the court then permits plaintiff to introduce evidence that the tax deed is void, the court has not so abused its discretion, in regard to the order of trial as to require a reversal. *Board of Regents of State Agricultural College v. Linscott*, 1 P. 81, 30 Kan. 240.

³¹ *Higgins v. Street*, 92 P. 155, 19 Okl. 42.

timony it is not improper to permit him to give testimony as to the object of his agency.³²

Where the authority of the owner's agent was not shown, the trial court, in the owner's action of ejectment, properly rejected evidence of an agreement made by the alleged agent with regard to a boundary line.³³

§ 907. Rebuttal and surrebuttal

It is within discretion of trial court to admit in rebuttal facts which should have been offered in chief,³⁴ and the exclusion of such evidence is not error.³⁵

After defendant has rested his case, and plaintiff has given impeaching evidence in rebuttal, defendant is not entitled, as a matter of right, to open up his defense, and give further evidence in support thereof.³⁶

§ 908. Reopening case

A request to reopen a case for the introduction of evidence is addressed largely to the sound discretion of the court,³⁷ even after a demurrer to the evidence has been interposed.³⁸

³² *Chicago, R. I. & P. Ry. Co. v. Cotton*, 62 Okl. 168, 162 P. 763.

³³ *Peyton v. Waters*, 104 Kan. 81, 177 P. 525.

³⁴ *State v. Stout*, 101 Kan. 600, 168 P. 853.

In an action against driver of automobile for killing a boy, charging driver's negligence in going too fast, plaintiff's expert testimony that under circumstances testified to by defendant the first brake would have stopped car within two feet, if going only six or eight miles an hour, and that twenty feet traveled before stopping indicated an initial speed of thirty to forty miles an hour, is proper in rebuttal. *Eames v. Clark*, 104 Kan. 65, 177 P. 540.

Where plaintiff testified that steam was escaping from the top and bottom of defendant's engine and defendant's witness testified that steam could not escape from below on account of the mechanical construction of the engine, it was error to exclude testimony in rebuttal that steam could escape from below. *Talliaferro v. Atchison, T. & S. F. Ry. Co.*, 61 Okl. 27, 160 P. 69.

³⁵ *Prosser v. Pretzel*, 55 P. 854, 8 Kan. App. 856.

³⁶ *Meixell v. Kirkpatrick*, 6 P. 241, 33 Kan. 282.

³⁷ *Federal Life Ins. Co. v. Whitehead* (Okl.) 174 P. 784; *St. Louis & S. F. R. Co. v. Long*, 137 P. 1156, 41 Okl. 177, Ann. Cas. 1915C, 432.

It is within discretion of trial court to reopen case any time before final submission and permit either side to offer evidence. *State v. Stout*, 101 Kan. 600, 168 P. 853.

Where court, after parties had rested, reopened case and allowed further testimony over plaintiff's objection that its witnesses on that subject had left

³⁸ See note 38 on following page.

Where a demurrer to the evidence is sustained, and the court grants a motion of plaintiff to reopen the case to admit other evidence on conditions, and the plaintiff's attorney refuses to comply therewith, it is not error to render judgment for defendant.³⁹

Opening a case for further evidence, after trial, but before a decision is rendered, and continuing it for such evidence, and receiving the evidence, are all within the discretion of the court.⁴⁰

A refusal to permit the jury to be recalled on a party's appearance to testify is not an abuse of discretion, where such party had voluntarily remained away from the trial until the jury had retired.⁴¹

§ 909. Objections—Form

Counsel cannot allow evidence to come in and take advantage of it if favorable, and, if not, ask that it be stricken out.⁴²

court and that their evidence was not then available and defendants conceded that absent witnesses, if present, would testify as stated by plaintiff, there was no abuse of discretion in reopening case. *Fisher Mach. Works Co. v. Singletary*, 104 Kan. 460, 179 P. 328.

The opening of a case for additional testimony for plaintiff after instructing was within the discretion of the court, where defendant's attorney, in his opening, admitted the fact shown by such evidence, and at the close of the case moved to dismiss, because it was not shown. *Bristow v. Carrigar*, 132 P. 1108, 37 Okl. 736.

Opening of case for further testimony, after findings of fact and discharge of jury, is within trial court's discretion, on which it may consider counter-affidavits as well as affidavits in support of motion. *Randall v. Randall*, 101 Kan. 341, 166 P. 516.

³⁸ *State Bank of Westfield v. Kiser*, 46 Okl. 180, 148 P. 685; *Insurance Co. of State of Pennsylvania v. Harris*, 49 Okl. 165, 152 P. 359; *Russell v. Watts*, 150 P. 600, 96 Kan. 275; *Oberlander v. Confrey*, 17 P. 88, 38 Kan. 462.

Permitting a case to be reopened, after sustaining a demurrer to evidence, and allowing further evidence to be introduced, being within the discretion of the trial court, is not ground of reversal. *Farmers' & Merchants' Bank v. Bank of Glen Elder*, 26 P. 680, 46 Kan. 376; *Cole v. Gray*, 79 P. 654, 70 Kan. 705.

³⁹ *Cole v. Gray*, 79 P. 654, 70 Kan. 705.

⁴⁰ *West v. Cameron*, 18 P. 894, 39 Kan. 736, judgment affirmed on rehearing 19 P. 616.

⁴¹ *Denman v. Brennaman*, 48 Okl. 566, 149 P. 1105, L. R. A. 1915E, 1047.

⁴² *Brownell v. Moorehead* (Okl.) 165 P. 408.

In an action to have set aside a deed made by a married man to a woman not his wife in anticipation of a marriage with her, there were no allegations in the pleadings that plaintiff had at one time been a married man and was afterwards divorced, but such facts appeared for the first time on the trial, and the fact of the divorce was proved, without objection. Held, that

If the admissibility of offered evidence clearly appears on its face, no reason for its exclusion is necessary.⁴³

Where an exception has been taken to the overruling of an objection to an incompetent question, the objecting party need not renew his objection, where the examining counsel tells the witness to proceed in his own way in response to a suggestion from the witness as to the manner of his answer.⁴⁴

An objection to the admission or exclusion of evidence must be specific and state the grounds of the objection.⁴⁵

A general objection to evidence will not avail, where any part of such evidence is not subject to the objection;⁴⁶ but this rule does not apply without modification to an objection on the oral

objection to such evidence cannot afterwards be made. *Douthitt v. Applegate*, 6 P. 575, 33 Kan. 395, 52 Am. Rep. 533.

When additional bodily injuries and damages resulting therefrom were not alleged in the plaintiff's petition, but evidence of them was received upon the trial without objection by the defendant, and upon which evidence the defendant cross-examined the witnesses giving it, an objection to it cannot be made for the first time by a request to instruct the jury to disregard it in making up their verdict. *Leavenworth Electric R. Co. v. Cusick*, 57 P. 519, 60 Kan. 590, 72 Am. St. Rep. 374.

⁴³ *McDonald v. Strawn*, 78 Okl. 271, 190 P. 558.

⁴⁴ *Cooper v. Bower*, 96 P. 59, 78 Kan. 158, rehearing denied 96 P. 794, 78 Kan. 184.

⁴⁵ *Stout v. Baker*, 4 P. 141, 32 Kan. 113; *Missouri Pac. Ry. Co. v. Morrow*, 4 P. 87, 32 Kan. 217; *Smith v. Morrill*, 18 P. 915, 39 Kan. 665; *Howard v. Howard*, 34 P. 1114, 52 Kan. 469; *Enid & A. Ry. Co. v. Wiley*, 78 P. 96, 14 Okl. 310; *Conklin v. Yates*, 83 P. 910, 16 Okl. 266.

A general objection to the introduction of testimony without specifying any ground upon which evidence offered is inadmissible is too indefinite, and may be properly overruled. *McNally v. Harley* (Okl.) 172 P. 46.

Under Rev. Laws 1910, § 5070, a general objection to the admission of an "enrollment record" in evidence was properly overruled. *Diamond v. Perry*, 46 Okl. 16, 148 P. 88.

An objection "to all of the above testimony of the witness" is not sufficient. *Osborn v. Woodford Bros.*, 1 P. 548, 31 Kan. 290.

In an action against a railroad company for damages because of plaintiffs being compelled to herd their cattle by reason of defendant's failure to construct cattle guards where its railroad entered and left their inclosed pasture, the action of the court in permitting plaintiffs to show that it was necessary to herd their cattle, and the value of such herding, by a witness who was not first shown to be an expert, will not be held error, where the only objection made to the evidence was that it was "incompetent, irrelevant, and immaterial." *Chicago, K. & N. Ry. Co. v. Behney*, 28 P. 980, 48 Kan. 47.

⁴⁶ *Parker v. Richolson*, 26 P. 729, 46 Kan. 283; *Chicago Lumber Co. v. Cox*, 147 P. 67, 94 Kan. 563.

examination of a witness to a question including several different propositions, part of which are not subject to the objection. Ordinarily it is incumbent upon the examiner to frame his question so that in its entirety it is free from the objection made; otherwise the objection should be sustained.⁴⁷ The general rule is that an objection that the evidence is "incompetent, irrelevant, and immaterial" is no objection.⁴⁸

An objection to evidence of a local custom or usage, not pleaded, that it is "incompetent, irrelevant, and immaterial," is sufficient in absence of inquiry by the court or counsel as to the specific grounds.⁴⁹

An objection by a party to the admission in evidence of a writing, upon the ground that the opposite party had failed and refused, upon demand, to give him a copy of the same, will not be sustained unless such failure or refusal is shown.⁵⁰

Where one in possession of a written contract testified as to its loss, and there was no objection that a sufficient foundation to admit evidence as to its contents had not been laid, an objection that the same was incompetent was properly overruled.⁵¹

In an action on an accident policy, a general objection to the admission of testimony as to a claim by the insured and response denying all liability is not sufficient to raise the point that such evidence is not within the issues.⁵²

Where, in an action against a corporation on a promissory note, a copy of the constitution and by-laws was offered in evidence, to which only the general objection was made that they were incompetent, and not that they were not the best evidence, it was proper to admit such copy in evidence.⁵³

An objection to the admission of a deed in evidence on the

⁴⁷ *Cooper v. Bower*, 96 P. 794, 78 Kan. 164, rehearing, 96 P. 59, 78 Kan. 156, denied.

⁴⁸ *McDonald v. Strawn*, 78 Okl. 271, 190 P. 558. But an objection assigned to the introduction of incompetent evidence, that it was "incompetent, irrelevant, and immaterial," is sufficient. *City of Topeka v. Sherwood*, 18 P. 933, 39 Kan. 690.

⁴⁹ *Gilbert v. Citizens' Nat. Bank of Chickasha*, 61 Okl. 112, 160 P. 635, L. R. A. 1917A, 740.

⁵⁰ *Van Fleet v. Stout*, 24 P. 960, 44 Kan. 523.

⁵¹ *Phillips v. Bishop*, 140 P. 834, 92 Kan. 313.

⁵² *Continental Casualty Co. v. Wynne*, 129 P. 16, 36 Okl. 325.

⁵³ *Topeka Capital Co. v. March*, 61 P. 876, 10 Kan. App. 40.

ground of incompetency, irrelevancy, and immateriality is not sufficient to raise the question of authority of the person executing it as attorney in fact.⁵⁴

A general objection to the admission of the record copy of a deed, in an action where the original was competent evidence for some purposes, and under certain circumstances, is not available for the purposes of error.⁵⁵

Where the record of a patent to land is offered in evidence to show title, a general objection that it is incompetent will not present the objection that no proper foundation has been laid by showing the original was not in control of the party offering the copy.⁵⁶

Where a tax deed, offered in evidence, is valid on its face, the proper practice is not to object to its admission, but to produce the evidence of its illegality in rebuttal.⁵⁷

An objection to a question because it is leading does not raise the question as to whether such question is competent or not;⁵⁸ nor does an objection that evidence offered is incompetent and immaterial raise the question that it is not the best evidence, or that proper foundation has not been laid for its introduction.⁵⁹ Such objection is insufficient to call the attention of the court to the nature of the certification of the judgment proposed to be introduced.⁶⁰

Where a witness is asked what a party, in whose behalf he is called, had said about the litigation, an objection that a self-serving declaration is thereby called for is sufficiently indicated by the use of the term "incompetent," and the addition of the words, "irrelevant and immaterial," does not so far detract from its force as to render it unavailing on review.⁶¹

Where a plea to the jurisdiction had been overruled, an objection to the introduction of any evidence on the ground that the

⁵⁴ Long-Bell Lumber Co. v. Martin, 66 P. 328, 11 Okl. 192.

⁵⁵ Smith v. Leighton, 17 P. 52, 38 Kan. 544, 5 Am. St. Rep. 778.

⁵⁶ Enid & A. Ry. Co. v. Wiley, 78 P. 96, 14 Okl. 310.

⁵⁷ Douglass v. Dickson, 1 P. 541, 31 Kan. 310.

⁵⁸ Kansas Farmers' Fire Ins. Co. v. Hawley, 27 P. 176, 46 Kan. 746.

⁵⁹ Priest v. Robinson, 67 P. 850, 64 Kan. 416.

⁶⁰ Mechanics' Sav. Bank v. Harding, 70 P. 655, 65 Kan. 655.

⁶¹ Cooper v. Bower, 96 P. 794, 78 Kan. 164, rehearing, 96 P. 59, 78 Kan. 156, denied.

court had no jurisdiction and on other grounds substantially equivalent to defenses set up in the answer was properly overruled.⁶²

OBJECTIONS TO EVIDENCE. (ORAL)

To which question the defendant (or plaintiff) objects, for the reason that the same is incompetent, irrelevant, and immaterial, leading and suggestive, and calls for a conclusion of the witness (add any other specific grounds).

§ 910. Motion to strike out—Form

When a proper question is propounded to a witness, but the answer thereto is objectionable, the remedy is by a motion to strike it out; otherwise error cannot be assigned.⁶³

An objection to testimony is waived where the answer is permitted to be made subject to later exclusion, and the objecting party fails to ask for its exclusion.⁶⁴

In order to base error on the admission of an answer, not responsive to the question put to a witness, the motion should be made to strike out the answer for that reason.⁶⁵

Where the first part of an answer to a proper question was proper, and there was no motion made to strike out any part of the answer, but the question only was objected to, the improper portion of the answer was admitted without objection.⁶⁶

⁶² *Wichita Falls & N. W. Ry. Co. v. Puckett*, 53 Okl. 463, 157 P. 112.

⁶³ *Relley v. Haynes*, 16 P. 440, 38 Kan. 259, 5 Am. St. Rep. 737; *City of Atchison v. Rose*, 23 P. 561, 43 Kan. 605; *Kansas Farmers' Fire Ins. Co. v. Hawley*, 27 P. 176, 46 Kan. 746.

⁶⁴ *Missouri, O. & G. Ry. Co. v. Collins*, 47 Okl. 761, 150 P. 142.

⁶⁵ *Missouri Pac. Ry. Co. v. Shumaker*, 27 P. 126, 46 Kan. 769; *Borin v. Johnson*, 65 P. 640, 63 Kan. 885.

Error cannot be assigned on an objectionable answer to a proper question unless a motion is made to strike out the answer, or the attention of the court is otherwise brought to the fact that the answer is not responsive to the question. *Standard Life & Accident Ins. Co. v. Davis*, 53 P. 856, 59 Kan. 521.

In replevin for two steers, defendant testified, on cross-examination, that he had taken witnesses to see the cattle. He was asked why he did so, and said that it was to identify them if there was any trouble. He was then allowed to state that he had been told that plaintiff had taken cattle belonging to others, and had trouble with every one he had anything to do with. Held, that it was prejudicial error to refuse to strike out this part of the answer. *Hite v. Stimmell*, 25 P. 852, 45 Kan. 469.

⁶⁶ *Manspeaker v. Pipher*, 48 P. 868, 5 Kan. App. 879, judgment affirmed *Hentig v. Pipher*, 51 P. 229, 58 Kan. 788.

A refusal to strike out testimony of a witness upon alleged grounds that it was contrary to all of the evidence on the question an untrue was not error.⁶⁷

A motion to strike out testimony because, on cross-examination, the witness has shown himself unqualified to give it, will not be sustained, since the objection should have been taken at first to the want of foundation.⁶⁸

There is no error in refusing a motion to strike out testimony in response to testimony of defendant, it not being objected to when offered, and tending to explain the transaction testified to by defendant,⁶⁹ nor when the objection to it is not disclosed and its impropriety or insufficiency is not apparent.⁷⁰

Where the grounds of a motion to strike testimony were not stated, and no objection had been made to the admission of the testimony, the motion is properly overruled,⁷¹ and a motion "to strike testimony of the witness along that line," as immaterial, is too indefinite.⁷²

A motion to strike out evidence is properly denied where some of it is admissible.⁷³

A party cannot complain of a refusal to sustain a motion to strike out testimony admitted without objection, where it was given in direct response to his own question.⁷⁴

When oral evidence has been introduced concerning a contract and it is established by the cross-examination that the contract was in writing, it is error for the trial court, on proper motion being made, to refuse to exclude all oral evidence concerning the transaction, after such written contract has been read in evidence.⁷⁵

The exclusion of incompetent and irrelevant evidence is not error, though no objection is made thereto.⁷⁶

⁶⁷ *Carlson v. Mid-Continent Development Co.*, 103 Kan. 464, 173 P. 910, L. R. A. 1918F, 318.

⁶⁸ *Hughes v. Ward*, 16 P. 810, 38 Kan. 452.

⁶⁹ *Anthony v. Atwood*, 62 P. 720, 10 Kan. App. 578.

⁷⁰ *Wideman v. Faivre*, 163 P. 619, 100 Kan. 102, Ann. Cas. 1918B, 1168.

⁷¹ *Ewing v. Wichita R. & Light Co.*, 137 P. 940, 91 Kan. 388.

⁷² *St. Louis & S. F. R. Co. v. Murray*, 50 Okl. 64, 150 P. 884.

⁷³ *Smythe v. Parsons*, 14 P. 444, 37 Kan. 79; *Elliot v. Missouri Pac. Ry. Co.*, 55 P. 490, 8 Kan. App. 191.

⁷⁴ *Brownell v. Moorehead (Okl.)* 165 P. 408; *Ardmore Oil & Milling Co. v. Robinson*, 116 P. 191, 29 Okl. 79.

⁷⁵ *Rich v. Northwestern Cattle Co.*, 29 P. 466, 48 Kan. 197.

⁷⁶ *Jackson v. Uncle Sam Oil Co. of Kansas*, 156 P. 756, 97 Kan. 674.

Evidence which is not of the quality or character required by law, though not intrinsically destitute of probative quality, admitted without objection and not in conflict with legal evidence, should be considered as if it was legal evidence;⁷⁷ in other words, a fact may be established by incompetent evidence, if material, where it is received without objection.⁷⁸

That evidence admitted without objection was incompetent will not preclude it from being sufficient to sustain the verdict, where it is relevant to the issue.⁷⁹

Testimony consisting of mere conclusions of the witnesses must be given effect, where it was admitted without objection.⁸⁰

An instruction touching a pertinent fact proved without objection, though not expressly pleaded, is proper.⁸¹

MOTION TO STRIKE OUT EVIDENCE (ORAL)

Comes now the defendant (or plaintiff) and moves the court to strike the answer of the witness to the foregoing question, for the reason that the same is incompetent, irrelevant, and immaterial, not responsive to the question, argumentative, and is hearsay (add other grounds).

§ 911. Exceptions

A statement of the court, in the jury's absence, that an exception to the admission of evidence would be allowed, is sufficient though no exception was taken when the evidence was introduced.⁸²

⁷⁷ Jones v. Citizens' State Bank, 39 Okl. 393, 135 P. 373.

⁷⁸ Jaggar v. Plunkett, 106 P. 280, 81 Kan. 565, 25 L. R. A. (N. S.) 935.

⁷⁹ Dane v. Bennett, 51 Okl. 684, 152 P. 347.

⁸⁰ Sentney v. Hutchinson Interurban Ry. Co., 135 P. 678, 90 Kan. 610.

⁸¹ Hoskinson v. Smyser, 148 P. 640, 95 Kan. 568.

⁸² Harris v. Hart, 49 Okl. 143, 151 P. 1038.

ARTICLE II

JUDICIAL NOTICE

Sections

- 912. Matters of common knowledge.
- 913. Political subdivisions.
- 914. Legislature.
- 915. Laws and ordinances.
- 916. Acts of Congress.
- 917. Laws of other states.
- 918. Indians.
- 919. Jurisdiction of courts.
- 920. Judicial proceedings.
- 921. Officials—Authority.
- 922. Rules and acts.

§ 912. Matters of common knowledge

Judicial notice will be taken of matters of common knowledge,³³ such as matters of public contemporaneous history,³⁴ commercial

³³ Matters judicially noticed as to navigability of Arkansas river, including congressional appropriations by the acts of March 3, 1879, March 3, 1881, and June 14, 1880, stated. *Dana v. Hurst*, 86 Kan. 947, 122 P. 1041.

The Supreme Court takes judicial notice that the Arkansas river is the largest western tributary of the Mississippi-Missouri system, that it is 2,000 miles long, draining approximately 189,000 square miles, and is navigable through its course in Oklahoma, and that the title to the bed to high-water mark within the state is in the state. *State v. Nolegs*, 139 P. 943, 40 Okl. 479.

The Supreme Court takes judicial notice of the fact that gas and oil are mined by means of deep wells drilled into the earth. *Kemp v. Barr Gas. Co.*, 103 Kan. 595, 175 P. 988.

Taking of extrinsic evidence after a rule to show cause that the filing of a protest was not necessary to support corporation commission's order against railroad rate advances where necessity and reasonableness appear from conditions of which courts and commission may take notice. *Atchison, T. & S. F. Ry. Co. v. State (Okl.)* 171 P. 43.

No judicial notice is taken of arrival and departure of trains at a particular place. *Boatman v. Coverdale*, 80 Okl. 9, 193 P. 874; *Booth & Flinn v. Cook*, 79 Okl. 280, 193 P. 36. Courts will take judicial notice of railway operations. *Lusk v. Henson*, 78 Okl. 147, 189 P. 191.

The courts will not take judicial notice that the equipment or an employé of a railroad is engaged in interstate commerce at any precise time or place. *Chicago, R. I. & P. Ry. Co. v. McBee*, 45 Okl. 192, 145 P. 331.

The court will not take judicial notice of bookkeeping methods of insurance agent. *Coon v. Boston Ins. Co.*, 79 Okl. 296, 192 P. 1092.

³⁴ Courts take judicial notice that under the treaty of Paris the Philippine Islands became a part of the territory of the United States, and after that time were in a state of insurrection against the government, which insurrec-

usages and customs,⁸⁵ facts of general scientific knowledge,⁸⁶ ordinary words of our language, and technical words when their meaning has been settled by common usage,⁸⁷ seasons and the

tion had not ended in the island of Mindanao in 1902. *La Rue v. Kansas Mut. Life Ins. Co.*, 75 P. 494, 68 Kan. 539.

⁸⁵ Judicial notice will be taken of the fact that, in case of shipments involving the services of connecting carriers, freights not prepaid are collected in a lump sum by the final carrier prior to delivery. *Southern Pac. Co. v. Larabee*, 132 P. 205, 89 Kan. 608.

The courts will take knowledge of the existence of the universal custom that crop rent is payable when the crop matures. *Pruitt v. Carter*, 52 Okl. 284, 152 P. 1081.

The common-law rule that a tenant is not entitled to a crop sown, but not maturing, before expiration of his lease, has not been modified by any custom of which judicial notice will be taken. *Bank of Denton v. Jesch*, 163 P. 150, 99 Kan. 797.

Judicial notice will be taken of the fact that carriers by rail customarily carry as baggage sample trunks of travelling salesmen. *Kansas City, M. & O. Ry. Co. v. Fugatt*, 47 Okl. 727, 150 P. 669, L. R. A. 1916A, 545.

The court will take judicial notice that no custom prevails, in the cities generally, to the effect that a landlord, in the absence of stipulations in the lease, is liable for water rent for water used by the tenant. *Atkinson v. Kirkpatrick*, 135 P. 579, 90 Kan. 515.

A cosurety, sued for contribution, set up as a defense that the bank, payee of the note, had extended the time of payment without his knowledge or consent. He offered no proof of any such extension, but it appeared that the note was not fully paid until four years after maturity. Held, that the court will not take judicial notice of the alleged custom of banks to require renewal of note not paid promptly at maturity. *Livermore v. Ayres*, 119 P. 549, 86 Kan. 50.

⁸⁶ Improvement in communication which telephone has made, its nature, operation, and ordinary uses, are facts of general scientific knowledge of which courts will take judicial notice. *Heckman v. Davis*, 56 Okl. 483, 153 P. 1170.

The courts will take judicial notice that abandoned coal mines generate gases. *Cheek v. Missouri, K. & T. Ry. Co.*, 131 P. 617, 89 Kan. 247.

In an action to recover for injuries resulting from an explosion in a coal mine, the court will not take judicial notice that dry, fine coal dust is a dangerous and explosive element. *Cherokee & P. Coal & Mining Co. v. Wilson*, 28 P. 178, 47 Kan. 460.

⁸⁷ Courts will take judicial notice of the meaning and force of the ordinary words of our language, and also of technical words, where their meaning is well settled by common usage. *State v. Baldwin*, 12 P. 318, 36 Kan. 1; *Sun Ins. Office of London v. Western Woolen Mill Co.*, 82 P. 513, 72 Kan. 41.

The court will take judicial notice of the meaning of the term "milling in transit privilege," and admission of oral evidence to explain it is not error, in action for breach of contract of carriage which deprived plaintiff of privilege. *St. Louis & S. F. R. Co. v. Wm. Bondies & Co.*, 64 Okl. 88, 166 P. 179.

course of nature,⁸⁸ geographical facts,⁸⁹ location of cities⁹⁰ and counties,⁹¹ population, where a matter of official record within the state,⁹² routes of railroads,⁹³ and the standard tables of life expectancy.⁹⁴

⁸⁸ Judicial notice will be taken of the seasons and the course of nature, which includes the general course of agriculture and the growth of the staple crops. *First Nat. Bank v. Rogers*, 103 P. 582, 24 Okl. 357; *Payne v. McCormick Harvesting Mach. Co.*, 66 P. 287, 11 Okl. 318.

Judicial notice will be taken of the natural shrinkage of grain in transit; the Legislature having recognized in Gen. St. 1909, § 7103, that wheat in transit will naturally shrink as much as one-fourth of one per cent. of its total weight. *Cardwell v. Union Pac. R. Co.*, 136 P. 244, 90 Kan. 707.

⁸⁹ The courts will take judicial notice of the boundaries of the counties and the territory, and of the geographical location of cities and towns within its jurisdiction, and the court judicially knows that a place about eight miles southeast of Lexington is in Cleveland county, Okl. *Harvey v. Territory*, 65 P. 837, 11 Okl. 156.

The Supreme Court of Kansas will take judicial notice that on January 17, 1861, the region of country known as "Pike's Peak" was within the territory of Kansas. *Carey v. Reeves*, 26 P. 951, 46 Kan. 571.

The courts will ordinarily take judicial notice of the principal water courses within their respective jurisdictions. *Board of Com'rs of Kay County v. Smith*, 47 Okl. 184, 148 P. 111.

⁹⁰ The Supreme Court will take judicial notice that Chickasha, Okl., is within that portion of the state which was formerly Indian Territory. *Anheuser-Busch Brewing Ass'n v. Doss*, 129 P. 49, 36 Okl. 318.

In an action against a railroad company for killing stock, judicial notice will be taken of the location of a city, the place of trial. *Kansas City, Ft. S. & G. R. Co. v. Burge*, 21 P. 589, 40 Kan. 736.

The court cannot take judicial notice that an alley between two designated streets is within the territorial boundaries of the city of Topeka. *City of Topeka v. Cook*, 84 P. 376, 72 Kan. 595.

⁹¹ The courts will take judicial notice that Canadian county is not located in that part of the territory where persons may permit their stock to run at large, under Sess. Laws 1899, p. 58, c. 2, art. 2. *Lewis v. Rasp*, 76 P. 142, 14 Okl. 69.

⁹² The court will take judicial notice of the population of the counties, and of the towns and cities located in such counties, traversed by certain railroad, as shown by the special federal census of July 1, 1907, especially after its adoption by the Legislature. *St. Louis & S. W. R. Co. v. Williams*, 107 P. 428, 25 Okl. 662.

The court judicially knows that counties having a population of more than 60,000 include Oklahoma county only. *Board of Com'rs of Oklahoma County v. Beaty* (Okl.) 171 P. 34.

⁹³ The courts will take judicial notice of the route of a railroad which had been operated for a number of years from one station to another in the state, and that for a great portion of the distance between such stations such route

⁹⁴ See note 94 on following page.

The court may ascertain from sources open to all the facts of which it is required to take notice.⁹⁵

§ 913. Political subdivisions

Courts take judicial notice of the boundaries of counties, the location of cities within their districts, and whether a certain place definitely located as to an incorporated city is within the county in which the court is held.⁹⁶ They will take judicial notice that certain towns are county seats of their respective counties.⁹⁷

The court will take judicial notice that a city of the state is of the first class.⁹⁸

is beyond the boundaries of the state and within another state and again returns into the state. *Patterson v. Missouri Pac. Ry. Co.*, 94 P. 138, 77 Kan. 236, 15 L. R. A. (N. S.) 733.

The Supreme Court will take judicial notice that in 1885 the Atchison, Topeka & Santa Fé Railroad Company was not operating its railway in Hodgeman county. *State v. Carlson*, 104 Kan. 485, 182 P. 544. The supreme Court will take judicial notice that in 1885 the Atchison, Topeka & Santa Fé Railroad Company was a nonresident of Hodgeman county. *Id.*

The Supreme Court will take judicial notice of the permanent location of an important line of railroad which traverses the state upon a firmly established route, and that certain lands conveyed to it by the authority of an act of Congress are within the limits of such permanent location and a part of the lands granted to the railway company. *L. P. Worden & Son v. Cole*, 86 P. 464, 74 Kan. 226.

The court will take judicial notice of a town by a certain name, but not of the railroad station of that name, or that it is the only railroad station on a certain line of road between that point and the state line. *St. Louis & S. F. R. Co. v. Williams*, 107 P. 428, 25 Okl. 662.

⁹⁴ The courts judicially know the standard tables of life expectancy, and, in an action for damages for wrongfully causing a death under Civ. Code, § 422, may allow them to be read to the jury out of cyclopædias of known authenticity and general use. *Atchison, T. & S. F. Ry. Co. v. Ryan*, 64 P. 603, 62 Kan. 682.

⁹⁵ The court may properly ascertain from sources open to all what knowledge can be gained as to the character of a stream as to navigability in days gone by. *Dana v. Hurst*, 86 Kan. 947, 122 P. 1041.

⁹⁶ *Atchison, T. & S. F. Ry. Co. v. Paxton*, 88 P. 1082, 75 Kan. 197.

⁹⁷ *St. Louis & S. F. R. Co. v. Williams*, 107 P. 428, 25 Okl. 662.

Courts of record in any county will take judicial notice of the county seat, and if the seat of public business is the county seat, *de facto*, the courts will take notice thereof, and the proceedings of such court, transacted at such county seat, cannot thereafter be collaterally attacked. *Board of Com'rs of Day County v. State of Kansas*, 91 P. 699, 19 Okl. 375.

⁹⁸ *City of Ft. Scott v. Elliott*, 74 P. 609, 68 Kan. 805.

§ 914. Legislature

The courts of record of Oklahoma will take judicial notice of the date of the meeting and final adjournment of the Legislature.**

§ 915. Laws and ordinances

The court will take judicial notice of a public law in effect generally throughout its territorial jurisdiction,¹ and of the date of the passage and approval of general laws passed by the Legislature.²

For the purpose of construing a Constitution or statute, the courts may take judicial notice of everything which may affect the validity or meaning of such Constitution or statute.³ It will also take judicial notice of the abuse to be remedied by the act in question.⁴

§ 916. Acts of Congress

Judicial notice will be taken of acts of Congress which are of a general nature,⁵ but not of private acts.*

** *Lusk v. Ryan* (Okl.) 171 P. 323.

¹ *Saum v. Dewey*, 115 P. 570, 84 Kan. 811; *Johnson v. Grady County*, 50 Okl. 188, 150 P. 497.

The courts of the state will take judicial knowledge of the laws in force in Indian Territory prior to the erection of the state. *Guthrie v. Mitchell*, 38 Okl. 55, 132 P. 138.

The laws of Arkansas which were extended over the Indian territory, being in force in Oklahoma, under Const. Schedule, § 1, as to rights under Indian Territory contracts, need not be proved. *Marx v. Hefner*, 46 Okl. 453, 149 P. 207, Ann. Cas. 1917B, 656.

Judicial notice may be taken of the adoption of Laws 1891, c. 162 (Gen. St. 1909, §§ 9462-9464), and amendments thereto (Laws 1911, c. 326, § 1; Laws 1913, c. 324, § 1), by a county and that it was in operation in the county when certain tax proceedings were had. *Brown v. Going*, 150 P. 554, 96 Kan. 266.

² *Lusk v. Ryan* (Okl.) 171 P. 323.

³ *City of Topeka v. Gillett*, 4 P. 800, 32 Kan. 431.

⁴ *Chicago, R. I. & P. Ry. Co. v. Gist*, 79 Okl. 8, 190 P. 878.

⁵ Provisions of the acts of Congress of February 20, 1811, April 8, 1812, March 1, 1817 and March 6, 1820, and ordinance for Northwest Territory as to Mississippi river and tributaries, held judicially noticed by Supreme Court. *Dana v. Hurst*, 86 Kan. 947, 122 P. 1041.

The Supreme Court will take judicial notice that the shipment of intoxicating liquors into Chickasha, Okl., which is within that portion of the state which was formerly Indian Territory, is illegal. *Anheuser-Busch Brewing Ass'n v. Doss*, 129 P. 49, 36 Okl. 318.

* Act Cong. March 3, 1905, approving a lease of land in Osage Nation and extending it for ten years, is a private act, of which the courts cannot take

§ 917. Laws of other states

Judicial notice cannot be taken of the laws of another state,⁷ except to aid in interpreting the laws of the forum on a particular subject, and the rule is not changed by the fact that a pleader relying upon the law of another state has referred to a particular decision of the Supreme Court of that state citing the volume and page of the reports where the decision may be found.⁸

judicial notice. *State v. Indian Territory Illuminating Oil Co.*, 123 P. 166, 32 Okl. 607.

Where Congress puts in force a code of laws in a territory by reference to such laws, the same not being embraced in the act or by express provision made a part thereof, the courts of the other states and territories from which such code of laws is not taken will take judicial notice of every fact that can be obtained from the act of Congress, but will not take judicial notice of the provisions of the laws it puts in force; and, in order that they be availed of, they must be pleaded and proven. *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 60 P. 249, 9 Okl. 353.

⁷ Under Rev. Laws 1910, § 5097, the laws of other states are facts to be established by competent evidence, and the courts cannot take judicial notice thereof. *Atchison, T. & S. F. Ry. Co. v. Lambert*, 123 P. 423, 32 Okl. 665. Foreign laws must be proved. *Marx v. Hefner*, 46 Okl. 453, 149 P. 207, Ann. Cas. 1917B, 656.

Where the law of another state becomes material, it must be pleaded and proved as a fact, and a mistake concerning a statute of another state is treated as a mistake of fact. *Bolinger v. Beacham*, 106 P. 1094, 81 Kan. 746.

The Kansas courts may take judicial notice of the common law of Kansas, and what it would be except for the state statutes and written law, and for this purpose may take judicial notice of all the judicial decisions in this country, and in all other countries which have adopted the common law of England; but for the purpose that the courts shall know as a fact, in a particular case, what the common law of some other state is, such law must be proved as any other fact. *St. Louis & S. F. Ry. Co. v. Weaver*, 11 P. 403, 35 Kan. 412, 57 Am. Rep. 176.

Where defendant in an action for injuries received in another state invokes the law of such state as declared by its Supreme Court, he must show the existence of the law, as it cannot be judicially noticed, except for construing domestic laws. *Ferd Heim Brewing Co. v. Gimber*, 72 P. 859, 67 Kan. 834.

Judicial notice not being taken of the statutes of Missouri, it cannot be known without proof whether filing of a transcript of a justice's judgment in a circuit court of that state gives to such judgment the effect of a judgment of the circuit court. *Hinman v. Missouri K. & T. R. Co.*, 83 Kan. 35, 110 P. 102, 21 Ann. Cas. 1152.

⁸ *Missouri, K. & T. Ry. Co. v. Sealy*, 99 P. 230, 78 Kan. 753.

§ 918. Indians

The state courts do not take judicial notice of the laws of an Indian Nation,⁹ except the laws and customs of descent and distribution of the Creek Nation applying to the distributive share of allotted lands and funds of said tribe by Act Cong. March 1, 1901.¹⁰

The Supreme Court will not take judicial notice of the quantum of Indian blood of a member of an Indian tribe.¹¹

Courts take judicial knowledge that, by the treaties between the United States and the Indian tribes, title to Indian reservations in Oklahoma is in either the tribes, or the United States for the benefit of the tribes, and hence is not subject to territorial taxation.¹²

§ 919. Jurisdiction of courts

The courts take judicial notice of the other courts of the state and of their jurisdiction.¹³

§ 920. Judicial proceedings

Judicial notice will not be taken of the pleadings, testimony, or rulings in a former suit between the same parties.¹⁴

On a hearing of a motion to confirm a sale, the court cannot take judicial notice of an order enjoining the sale, made by it in a separate case.¹⁵

The court will take judicial knowledge of its judgments and decrees.¹⁶

⁹ Sewell v. Settermann (Okl.) 175 P. 111.

Courts will not take judicial notice that a white woman marrying an Indian man, a member of the Cherokee Tribe, acquired the same rights as a white man who married an Indian woman, a member of the tribe, in accordance with the law of the Cherokee Nation, and that among those rights was that of segregating possessory rights in the public domain by making improvements thereon, which improvements were property subject to sale and descent. Boudinot v. Morris, 110 P. 894, 26 Okl. 768. Courts will not take judicial notice of the laws of the Cherokee Indian Nation. Id.

¹⁰ Scott v. Jacobs, 126 P. 780, 31 Okl. 109.

¹¹ Harriss v. Leeper Bros. Lumber Co. (Okl.) 176 P. 412.

The Supreme Court will not take judicial notice of the quantity of Indian blood possessed by a party before it. Ball v. Dancer, 44 Okl. 114, 143 P. 855; Moffer v. Jones (Okl.) 169 P. 652.

¹² Gay v. Thomas, 46 P. 578, 5 Okl. 1; 54 P. 444, 7 Okl. 184.

¹³ Copeland v. Copeland (Okl.) 175 P. 764.

¹⁴ Wyatt v. State Line Oil & Gas Co., 103 Kan. 524, 175 P. 596.

¹⁵ Thayer v. Honeywell, 51 P. 929, 7 Kan. App. 548.

¹⁶ Loeser v. Loeser, 50 Okl. 249, 150 P. 1045.

The district court of a county does not take judicial notice of the cases filed or of the subject-matter, orders, and judgments entered in suits in the superior court of the same county.¹⁷

In a contempt proceeding, the court takes judicial notice of previous steps taken in the cause and of the order which defendant is charged with having disobeyed.¹⁸

§ 921. Officials—Authority

The courts will take judicial knowledge of who are the tax assessors and tax officials within the courts' jurisdiction.¹⁹

The Supreme Court will take judicial notice of judges of courts of record in the state, but not of a special judge agreed on or elected to preside in a specific case.²⁰ It will also take judicial notice that the term of a district judge has, pending an application for writ of prohibition, expired, and that a successor has been elected and qualified;²¹ also of the terms of office of public officers, when fixed by statute.²²

The courts will take judicial notice of the fact that one appearing or acting as an attorney is or is not duly licensed to act as such.²³

Courts judicially know chief officers in the federal departments and their signatures.²⁴

¹⁷ Woodward v. Panther Creek Oil Co., 50 Okl. 318, 150 P. 1065.

¹⁸ Nichols v. Quinn, 94 Kan. 742, 147 P. 1103.

¹⁹ Weatherly v. Cloworth Development Co., 63 Okl. 307, 166 P. 156.

²⁰ Apple v. Ellis, 50 Okl. 80, 150 P. 1057.

²¹ State v. Shea, 115 P. 862, 28 Okl. 821.

²² Aultman Taylor Machinery Co. v. Burchett, 83 P. 719, 15 Okl. 490.

It being set out in the complaint that plaintiffs were a partnership composed of W. and another, and the return being sworn to before W. as a notary public, it nowhere appearing in the record of the proceedings before the United States commissioner that W., a party plaintiff, and W., a notary public, were one and the same, the lower court in passing on a motion to quash a garnishment could not take judicial notice of such fact. England Bros. v. Young, 110 P. 896, 26 Okl. 494.

²³ Nolan v. St. Louis & S. F. R. Co., 91 P. 1128, 19 Okl. 51.

²⁴ In re Son-se-gra's Will, 78 Okl. 213, 189 P. 865.

§ 922. Rules and acts

A court may take judicial notice of a tax levied by county commissioners of the county in which the court is held on all the taxable property in the county.²⁵

The courts take judicial notice of the rules and regulations of the general land office.²⁶

ARTICLE III**PRESUMPTIONS****Sections**

- 923. In general.
- 924. Knowledge of law.
- 925. Continuance of fact.
- 926. Personal status.
- 927. Indians.
- 928. Regularity in business.
- 929. Mail matter.
- 930. Available evidence not produced.
- 931. Laws of another state.
- 932. Judicial proceedings.
- 933. Official acts.
- 934. Carriers.
- 935. Railroads—Injury to passenger.
- 936. Injury to employee.
- 937. Damage to property.
- 938. Wrongful death.
- 939. Death.
- 940. Fraud.
- 941. Contracts.
- 942. Agency.
- 943. Reports—Records—Partnership.
- 944. Wills.
- 945. Trusts.
- 946. Bills and notes.
- 947. Marriage.
- 948. Payment.
- 949. Libel and slander.

§ 923. In general

To find a fact by presumption or inference, the inference should be a logical deduction and reasonably certain in the light of all other proper presumptions and collateral facts.²⁷

²⁵ School Dist. No. 32, Wilson County, v. Board of Com'rs of Wilson County, 82 Kan. 806, 109 P. 168.

²⁶ Peters v. United States, 33 P. 1031, 2 Okl. 116; Stansbury v. Same, 37 P. 1083, 2 Okl. 151; Dempsey v. Same, 44 P. 382, 2 Okl. 151.

²⁷ Duncan v. Chicago, R. I. & P. Ry. Co., 108 P. 101, 82 Kan. 230.

Presumption of delivery of a policy arising from possession thereof does not

One presumption cannot be based upon another.²⁸ Facts upon which an inference may legitimately rest must be established by direct evidence, as if they were the very facts in issue.²⁹

arise, where, on face of policy, some act remains to be done to make it complete, such as is shown by a clause "in further consideration of the sum of \$—— to be paid in advance." *Columbian Nat. Life Ins. Co. v. Wirthle* (Okla.) 176 P. 406.

A mortgage is only an incident of the debt secured, and the transfer of a note or debt secured will be presumed to have preceded the transfer of the mortgage. *Local Inv. Co. v. Humes*, 51 Okla. 251, 151 P. 878.

Where private property is to be taken for public use, under statutory or constitutional authority, all presumptions indulged are in favor of the owner. *Watkins v. Board of Com'rs of Stephens County* (Okla.) 174 P. 523.

On an issue as to whether the indebtedness of a county exceeded the federal limit, where there was no evidence of the amount of cash in the treasury or of the other available assets, which were proper credits in estimating such indebtedness, the court cannot presume that there was no cash or available assets, which would reduce such indebtedness below the federal limit. *Johnson v. Board of Com'rs of Pawnee County*, 56 P. 701, 7 Okla. 686.

In the absence of proof that the place where animals were killed by a train was exempt from the law prohibiting their running at large, it will be presumed that they were so prohibited. *St. Louis & S. F. R. Co. v. Hardesty*, 129 P. 739, 36 Okla. 682.

In suit by rightful claimant of patent to avoid decision of Land Department and charge legal title of patentee with his equitable right, brought on ground of department's mistake of law or fact, every reasonable presumption must be indulged in, in support of department's decision resulting in patent. *Forster v. Ingram* (Okla.) 178 P. 99.

A municipal ordinance providing for a public improvement is presumptively valid, and will not be set aside by the courts, unless it appears that the discretion imposed on the municipal authorities has been abused or arbitrarily exercised. *Seminole Townsite Co. v. Town of Seminole*, 130 P. 1098, 35 Okla. 554; *Id.*, 130 P. 1100, 35 Okla. 558.

Adverse possession held provable only by clear and positive proof; every presumption being in favor of possession in subordination to the title of the true owner. *Flesher v. Callahan*, 122 P. 489, 32 Okla. 283.

Presumption that person will accept purely unqualified gift will be acted on as a working rule as to such conveyances. *Shaffer v. Smith*, 53 Okla. 352, 156 P. 1188.

Direct proof of a written conveyance which has been lost or destroyed may be aided by the presumption arising from long peaceable possession and repeated acts of ownership, though during a time less than the limitation period. *Adkins v. Wright*, 131 P. 686, 37 Okla. 771.

²⁸ An instruction that it is a presumption of fact that, when a mechanical appliance fails to do the work it is intended to do, it is defective or out of repair, and that, when such appliance is once shown to be defective, it is presumed to remain so, is erroneous. *Chicago, R. I. & P. Ry. Co. v. Rhoades*, 68 P. 58, 64 Kan. 553.

²⁹ *Columbian Nat. Life Ins. Co. v. Wirthle* (Okla.) 176 P. 406; *City of Duncan v. Tidwell*, 48 Okla. 382, 150 P. 112.

No liberal presumptions can be entertained for the purpose of supplying omissions, aiding deficiencies, or extending the import of the language of a portion of a record introduced in evidence. It is only when the whole of the record is introduced that liberal presumptions can be invoked to aid it.³⁰

A presumption of ownership, in the absence of evidence to the contrary, arises from possession of personal property.³¹

The law presumes that a building erected upon a tract of land is a part of the land it occupies, and therefore real property, which presumption may be rebutted by showing that the building, in fact, was personal property.³²

It is a presumption of law that one conveying by a general warranty deed holds the original grant.³³ A recital in a tax deed is presumptive evidence only, and may be contradicted.³⁴

§ 924. Knowledge of law

A contracting party is ordinarily presumed to know, not only the laws of the country where he dwells, but also those of the foreign country or state in which he transacts business.³⁵

Where a minor's land is sold by his guardian, the purchaser and all others afterwards dealing with it are charged with notice of probate proceedings through which sale was made, and of the law in-

³⁰ *Capital Bank of Topeka v. Huntoon*, 11 P. 369, 35 Kan. 577.

³¹ *United States Supply Co. v. Gillespie* (Okla.) 166 P. 139; *City of Sulphur v. State*, 62 Okl. 312, 162 P. 744; *Ragan v. Citizens' State Bank of Foraker*, 38 Okl. 65, 131 P. 1093.

³² *Shelton v. Jones* (Okla.) 167 P. 458, L. R. A. 1918A, 830.

Articles affixed to land in fact, though only slightly, are *prima facie* realty. *Etchen v. Ferguson*, 59 Okl. 280, 159 P. 306; *Bridges v. Thomas*, 58 P. 955, 8 Okl. 620.

Evidence held insufficient to show that a galvanized iron portable grain bin had become "affixed to land," within Rev. Laws 1910, § 6592. *Tolle v. Vandenberg*, 44 Okl. 780, 146 P. 212.

³³ *West & Russell v. Rawden*, 130 P. 1160, 33 Okl. 399.

Title to the property of a married woman is not clouded with any presumption that it was acquired by the efforts or means of her husband. *Farmers' State Bank of Ada v. Keen* (Okla.) 167 P. 207.

³⁴ *Miller v. Noble*, 59 Okl. 29, 157 P. 740; Rev. Laws 1910, § 7416.

Where the sheriff's return of service of notice of expiration of the period of redemption from tax sale shows an insufficient service, it will be presumed that the service was made as shown in such return, and the *prima facie* evidence furnished by the tax deed as to the regularity of all prior proceedings is overcome. *Dawson v. Anderson*, 38 Okl. 167, 132 P. 666.

³⁵ *Klein v. Keller*, 141 P. 1117, 42 Okl. 592, Ann. Cas. 1916D, 1070.

volved, and must take notice that any deferred payments must be secured by a first lien on land sold.³⁶

§ 925. Continuance of fact

The continuance of a fact or condition will ordinarily be presumed.³⁷ Thus, the fact of insanity being established, it is presumed to continue.³⁸ Likewise it is presumed that the influence of duress by threats continues.³⁹

Possession being a fact continuous in its nature, when its existence is once shown, it will be presumed to continue until the contrary is proved.⁴⁰

§ 926. Personal status

Contracting parties are presumed to be adults and competent, in the absence of anything shown to the contrary.⁴¹

§ 927. — Indians

In the absence of proof, courts will not presume that an Indian is of such a quantum of blood as to render his land subject to restriction.⁴² The minority of a Creek freedwoman at the time of a conveyance of allotted lands is not conclusively presumed, where the enrollment record does not show minority.⁴³

³⁶ *American Inv. Co. v. Brewer* (Okl.) 181 P. 294.

³⁷ Where, in an action for the killing of a hog struck by a train, there is no proof that the herd law has been suspended in the county where the injury occurred, it will be presumed to have been in effect at the time of the injury. *St. Louis & S. F. R. Co. v. Higgs*, 141 P. 10, 42 Okl. 171.

³⁸ *Lantis v. Davidson*, 56 P. 745, 60 Kan. 389.

Under Gen. St. 1909, §§ 4844, 4845, a person adjudged insane and placed in the state hospital for the insane, and then discharged as improved, is presumed insane until it is found that he has been restored to his right mind. *Johnson v. Gustafson*, 152 P. 621, 96 Kan. 630.

³⁹ *Eureka Bank v. Bay*, 135 P. 584, 90 Kan. 506.

⁴⁰ *Walls v. Farrington*, 116 P. 428, 27 Okl. 754, 35 L. R. A. (N. S.) 1174.

⁴¹ *McKeever v. Carter*, 53 Okl. 360, 157 P. 56.

Where, in an action to reform a lease, nothing appears to the contrary, the lessor will be presumed to have been an adult at the time of making the lease. *Giles v. Latimer*, 137 P. 113, 40 Okl. 301.

⁴² *Harriss v. Leeper Bros. Lumber Co.* (Okl.) 176 P. 412.

The Supreme Court will not presume that a minor Indian is of such degree of Indian blood as to render his conveyance of lands inherited by him subject to Act Cong. May 27, 1908, § 9, removing certain restrictions on alienation and requiring conveyance of interest of full-blood Indian heir, to be approved by court. *Moffet v. Jones* (Okl.) 169 P. 652.

⁴³ *Jackson v. Lair*, 48 Okl. 269, 150 P. 162; Act Cong. May 27, 1908, c. 199, 35 Stat. 312.

§ 928. Regularity in business

There is usually a presumption of good faith,⁴⁴ authority, and regularity in the course of business and the conduct of affairs,⁴⁵ and in corporate acts.⁴⁶

§ 929. Mail matter

When a letter is sent by mail properly addressed, the presumption of its receipt by the party to whom it is addressed arises, and

⁴⁴ Settlement by plaintiff on advice of counsel for less than the amount claimed, to the apparent detriment of himself and others, held presumed to have been made in good faith. *Shawnee Fire Ins. Co. v. Cosgrove*, 121 P. 488, 86 Kan. 374, affirming judgment on rehearing 116 P. 819, 85 Kan. 296, 41 L. R. A. (N. S.) 719.

Where it was stipulated between a principal and agent that the latter should sell the former's flour at "association prices," there being no allegation in the pleadings in an action thereon that the association existed in restraint of trade or as a monopoly, nor any evidence that such contract was in restraint of trade, the presumption was that such contract was valid, and that the prices were lawfully quoted. *Barteldes Seed Co. v. Border Queen Mill & Elevator Co.*, 101 P. 1130, 23 Okl. 875.

Where contract for the sale of oil and gas lease made approval of title by purchaser's attorney a condition precedent to its performance, the presumption was that attorney, in examining the title, acted in good faith. *First Nat. Bank v. Clay* (Okl.) 177 P. 115.

⁴⁵ When a chattel mortgage shows on its face that it was signed in the presence of two persons, who signed the same as witnesses, as required by St. 1893, c. 51, § 23, the register of deeds should receive and record the same, and disqualification of the witnesses should be shown by the proof in the case. In the absence of proof the court will presume that said witnessing is legal, and in accordance with the requirements of the statute. *Watts v. First Nat. Bank*, 58 P. 782, 8 Okl. 645.

The fact that an adopted member of the Pottawatomie Tribe of Indians was permitted by the tribe to remove with them to a new reservation, and live there as a member of the tribe, sharing in the tribal property, will warrant the presumption that he had not previously taken advantage of treaty provisions by which he might have received patent to lands in severalty and surrendered his tribal relation, since such acts would have prevented him from going with the tribe to the new reservation. *Cyr v. Walker*, 116 P. 931, 29 Okl. 281, 35 L. R. A. (N. S.) 795.

An affidavit in support of a motion for a continuance, filed a few days before continuance was granted on the application of the party in whose behalf it professes to be made, will be presumed, in the absence of evidence to the contrary, to have been filed by authority of such person. *Stone v. Missouri Pac. Ry. Co.*, 90 P. 251, 75 Kan. 600.

⁴⁶ Without evidence to the contrary, it will be presumed that the schedules of rates and regulations in use by an intrastate carrier have been properly filed with the utilities commission. *Kennedy v. Atchison, T. & S. F. Ry. Co.*, 104 Kan. 129, 179 P. 314.

this presumption remains until overcome by contradictory evidence.⁴⁷

§ 930. Available evidence not produced

Where it lies within the power of a party to produce evidence upon an issue, the burden of which is on him, his failure raises a presumption that such evidence would be unfavorable;⁴⁸ but failure of a party to introduce competent witnesses equally accessible to both parties raises no unfavorable inference.⁴⁹

One who relies on the record of a court of general jurisdiction as proof must introduce the whole of it; otherwise, the presumptions from silence or absence will be against him.⁵⁰

Without evidence to the contrary, the presumption obtains that the herd law was in effect in the county where the injury to stock was inflicted.

⁴⁷ *Reeves & Co. v. Martin*, 94 P. 1058, 20 Okl. 558.

⁴⁸ *St. Louis & S. F. R. Co. v. Bruner*, 52 Okl. 349, 152 P. 1103; *Moore v. Adams*, 108 P. 392, 26 Okl. 48; *First Nat. Bank of Poteau v. Monlot*, 50 Okl. 85, 150 P. 1040; *Fowler Packing Co. v. Enzenperger*, 94 P. 995, 77 Kan. 406, 15 L. R. A. (N. S.) 784; *Hodgson v. John Deere Plow Co.*, 104 Kan. 237, 178 P. 607; *Missouri Pac. Ry. Co. v. Kennett*, 99 P. 269, 79 Kan. 232; *Belknap Hardware Co. v. Sleeth*, 93 P. 580, 77 Kan. 164.

Where one plaintiff, testifying by deposition in an action on notes, stated that he had an agreement material to the issues, but on the advice of counsel refused to produce it, the legitimate inference was that such agreement would be detrimental to plaintiffs' case. *Ireland v. Shore*, 137 P. 926, 91 Kan. 326.

Where the deposition of a nonresident was taken at the instance of the adverse party, his refusal to testify to material matters within his knowledge, where no sufficient reason is given, is the denial of substantial right, and warrants the inference that the information withheld would have been unfavorable to such witness and of benefit to the party seeking it. *Belknap Hardware Co. v. Sleeth*, 93 P. 580, 77 Kan. 164.

Where it is reasonably within the power of a party to offer evidence upon the facts and rebut the inferences which the circumstances tend to establish against him, and he fails to offer such proof in rebuttal, the natural conclusion is that the proof, if produced, would support the inferences against him, and the jury may act upon that conclusion. *Atchison T. & S. F. Ry. Co. v. Davis & Young*, 109 P. 551, 26 Okl. 359.

⁴⁹ *Fulsom-Morris Coal & Mining Co. v. Mitchell*, 132 P. 1103, 37 Okl. 575.

⁵⁰ *Towne v. Milner*, 1 P. 613, 31 Kan. 207.

⁵¹ *Lusk v. Skelton* (Okl.) 169 P. 892; *Missouri, K. & T. Ry. v. Savage*, 122 P. 656, 32 Okl. 376.

§ 931. Laws of another state

In the absence of proof, the common law of another state is presumed to be the same as that of the forum,⁵² and, likewise, the statutory law.⁵³

§ 932. Judicial proceedings

The regularity of judicial proceedings will ordinarily be presumed.⁵⁴ An order will be presumed to be based upon all facts necessary to its validity, where no findings are required.⁵⁵

⁵² *St. Louis & S. F. R. Co. v. Weaver*, 11 P. 408, 35 Kan. 412, 57 Am. Rep. 176; *Woolacott v. Case*, 64 P. 965, 63 Kan. 35; *St. Louis & S. F. R. Co. v. Johnson*, 86 P. 156, 74 Kan. 83; *Sykes v. Citizens' Nat. Bank of Des Moines, Iowa*, 98 P. 208, 78 Kan. 688, 19 L. R. A. (N. S.) 665; *Arkansas City Bank v. Swift*, 46 P. 950, 57 Kan. 460.

⁵³ The laws of another state when neither pleaded nor proven, will be presumed to be the same as those of the forum. *McNair v. Underwood*, 55 Okl. 585, 155 P. 553; *Mutual Home & Savings Ass'n v. Worz*, 73 P. 116, 67 Kan. 506; *Bice v. Nelson*, 105 Kan. 23, 181 P. 558; *Dunbar v. Commercial Electrical Supply Co.*, 123 P. 417; 32 Okl. 634; *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 60 P. 249, 9 Okl. 353; *Newton v. New York Life Ins. Co.*, 148 P. 619, 95 Kan. 427; *Marx v. Hefner*, 46 Okl. 453, 149 P. 207, Ann. Cas. 1917E, 656; *Betz v. Wilson*, 87 P. 844, 17 Okl. 383; *Nichols v. Bryden*, 122 P. 1119, 86 Kan. 941; *Keagy v. Wellington Nat. Bank*, 69 P. 811, 12 Okl. 33.

Where, in an action on an Arkansas note, the laws of Arkansas are not pleaded or proven, they will be presumed to be the same as the laws of Oklahoma. *Palmer v. Noe*, 48 Okl. 450, 150 P. 462.

In a suit on a contract made in another state, where the laws of such state have not been pleaded and proven, it will be presumed they are the same as the laws of the state of the forum. *Hoshaw v. Lines*, 30 Okl. 67, 118 P. 583.

But in a Kansas case it was held, in an action to recover the price of liquor sold to defendant, and sums collected by defendant from third persons, it would not be presumed that the sale of liquors is forbidden by laws of Missouri. *Danciger v. Cooley*, 157 P. 453, 98 Kan. 88, rehearing denied 158 P. 1119, 98 Kan. 484.

⁵⁴ Irregularities in the proceedings of courts of record will not be presumed, but must be properly and affirmatively shown. *Wilson v. State*, 109 P. 289, 3 Okl. Cr. 714.

In an action on a judgment against a decedent's estate, it will be presumed that the judgment was legally obtained. *Chitty v. Gillett*, 46 Okl. 724, 148 P. 1048, L. R. A. 1916A, 1181.

Where record of county court in a guardianship proceeding is silent as to

⁵⁵ *Sess. Laws 1915, c. 198*, does not specifically require that county court's order approving a deed to lands inherited by full-blood Indian heirs shall contain specific findings as to jurisdictional facts required by section 2 thereof to be alleged in petition for approval, and while that might be the better practice, yet without such special findings the order will be presumed to be based upon all facts necessary to its validity. *Dunkin v. Galloway*, 75 Okl. 125, 181 P. 939.

§ 933. Official acts

The law presumes that a public official performs his duty,⁵⁶ and that his official proceedings and acts are regular,⁵⁷ except where it

competency of person appointed as guardian, it will be presumed that court, in proper discharge of its duty, upon inquiry adjudged that person designated possessed all requisite qualifications. *King v. Shults* (Okl.) 180 P. 550; *King v. Mitchell* (Okl.) 171 P. 725.

Where the court record showed that adjournment *sine die* was announced by sheriff and recorded by the clerk, there is a presumption that announcement was made pursuant to an order of court. *Mulcahy v. City of Moline*, 171 P. 597, 101 Kan. 532, 102 Kan. 531.

It is to be presumed that county court, before ordering the transfer of guardianship cause to county court of another county, performed his duty and found the facts to justify the order to be true. *Southwestern Surety Ins. Co. v. Taylor* (Okl.) 173 P. 831, 835.

The official acts of a city court having jurisdiction of a justice of the peace are presumed to have been rightfully done. *Cahill-Swift Mfg. Co. v. Hayes*, 157 P. 1169, 98 Kan. 269, denying rehearing 156 P. 735, 97 Kan. 740.

Where, after judgment was opened under Code Civ. Proc. § 83 (Gen. St. 1915, § 6974), and cause was tried, files were destroyed by fire, it will be presumed, on files reproduced from recollection of parties and attorneys and affidavits of defendants' attorneys and of trial judge, that statutory requirements were fully complied with. *Wyatt v. Collins*, 105 Kan. 182, 180 P. 789.

⁵⁶ *Copeland v. Copeland* (Okl.) 175 P. 764; *Southwestern Surety Ins. Co. v. Davis*, 53 Okl. 332, 156 P. 213; *Board of Com'rs of Garfield County v. Field*, 63 Okl. 80, 162 P. 733; *City of Sulphur v. State*, 62 Okl. 312, 162 P. 744; *Cahill-Swift Mfg. Co. v. Hayes*, 157 P. 1169, 98 Kan. 269, denying rehearing 156 P. 735, 97 Kan. 740.

Without allegation or proof that the Kansas board of review acted arbitrarily or dishonestly in disapproving a motion picture film, it must be presumed that it acted in good faith and in the honest exercise of its best judgment. *Mid-West Photo-Play Corp. v. Miller*, 102 Kan. 356, 169 P. 1154.

⁵⁷ *Southern Surety Co. v. Waits*, 45 Okl. 513, 146 P. 431; *Board of Com'rs of Greer County v. Gregory*, 81 P. 422, 15 Okl. 208; *Valley Tp. v. King Iron Bridge & Mfg. Co.*, 45 P. 660, 4 Kan. App. 622; *Cahill-Swift Mfg. Co. v. Hayes*, 157 P. 1169, 98 Kan. 269, denying rehearing 156 P. 735, 97 Kan. 740; *Board of Education of City of Emporia v. Shepherd*, 135 P. 605, 90 Kan. 628.

In a suit by one claiming to be the rightful claimant to public land, to enforce his remedy against a person to whom the patent has been issued by the Land Department, all reasonable presumptions will be indulged in support of the department officers. *Johnson v. Riddle*, 139 P. 1143, 41 Okl. 759.

Where a bank commissioner, in winding up insolvent bank, sold certain of its assets, it will be presumed, in absence of an affirmative contrary showing, that he obtained authority for the sale from district court or a judge thereof, as required by Rev. Laws 1910, §§ 302, 304. *Williamson-Halsell-Frazier Co. v. State* (Okl.) 171 P. 453.

When an action is commenced in the district court in the name of the state by the Attorney General, in the absence of an affirmative showing to the contrary, he is presumed to have brought such action after having been

is sought to take away the personal rights of a citizen, or deprive him of his property, or place a charge or lien thereon.⁵⁸

All reasonable presumptions will be indulged as to the regularity of elections.⁵⁹

A statutory presumption of fraud, not intended to be conclusive, may be overthrown by evidence of good faith.⁶⁰

§ 934. Carriers

Property received by an initial carrier in good order is presumed to have been received in like order by the succeeding carrier, and final delivery in bad order raises a rebuttable presumption that the injury occurred on the line of the delivering carrier.⁶¹

A carrier, defending on the ground that the loss of or injury to goods is one excepted by special contract, has the burden of proving, not only the making of the contract, but that the loss or injury falls within it.⁶²

requested to do so by the Governor or one of the branches of the Legislature. *Leedy v. Brown*, 113 P. 177, 27 Okl. 489.

⁵⁸ *Watkins v. Havighorst*, 74 P. 318, 13 Okl. 128; *Christ v. Fent*, 84 P. 1074, 16 Okl. 375.

⁵⁹ *Town of Grove v. Haskell*, 104 P. 56, 24 Okl. 707.

⁶⁰ *Williams v. Fourth Nat. Bank*, 82 P. 496, 15 Okl. 477, 2 L. R. A. (N. S.) 334, 6 Ann. Cas. 970.

⁶¹ Where goods shipped over several connecting lines are found to be injured at destination, there is no presumption that the injury occurred on the line of the first carrier. *Chicago, R. I. & P. Ry. Co. v. Diggs*, 140 P. 1160, 42 Okl. 183.

Where goods shipped over several connecting lines are found to be injured when they reach their destination, there is no presumption that the injury occurred while the goods were in the hands of the first carrier. *St. Louis & S. F. R. Co. v. McGivney*, 91 P. 693, 19 Okl. 361; *Atchison, T. & S. F. Ry. Co. v. Rutherford*, 120 P. 266, 29 Okl. 850.

The Carmack amendment did not abrogate the rule that property received by an initial carrier in good order is presumed to have been received in like order by the succeeding carrier, and that final delivery in bad order raises a rebuttable presumption that the injury occurred on the delivering carrier's line. *Chicago, R. I. & P. Ry. Co. v. Harrington*, 44 Okl. 41, 143 P. 325.

Where part of a shipment over the lines of connecting carriers is lost, the presumption is that the loss occurred on the line of the delivering carrier. *St. Louis, I. M. & S. Ry. Co. v. Carille*, 128 P. 690, 35 Okl. 118.

Where cattle in good condition are delivered for shipment over connecting lines, and on delivery some are injured and some are dead, the presumption is that injury occurred on line of delivering carrier. *Wichita Falls & N. W. Ry. Co. v. Benton* (Okl.) 167 P. 633.

⁶² *Patterson v. Missouri, K. & T. Ry. Co.*, 104 P. 31, 24 Okl. 747.

Proof that a shipment of cattle was in good condition when delivered to an initial carrier, and in damaged condition when received from the terminal carrier, does not raise the presumption of negligence against such terminal carrier where the shipper accompanies the stock under contract to look after it.⁶³

Where a carrier which had received a shipment of goods in good condition delivered them in a damaged condition to the consignee, proof that the damage was due entirely to a flood, amounting to an act of God, overcomes the *prima facie* case against the carrier arising from the acceptance of the goods in good condition and their delivery in a damaged condition, and shifts the burden of proof to the shipper to show that negligence of the carrier co-operated with the act of God in bringing about the damage.⁶⁴

In an action for loss of an interstate shipment, the burden is on the carrier claiming a release of liability above an agreed value to prove a valid stipulation of release.⁶⁵

§ 935. Railroads—Injury to passenger

A presumption of negligence against a carrier arises from the mere happening of an accident, and proof that it happened from some inexplicable cause will not rebut the presumption.⁶⁶

Where a passenger makes out a *prima facie* case raising a presumption of defendant's negligence, the burden is then on defendant to overcome such presumption to the satisfaction of the jury.⁶⁷

⁶³ *Missouri, K. & T. Ry. Co. v. Peters*, 131 P. 525, 37 Okl. 188.

⁶⁴ *Armstrong, Byrd & Co. v. Illinois Cent. R. Co.*, 109 P. 216, 26 Okl. 352, 29 L. R. A. (N. S.) 671.

⁶⁵ *St. Louis & S. F. R. Co. v. Mounts*, 44 Okl. 359, 144 P. 1036.

⁶⁶ *Muskogee Electric Traction Co. v. Eaton*, 49 Okl. 344, 152 P. 1109.

⁶⁷ *Missouri, O. & G. Ry. Co. v. Vandivere*, 141 P. 799, 42 Okl. 427; *St. Louis & S. F. Ry. Co. v. Nichols*, 136 P. 159, 39 Okl. 522; *Ramsey v. McKay*, 44 Okl. 774, 146 P. 210.

Where a *prima facie* case is made out to recover damages to a passenger through derailment of a train, the railroad company must show that the accident could not have been avoided by the exercise of the utmost human prudence. *St. Louis & S. F. R. Co. v. Posten*, 124 P. 2, 31 Okl. 821.

Where, in an action for injuries to a child passenger from a sudden jerk of the train, the burden was on defendant to show that the exercise of due skill, foresight, and diligence could not have prevented the accident. *St. Louis & S. F. R. Co. v. Flitts*, 140 P. 144, 40 Okl. 685, L. R. A. 1916C, 348.

Whenever a carrier seeks to excuse itself for loss occurring by an act of God, or some irresistible superhuman cause, the burden is on the carrier.

Even though negligence of railway company be shown, before a recovery can be had for injuries claimed to have been sustained, it must be shown that the acts of negligence complained of were the proximate cause of the injuries alleged.⁶⁸

Whether excessive speed of a train is the proximate cause of an injury is never presumed, but must be established by evidence.⁶⁹

§ 936. — Injury to employé

The fact of an accident to an employé does not raise a presumption of negligence on the part of the employer,⁷⁰ the doctrine of *res ipsa loquitur* not applying.⁷¹ But the employé must show the employer's negligence or breach of duty, and establish a causal connection between the accident and the injuries.⁷²

Chicago, R. I. & P. Ry. Co. v. Logan, Snow & Co., 105 P. 343, 23 Okl. 707, 29 L. R. A. (N. S.) 663.

The burden is on a carrier to establish that the damage to a delayed shipment was the proximate result of the act of God. St. Louis & S. F. Ry. Co. v. Dreyfus, 141 P. 773, 42 Okl. 401, L. R. A. 1915D, 547.

Proof that a passenger was injured from the derailment of a street car casts upon defendant the burden of proving that the injury was caused without its fault. Muskogee Electric Traction Co. v. McIntire, 183 P. 213, 37 Okl. 684, L. R. A. 1916C, 351.

⁶⁸ Ft. Smith & W. R. Co. v. Jones, 63 Okl. 228, 163 P. 1110.

⁶⁹ Chicago, R. I. & P. Ry. Co. v. Barton, 59 Okl. 109, 159 P. 250.

⁷⁰ Chicago, R. I. & P. Ry. Co. v. Nagle, 55 Okl. 235, 154 P. 667; Missouri, K. & T. Ry. Co. v. Taylor (Okl.) 170 P. 1148; Chicago, R. I. & P. Ry. Co. v. Hensenflow (Okl.) 170 P. 1161; Chicago, R. I. & P. Ry. Co. v. Foltz, 54 Okl. 556, 154 P. 519; St. Louis & S. F. Ry. Co. v. Clampitt, 55 Okl. 686, 154 P. 40; Phoenix Printing Co. v. Durham, 122 P. 708, 32 Okl. 575, 38 L. R. A. (N. S.) 1191.

⁷¹ Missouri, O. & G. Ry. Co. v. West, 50 Okl. 521, 151 P. 212; Smith v. Acme Milling Co., 126 P. 190, 34 Okl. 439.

Doctrine of *res ipsa loquitur* holding that the fact that a car left the track made out a prima facie case of negligent injury to a shipment does not apply between master and servant. Missouri, O. & G. Ry. Co. v. French, 52 Okl. 222, 152 P. 591.

Where an employer furnishes tools for his servant and an accident results, there is no presumption that the tools furnished were insufficient. Palmer v. Wichita Falls & N. W. Ry. Co., 60 Okl. 205, 159 P. 1115.

⁷² Sallisaw Cotton Oil Co. v. Holland, 56 Okl. 428, 156 P. 174; Ferris v. Shandy (Okl.) 174 P. 1060; Wichita Falls & N. W. Ry. Co. v. Cover (Okl.) 164 P. 660; Chicago, R. I. & P. Ry. Co. v. Brazzell, 138 P. 794, 40 Okl. 460; Dewey Portland Cement Co. v. Blunt, 38 Okl. 182, 132 P. 659; Chicago, R. I. & P. R. Co. v. Duran, 38 Okl. 719, 134 P. 876; Neeley v. Southwestern Cotton Seed Oil Co., 75 P. 537, 13 Okl. 356, 64 L. R. A. 145; Petroleum Iron Works Co. v. Wantland, 114 P. 717, 23 Okl. 481; Sallisaw Cotton Oil Co. v. Holland, 56 Okl. 428, 156 P. 174; St. Louis & S. F. R. Co. v. Rushing, 31 Okl. 231, 120 P. 973; Smith v. Chicago, R. I. & P. Ry. Co., 142 P. 398, 42 Okl. 577.

The burden is on the master to prove contributory negligence,⁷³ or assumption of risk.⁷⁴

The law presumes that all persons engaged in the common employment of the same master are fellow servants, and the burden is on him who claims damages for an injury caused by the negligence of a fellow employé to show that he is a vice principal.⁷⁵

An employer's intention to retain the control of a person working for him will be inferred where the employment was general, and not to do a certain piece of work on specified terms in a particular manner and for a stipulated sum.⁷⁶

Before the state court will administer the federal Employers' Liability Act, the party desiring such administration must show that the case is within such act.⁷⁷

§ 937. — Damage to property

Proof that property has been destroyed by sparks from a locomotive creates a presumption of negligence of the railroad company or its employes.⁷⁸

Negligence will not be presumed from the mere killing of trespassing animals, where the accident is as consistent with the presumption that it is unavoidable as it is with negligence.⁷⁹

§ 938. Wrongful death

It will not be presumed that one who has been killed voluntarily incurred danger,⁸⁰ or committed suicide.⁸¹

⁷³ In action for injury to servant, where evidence established the master's negligence causing the injury, with nothing to show servant's contributory negligence, the burden of proving such defense was upon master. *Folsom-Morris Coal Mining Co. v. Dillon* (Okl.) 162 P. 696.

⁷⁴ The burden was on defendant to prove that plaintiff assumed the risk of injury from working in an unsafe place after its defective condition was discovered. *Great Western Coal & Coke Co. v. Malone*, 136 P. 403, 39 Okl. 693.

⁷⁵ *Mollhoff v. Chicago, R. I. & P. R. Co.*, 82 P. 733, 15 Okl. 540.

⁷⁶ *Chicago, R. I. & P. Ry. Co. v. Bennett*, 128 P. 705, 36 Okl. 358.

⁷⁷ *Chicago, R. I. & P. Ry. Co. v. McBee*, 45 Okl. 192, 145 P. 331.

⁷⁸ *St. Louis, I. M. & S. Ry. Co. v. Marlin*, 128 P. 108, 33 Okl. 510; *St. Louis, I. M. & S. Ry. Co. v. Weldon*, 39 Okl. 369, 135 P. 8.

⁷⁹ *St. Louis & S. F. R. Co. v. Smith*, 137 P. 357, 41 Okl. 314; *Ft. Smith & W. R. Co. v. Dixon*, 51 Okl. 722, 152 P. 350.

⁸⁰ Where one is killed, and there are no eyewitnesses to the accident, his representative is entitled to the benefit of presumption that deceased did not voluntarily incur danger or the risk of death. *Silurian Oil Co. v. Morrell*, 176 P. 964.

⁸¹ *Modern Brotherhood of America v. White* (Okl.) 168 P. 794, L. R. A.

§ 939. Death

The unexplained absence of a person for more than seven years is *prima facie*, but not conclusive, evidence of his death.⁸² To raise the presumption of death from absence from home, unheard from, for seven years, it is essential that there be a lack of information, after diligent inquiry on the part of those likely to hear; also that there shall have been an inquiry which exhausts all sources of information which the circumstances suggest. The presumption of death does not authorize an absent person to presume that one left behind has died.⁸³

§ 940. Fraud

Fraud must be proven at law,⁸⁴ except where otherwise provided by statute, as in case of bulk sales;⁸⁵ but in equity it is sufficient to show facts from which it may be presumed,⁸⁶ provided it be shown and brought home to the opposite party by clear and convincing proof.⁸⁷

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1918B, 520; *Penn Mut. Life Ins. Co. v. Spaulding*, 50 Okl. 307, 150 P. 494; *Hart v. St. Louis & S. F. R. Co.*, 102 P. 1101, 80 Kan. 699.

⁸² *Thompson v. Millikin*, 143 P. 430, 93 Kan. 72.

⁸³ *Modern Woodmen of America v. Ghromley*, 139 P. 306, 41 Okl. 532, L. R. A. 1915B, 728, Ann. Cas. 1915C, 1063; *Caldwell v. Modern Woodmen of America*, 130 P. 642, 89 Kan. 11, judgment reversed on rehearing 133 P. 843, 90 Kan. 175.

An inquiry sufficient to raise the presumption of death from lack of information of a person for seven years should extend to all those places where information is likely to be obtained, and to all those persons who in the ordinary course of events would be likely to hear from him if he were alive, and should exhaust all patent sources of information and all others which the circumstances of the case suggest. *Modern Woodmen of America v. Gerdorn*, 82 P. 1100, 72 Kan. 391, 2 L. R. A. (N. S.) 809, 7 Ann. Cas. 570; *Renard v. Ben-*

⁸⁴ *St. Louis & S. F. R. Co. v. Reed*, 132 P. 355, 37 Okl. 350.

Fraud is a fact to be established by evidence as any other fact. *Chicago, R. I. & P. Ry. Co. v. Penix*, 61 Okl. 4, 159 P. 1141; *King v. Howeth & Co.*, 140 P. 1182, 42 Okl. 178; *Wells v. Guaranty State Bank*, 56 Okl. 688, 156 P. 896.

⁸⁵ A sale of merchandise in bulk is presumed to be fraudulent, and the presumption can be rebutted only by a showing of compliance with the statute. *Galbraith v. Oklahoma State Bank*, 130 P. 541, 36 Okl. 807; *Ellet-Kendall Shoe Co. v. Ross*, 115 P. 892, 28 Okl. 697; *Williams v. Fourth Nat. Bank*, 82 P. 496, 15 Okl. 477, 2 L. R. A. (N. S.) 334, 6 Ann. Cas. 970.

⁸⁶ *Pevehouse v. Adams*, 52 Okl. 495, 153 P. 65; *Young v. Blackert*, 51 Okl. 285, 151 P. 1057.

⁸⁷ *Ely Walker Dry Goods Co. v. Smith* (Okl.) 160 P. 898.

§ 941. Contracts

A person signing an instrument is presumed to know its contents.⁸⁸

Where the detriment suffered by the promisee is a benefit to a third person instead of to the promisor, it will be implied that such benefit was at the request of the promisee.⁸⁹

§ 942. Agency

Agency is a fact to be proved as any other fact.⁹⁰

The presumption is that one known to be an agent is acting within the scope of his authority.⁹¹

There is a presumption that an agent does not have authority to receive payment for his principal, but this presumption may be overcome by direct evidence or it may be inferred from the circumstances.⁹²

§ 943. Reports—Records—Partnership

A properly certified transcript of the report of any corporation, association, or person, engaged in the production and transportation of natural gas, "shall, as against the makers thereof, be prima facie evidence of the truth of any matter therein contained."⁹³

"Copies of the entries of the clerk of the district court" of records of partnerships, "when certified by him, and affidavits of publication, * * * made by the printer, publisher, or chief clerk of a newspaper, are presumptive evidence of the facts therein stated."⁹⁴

nett, 93 P. 261, 76 Kan. 848, 14 Ann. Cas. 240; *Thompson v. Millikin*, 143 P. 430, 93 Kan. 72; *Mackie v. Grand Lodge A. O. U. W. of Kansas*, 164 P. 263, 100 Kan. 345.

⁸⁸ *Herron v. M. Rumley Co.*, 116 P. 952, 29 Okl. 317.

⁸⁹ *Riddle v. Hudson* (Okl.) 172 P. 921.

⁹⁰ *Gast v. Barnes*, 44 Okl. 114, 143 P. 856.

⁹¹ *Midland Savings & Loan Co. v. Sutton*, 30 Okl. 448, 120 P. 1007.

⁹² *Midland Savings & Loan Co. v. Sutton*, 30 Okl. 448, 120 P. 1007.

Where a traveling salesman sells goods by sample or from price lists, sending the orders to his principal, the presumption is that he has no authority to collect therefor, and where a purchaser after ordering the goods makes payment therefor to the agent, he does so at his peril, and in an action for the price of the goods, the authority of the agent being denied, the burden is on the purchaser to show such authority. *Scarritt-Comstock Furniture Co. v. Hudspeth*, 91 P. 843, 19 Okl. 429, 14 Ann. Cas. 857.

⁹³ Sess. Laws 1913, p. 174, § 13.

⁹⁴ Rev. Laws 1910, § 4474.

A presumption of partnership arises from the use of a name, such as is commonly employed when a partnership exists.⁹⁵

§ 944. Wills

The presumption in a will contest is in favor of the will.⁹⁶

A presumption of sanity exists in favor of a testator, and the burden of proving unsoundness of mind in a will contest rests on the contestant.⁹⁷

The proponent of a will must make preliminary proof required

⁹⁵ *Cobb v. Martin*, 123 P. 422, 32 Okl. 588; *Moning Dry Goods Co. v. Wiseman*, 60 Okl. 94, 159 P. 259.

⁹⁶ *In re Lavinburg's Estate*, 119 P. 915, 161 Cal. 536.

Where a will shows on its face that it was signed by testator and witnesses, and such fact is proved, it will be presumed on the death of the witnesses to the will or on the failure of their memory that all the other details of the statute, proof of which depends on the recollection of the witnesses, were duly observed. *In re Kent's Estate*, 118 P. 523, 161 Cal. 142.

Where a will legally executed has been offered for probate, the onus is on contestants to prove its revocation. *In re Olmsted's Estate*, 54 P. 745, 122 Cal. 224.

Testator is presumed to have known when he made his will that, without his wife's consent, he could dispose of only one-half of the community property, and also, unless the contrary appears from the terms of the will, that he did not intend to devise or bequeath an interest in the community property which he could not dispose of, but the intention of the testator to dispose of the entire community estate, if clearly appearing from the will, must prevail over these presumptions. *In re Vogt's Estate*, 98 P. 265, 154 Cal. 508.

Code Civ. Proc. § 1869, providing that a party asserting a negative need not prove it where such negative consists of the denial of the existence of a document, the custody of which belongs to the opposite party, applies only to the issue as to the material existence of the document, and does not apply to denials of the due execution or attestation of a will. *In re Latour's Estate*, 74 P. 441, 140 Cal. 414, rehearing, 73 P. 1070, 140 Cal. 414, denied; *In re Baird's Estate*, 176 Cal. 381, 168 P. 561.

In a contest of a will after probate, the contestants have the burden of proof to show nonexecution, and, where they fail to introduce evidence on such issue, the court may find in favor of the due execution, on the presumption to that effect. *In re McKenna's Estate*, 77 P. 461, 143 Cal. 580.

Where a will does not show that the testatrix subscribed it in the presence of one of the witnesses, or acknowledged to him that she signed it, or declared it to be her will, or that he signed it at her request, or in her presence, the law will not presume that all such acts have been done. *In re Tyler's Estate* (Cal.) 50 P. 927.

⁹⁷ *In re MacCrellish's Estate*, 141 P. 257, 167 Cal. 711, L. R. A. 1915A, 443; *In re Dole's Estate*, 81 P. 534, 147 Cal. 188; *In re Weber's Estate*, 114 P. 597, 15 Cal. App. 224; *In re Dolbeer's Estate*, 86 P. 695, 149 Cal. 227, 9 Ann. Cas. 795; *Schander v. Gray*, Id.; *In re Motz's Estate*, 69 P. 294, 136 Cal. 558; *Motz v. Motz*, Id.; *In re Scott's Estate*, 60 P. 527, 128 Cal. 57; *In ra*

by statutes, as to execution of will and testator's soundness of mind, whereupon, in case of contest, the burden shifts to contestant to prove matters set forth in objections filed.⁹⁸

It is incumbent on one petitioning for the probate of a will of a decedent to make satisfactory proof of the will, and, if he fails to do so, the trial court must, though there is no opposition to the probate, refuse probate.⁹⁹

Where a will is unreasonable, the burden of explaining away the unreasonableness does not devolve on the proponent in a contest over its probate.¹

The burden of proving that the decedent understood the will was not shifted to the proponent of the will in a will contest merely because it was shown that the decedent at the time of the execution of the will was unable to speak articulately, but only communicated to those around him by signs made by him.²

In a proceeding to contest a will, where contestant's interest is put in issue by the pleadings, the burden is on him to show his interest.³

Where the principal beneficiary in a will was testatrix's attorney when the will was executed, occupying a fiduciary relation of the highest trust, the law presumes that undue influence was used, and the burden is upon the attorney to show the contrary.⁴

Every presumption, not inconsistent with the record, will be indulged in favor of the validity of an order admitting a will to probate.⁵

Allen's Estate, 177 Cal. 668, 171 P. 686; *In re Clark's Estate*, 170 Cal. 418, 149 P. 828.

That testator was an aged person held not to overcome the presumption of validity of the will. *In re Blackfeather's Estate*, 54 Okl. 1, 153 P. 839; *In re Cullberg's Estate*, 169 Cal. 365, 146 P. 888; *In re Latour's Estate*, 73 P. 1070, 140 Cal. 414, rehearing denied 74 P. 441, 140 Cal. 414; *In re Johnson's Estate*, 93 P. 1015, 152 Cal. 778; *In re Latour's Estate*, 73 P. 1070, 140 Cal. 414, rehearing denied 74 P. 441, 140 Cal. 414.

⁹⁸ *Dickey v. Dickey* (Okl.) 168 P. 1018.

⁹⁹ *In re Hayden's Estate*, 87 P. 275, 149 Cal. 680; *In re Cullberg's Estate*, 169 Cal. 365, 146 P. 888.

¹ *In re Black's Estate*, 64 P. 695, 132 Cal. 392.

² *In re Latour's Estate*, 73 P. 1070, 140 Cal. 414, rehearing denied 74 P. 441, 140 Cal. 414.

³ *In re Land's Estate*, 137 P. 246, 166 Cal. 538.

⁴ *Gidney v. Chapple*, 110 P. 1099, 26 Okl. 737.

⁵ Where the order admitting a will to probate is attacked on the ground

§ 945. Trusts

When a transfer of real estate is made to a person, and the consideration thereof is paid by or for another, a trust is presumed in favor of the person by or for whom the payment was made; but this presumption may be overcome by evidence.⁶

The burden of establishing a constructive or resulting trust is on him who seeks its enforcement.⁷

§ 946. Bills and notes

"A written instrument is presumptive evidence of a consideration."⁸

When such presumption is overcome, the obligation must be controlled by the common law governing joint obligations.⁹

"Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value."¹⁰

"Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue."¹¹

"Except where the contrary appears, every indorsement is presumed prima facie to have been made at the place where the instrument is dated."¹²

"Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as a holder in due course. But the last-mentioned rule does

that the heirs were never personally served with notice of the probate, every presumption, not upset by the record itself, is to be indulged in support of the validity of the order. In *re Twombly's Estate*, 52 P. 815, 120 Cal. 350.

⁶ *Helvie v. Hoover*, 69 P. 958, 11 Okl. 687; Rev. Laws 1910, § 8660.

⁷ *Hayden v. Dannenberg*, 143 P. 859, 42 Okl. 776, Ann. Cas. 1916D, 1191; *Babcock v. Collison* (Okl.) 175 P. 762.

⁸ Rev. Laws 1910, § 934.

⁹ *Outcalt v. Collier*, 58 P. 642, 8 Okl. 473, judgment, 52 P. 738, 6 Okl. 615, reversed.

¹⁰ Rev. Laws 1910, § 4074; *Metropolitan Discount Co. v. Davis* (Okl.) 170 P. 707, 7 A. L. R. 670.

¹¹ Rev. Laws 1910, § 4095; *Metropolitan Discount Co. v. Davis* (Okl.) 170 P. 707.

¹² Rev. Laws 1910, § 4096.

not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title.”¹³

§ 947. Marriage

Where a marriage has been celebrated in accordance with the form of the law, the law indulges a strong presumption in favor of its validity.¹⁴

With respect to marriages contracted according to the common law or conformably to Indian custom, the courts will exercise all presumptions in favor of validity in the endeavor to sustain the marriage.¹⁵

Cohabitation and reputation will not constitute marriage under the Creek laws or customs but will merely raise a presumption of marriage, where the cohabitation is matrimonial and not meretricious.¹⁶ The law is astute to preserve sanctity of the marriage relation, the legitimacy of children, and the stability of descent and distribution, and therefore presumes innocence and virtue in the absence of proof to contrary;¹⁷ and the fact that a man and woman have openly lived as husband and wife for a considerable time, and are reputed as such, may give rise to presumption of previous actual marriage.¹⁸

Where a second marriage is actually shown, a strong presumption exists in favor of its legality, which is not overcome by proof of prior marriage and wife's failure to obtain divorce; and the party

¹³ Rev. Laws 1910, § 4109.

¹⁴ *Copeland v. Copeland* (Okl.) 175 P. 764.

¹⁵ *Crickett v. Hardin*, 60 Okl. 57, 159 P. 275.

¹⁶ *Fender v. Segro*, 137 P. 103, 41 Okl. 318.

¹⁷ *In re Sanders' Estate* (Okl.) 168 P. 197.

One who asserts the invalidity of marriage consummated according to law, because one of the parties had been formerly married and the spouse of the former marriage is still living, has the burden of proving that it has not been dissolved by divorce. *Haile v. Haile*, 40 Okl. 101, 135 P. 1143.

¹⁸ *Coleman v. James* (Okl.) 169 P. 1064; *Linsey v. Jefferson* (Okl.) 172 P. 641; *Lewis v. Lewis*, 60 Okl. 60, 158 P. 368.

That a man and woman openly cohabited together as husband and wife for a considerable time, recognized each other as such by declarations, admissions, etc., and were generally reputed to be such, may give rise to presumption that they previously entered into an actual marriage, as presumption is in favor of marriage and against concubinage. *Linsey v. Jefferson* (Okl.) 172 P. 641,

attacking it has the burden of showing that neither party to first marriage had obtained divorce.¹⁹

§ 948. Payment

Payment is not presumed, and, where it is in issue, the burden of proof is on the party pleading same to prove it.²⁰

§ 949. Libel and slander

Where an action is predicated on a publication which is actionable per se, it is not necessary to allege and prove special injury;²¹ but, if it be shown that such publication was privileged, or the publication and testimony rebuts the presumption of malice, the burden devolves on plaintiff to show express malice.²²

¹⁹ Jones v. Jones, 63 Okl. 208, 164 P. 463, L. R. A. 1917E, 921; Chancey v. Whinnery, 47 Okl. 272, 147 P. 1036; Zimmerman v. Holmes, 59 Okl. 253, 159 P. 308; James v. Adams, 56 Okl. 450, 155 P. 1121; Coachman v. Sims, 129 P. 845, 36 Okl. 536; Thomas v. James (Okl.) 171 P. 855; Copeland v. Copeland (Okl.) 175 P. 764.

²⁰ State v. Emery (Okl.) 174 P. 770, 6 A. L. R. 234; Edwards v. Johnston-Larimer Dry Goods Co., 59 Okl. 101, 158 P. 446; Standard Fashion Co. v. Joels, 60 Okl. 195, 159 P. 846.

Where defendant in attachment gave a bond to secure the discharge of the property conditioned that he would perform the judgment in an action on the bond, it being shown that a valid judgment was rendered against defendant in the attachment, it would be presumed to be unpaid, and the burden of showing payment was on defendant. Winton v. Myers, 58 P. 634, 8 Okl. 421.

²¹ Smith v. Gillis, 51 Okl. 134, 151 P. 869.

²² On proof that an alleged slanderous publication was privileged, the burden devolves on plaintiff to show express malice. Hubbard v. Cowling, 129 P. 714, 36 Okl. 603.

Where plaintiff has established publication of defamatory matter, he is entitled to recover, unless the publication itself and the testimony rebut the presumption of malice; the burden of adducing rebutting testimony being on defendant. German-American Ins. Co. v. Huntley, 62 Okl. 39, 161 P. 815.

ARTICLE IV

BURDEN OF PROOF

Sections

- 950. In general.
- 951. Personal status.
- 952. Particular issues.
- 953. Contracts.
- 954. Bailment.
- 955. Bills and notes—Execution.
- 956. Holder.
- 957. Consideration.
- 958. Insurance—In general.
- 959. Proof of loss.
- 960. Misrepresentation or breach.
- 961. Indians.
- 962. Statute of limitations.
- 963. Damages.
- 964. Malicious prosecution.
- 965. Negligence.

§ 950. In general

The burden of proof is on the party holding the affirmative.²³ It is on the plaintiff to establish every fact necessary to make out his cause of action by a preponderance of the evidence, and on the de-

²³ *Montgomery v. Road*, 8 P., 253, 34 Kan. 122; *Bates v. Lyman*, 12 P. 33, 35 Kan. 634; *Fifth Ave. Library Society v. Phillips*, 136 P. 1076, 39 Okl. 799; *Standard Marine Ins. Co., Limited, of Liverpool, v. Traders' Compress Co.*, 46 Okl. 356, 148 P. 1019.

Account.—In an action on an account, wherein the answer puts in issue all the allegations of the petition, the burden of proof is on plaintiff throughout the trial. *Piper v. Matkins*, 8 Kan. App. 215, 55 P. 487.

Alienation of affections.—In a wife's action against her husband's parents for alienation of affections, the burden is on plaintiff to show a direct interference, and that defendants were inspired by malice. *Brison v. McKellop*, 133 P. 154, 41 Okl. 374. In such case, much stronger proof of improper motive is required than where such an action is brought against a stranger. *Brison v. McKellop*, 133 P. 154, 41 Okl. 374.

Bankruptcy.—Under Bankruptcy Act (as amended in 1903) § 60, subds. (a) and (b), being U. S. Comp. St. § 9644, in order to set aside an alleged voidable preference, the burden is on the trustee in bankruptcy to prove all the elements of a voidable preference as defined by such section. *Kentucky Bank & Trust Co. v. Pritchett*, 44 Okl. 87, 143 P. 338.

Where a petition has been filed under Bankruptcy Act, § 3, subd. (b), being U. S. Comp. St. § 9587, and the respondent takes issue with and denies the allegation of insolvency, it is its duty to appear on the hearing with its books and accounts and submit to an examination, and testify as to all matters tending to show solvency or insolvency, and on its failure to do so the burden

fendant to establish the affirmative allegations or defense set up in its answer by a preponderance of the evidence.²⁴

of proving solvency rests on it. In re American Pub. Co., 79 P. 762, 15 Okl. 177.

Corporations.—Where the defense is that the corporation in executing the notes sued on exceeded its powers, the burden of proving such want of power is on the party alleging same. Western & Southern Fire Ins. Co. v. Murphey, 56 Okl. 702, 156 P. 885.

To bind principal by act of purported agent of corporation, burden is on party asserting such agency to prove it, and that act of agent was within scope of his authority. Fuller v. Stout (Okl.) 166 P. 898, L. R. A. 1918B, 108.

— **Banks.**—The burden is on a bank to show that the cashier of the bank had authority from a depositor to transfer his funds to the account of the cashier. Where it is claimed that a depositor ratified the acts of the cashier in transferring the depositor's funds to the account of the cashier, burden is on the bank to show such ratification. First Nat. Bank v. Brewer (Okl.) 174 P. 1077.

Where, in an action on a bank's guaranty to pay a debt, plaintiff showed that sufficient funds had been received by the bank to pay the debt, the burden was on the bank to show why it failed to pay it. Crowder State Bank v. American Powder Mills, 46 Okl. 105, 148 P. 698.

Where a local bank accepts for collection a deposit in an institution with which it has no business relations, and apparently fails to exercise ordinary diligence to make collection, and the bank having the deposit fails, resulting in loss to the depositor, in the depositor's action against it, the burden is on the local bank to show that its delay was not through its fault, and that no damages resulted therefrom. Bank of Big Cabin v. English, 139 P. 258, 41 Okl. 546.

Former adjudication.—The burden of proof rests upon the party who alleges a former adjudication. Ex parte Stevenson, 94 P. 1071, 20 Okl. 549.

Bond.—In action on paid surety's building contract bond, defendant has burden of showing extent of injury from failure of obligee to observe contract stipulation not to pay more than 85 per cent. of value of work finished. National Surety Co. v. Haley, 58 Okl. 263, 159 P. 292.

In an action on a defendant's bond, given to secure the release of attached property, the condition of which is that the defendant will perform the judgment of the court in said action, where it is shown that a valid judgment was rendered, and against defendant, it will be presumed it is unpaid, and the burden is on defendant to show payment. Winton v. Myers, 58 P. 634, 8 Okl. 421.

In an action on a forfeited recognizance, where the instrument showed an

²⁴ Missouri, K. & T. Ry. Co. v. Horton, 119 P. 233, 28 Okl. 815.

Where plaintiff's evidence establishes account sued on, the burden of proving payment was upon defendant. Boorigie Bros. v. Quinn-Barry Tea & Coffee Co. (Okl.) 176 P. 391.

Under Rev. Laws 1910, § 7313, the burden was on defendant levying a tax warrant to prove that the tax debtor sold its property to plaintiff after the assessment without paying taxes or retaining sufficient property to pay same. Bailey v. Williamson-Halsell-Frazier Co., 44 Okl. 586, 145 P. 412.

The burden is determined by the pleadings.²⁵ Where, under the pleadings, plaintiff's case is admitted by the defendant, and nothing

erasure, and was invalid if for \$1,250, but valid if for \$1,200, the burden was on plaintiff to satisfactorily explain the alteration. *State v. Roberts*, 15 P. 593, 37 Kan. 437.

In an action against a surety on a guardian's bond released from guardian's subsequent but not from his previous default, where the default is established, the burden is on the surety to show that it did not occur before the release. *Ætna Accident & Liability Co. v. Langley* (Okl.) 174 P. 1046.

Lien.—The claimant must show that the material was actually used in the building on which the lien is claimed. *De Bolt v. Farmers' Exchange Bank*, 51 Okl. 12, 151 P. 686.

Municipalities.—In an action to enjoin the officers of a city from issuing bonds to construct a system of waterworks, where the petition alleges that there were nine illegal votes cast, which would change the result of the election, the burden is on plaintiff to establish such allegation; and where no such attempt is shown in the record, and it discloses a stipulation indicating that the allegation was not contended for, the question was waived. *Territory v. Whitehall*, 76 P. 148, 13 Okl. 534.

Municipal warrants valid on their face are presumed to be issued for a lawful corporate purpose, and the burden of proof, in an action thereon, is on the municipality to show that they were issued for a purpose concerning which the municipality had no power to contract. *Board of Com'rs of Greer County v. Gregory*, 81 P. 422, 15 Okl. 208.

In an action to recover for obstructing ingress and egress by laying a track in the street in which plaintiff's property fronts, where the railroad claimed that there was an alley in the rear, the burden of showing such existence was on the railway company. *Wichman v. Kansas City, M. & O. Ry. Co.*, 114 P. 212, 84 Kan. 339.

The burden is on one attacking collection of assessment for city improvements to show irregularity in the proceedings. *Rawlins v. Warner-Quinlan Asphalt Co.* (Okl.) 174 P. 526.

Occupation of land.—In an action for wrongful use and occupation of land, held, that the burden was on plaintiff to prove such use and occupation by defendant. *Jones v. Byington*, 56 Okl. 284, 155 P. 1118.

Where it clearly appeared that defendants leased the land, defenses excusing nonpayment of rent should be alleged and proven by defendants. *Pruitt v. Carter*, 52 Okl. 284, 152 P. 1081.

Where a mortgagee is in full possession, with the mortgagor's consent, and a creditor seeks possession under a junior attachment on the ground that part of the property is not covered by the mortgage, the burden is on the attaching creditor to show such fact. *Bell-Wayland Co. v. Miller-Mitscher Co.*, 39 Okl. 4, 130 P. 593, Ann. Cas. 1915D, 780.

When, in a trial to the court, the occupying claimant seeks compensation for breaking the land, but offers no proof of value, except what the breaking was worth when done, and the court asks for additional evidence as to the enhanced value of the land caused thereby, and the claimant offers no

²⁵ *Bass & Harbour Furniture & Carpet Co. v. Harbour*, 140 P. 956, 42 Okl. 335.

materially adverse is admitted by the plaintiff, the burden of proof is removed.²⁶

If a fact is peculiarly within the knowledge of a party, he must produce the necessary evidence to prove it.²⁷

§ 951. Personal status

Where the gist of the action is minority, the burden is upon that party alleging it to prove such minority by a preponderance of the evidence.²⁸

further evidence, a judgment refusing compensation will not be disturbed. *Adams v. Kells*, 100 P. 506, 79 Kan. 564. The burden of proof rests upon an occupying claimant to show the extent to which the improvement has enhanced the value of the land. *Id.*

Partnership.—The burden of proving partnership is upon the party alleging it. *Moning Dry Goods Co. v. Wiseman*, 60 Okl. 94, 159 P. 259; *Strickler v. Gitchel*, 78 P. 94, 14 Okl. 523.

In a suit by a trustee in bankruptcy of the estate of a bankrupt partnership to recover a preferential payment by the firm to a creditor, for plaintiff to recover, the burden is on him to show that the firm and the partners also were insolvent when the payment was made. *J. W. Crancer & Co. v. Wade*, 110 P. 778, 26 Okl. 757.

A person attacking a partner's deed to partnership realty held by him in his individual name must clearly prove that the purchaser took with notice that it was partnership property. *Martin v. Carlisle*, 46 Okl. 268, 148 P. 833, 6 A. L. R. 154.

Sale of Land.—A subsequent purchaser claiming as a bona fide purchaser of land must show a purchase for value. *Adams Oil & Gas Co. v. Hudson*, 55 Okl. 386, 155 P. 220.

Where in a vendor's action to compel specific performance of a contract for the sale of land plaintiff offered sufficient proof of a marketable title, the burden was on the purchaser to show wherein the title was bad or insufficiently established. *Van Gundy v. Shewey*, 133 P. 720, 90 Kan. 253, 47 L. R. A. (N. S.) 645.

— **Titles.**—There is a presumption that the equitable title is with the holder of the legal title, and one claiming to own equitable title has burden of showing such ownership. *Kale v. Humphrey* (Okl.) 170 P. 223.

²⁶ *Woodson Mach. Co. v. Morse*, 28 P. 152, 47 Kan. 429.

²⁷ *Brooks v. Garner*, 97 P. 995, 20 Okl. 236, denying rehearing 94 P. 694, 20 Okl. 236.

²⁸ *Tyrell v. Shaffer* (Okl.) 174 P. 1074.

One relying on infancy to defeat his contract must prove such infancy. *McKeever v. Carter*, 53 Okl. 360, 157 P. 56.

Where a grantor of land seeks to disaffirm her deed and recover the land on the ground that she was a minor, she has the burden of proving minority. *Rice v. Ruble*, 39 Okl. 51, 134 P. 49; *Sharshontay v. Hicks*, 62 Okl. 1, 166 P. 881.

When party having burden of proving title introduces in evidence duly acknowledged warranty deed, correct in form, the opposite party, who pleads

A party entering into a contract is presumed to have capacity to contract, and the burden is on those asserting his incapacity to prove it.²⁰

Where the issue in an action on an account is whether credit was extended to the defendant individually or as an agent of a corporation, the burden of proof is on the plaintiff.³⁰

§ 952. Particular issues

The question frequently arises as to the burden of proof on particular issues.³¹

infancy, has burden of proving defenses. *Jordan v. Jordan*, 62 Okl. 171, 162 P. 758.

Indians.—In an action involving the validity of a lease of an allotment of a citizen of the Choctaw Nation, the lessor will be presumed to be an adult when he made the lease, and one relying on his infancy to defeat his act has the burden of proof. *Mullen v. Carter* (Okl.) 173 P. 512.

In an Indian allottee's action to cancel deeds affecting his allotment, the burden was on plaintiff to show that he was an infant when the instruments were executed. *Freeman v. First Nat. Bank of Boynton*, 44 Okl. 146, 143 P. 1165, Ann. Cas. 1918A, 259.

²⁰ *Cushing v. McWaters* (Okl.) 175 P. 838.

In ejectment and to quiet title, duly acknowledged warranty deed from owner of record title offered by plaintiff, is prima facie evidence of title, and burden of proving its invalidity by reason of minority of Indian grantor is upon defendant. *Hutchison v. Brown* (Okl.) 167 P. 624.

Where defendant, in ejectment, is in possession derailing title through a deed from a Creek allottee, and the plaintiff claiming title through a subsequent deed from the same allottee relies on the first deed being invalid because of the allottee's minority at the time of its execution, the burden is on him to show such minority. *Bell v. Bearman*, 133 P. 188, 37 Okl. 645.

³⁰ *Lockett v. Theodore Maxfield Co.*, 57 Okl. 132, 156 P. 1192.

³¹ Where a surety sets up claims depending on that relation, and the fact of suretyship does not appear from the instrument signed by him, he must, in order to sustain such claims, prove that the creditor knew of the suretyship. *Stovall v. Adair*, 60 P. 282, 9 Okl. 620.

Where an acknowledgment to a deed was certified by a notary of the same name as the attorney appearing for the party claiming under the deed, there is no presumption that the notary and the attorney were the same person. *Buhler v. Hysell*, 132 P. 140, 37 Okl. 392.

Rev. Laws 1910, § 1005, embracing provision of Const. art. 14, § 3, except phrase "when knowingly done," does not require parties suing to recover usury to show that party taking or charging more than legal rate on money loaned had knowledge of usurious character of contract. *Midland Savings & Loan Co. v. Tuohy* (Okl.) 170 P. 244.

In an action for injuries to cattle by a railroad train, owing to failure to fence, the burden of showing the necessity of the designated unfenced station grounds is upon defendant. *Dickinson v. Stewart*, (Okl.) 174 P. 233.

The burden is on defendant to show that animals were killed at a point

For further example, in an action against a deputy sheriff for trespass in executing a search warrant, regular and valid on its face, it was error to instruct the jury that the burden was on defendant to prove that the facts set out in the complaint upon which the warrant was issued were true, though such officer verified the complaint.³²

One suing to recover his money lost by another at gaming must show that the money was his, that another wagered and lost it without complainant's consent, and that the person sued won it either as principal or agent.³³

The burden is on a guardian to prove all circumstances of knowledge, free consent, good faith, and absence of influence, which alone can overcome the presumption that dealings between him and his former ward, over whom he still has influence, are fraudulent.³⁴

In order for the plaintiff to recover property as exempt, he must prove himself a resident of the state, and the head of a family.³⁵

Where a county seeks to avoid the payment of its obligations on the ground that, at the time the debts were incurred and the obligations issued, the county was indebted beyond the federal limit, the burden of proof is on it to establish such facts.³⁶

Where a deed is attacked for fraud, and the grantee pleads that he is a bona fide purchaser, the burden of proof is on him, and plaintiff need only show the fraudulent intent of the grantor.³⁷

The burden is on a broker in his action for a commission to show that he was the procuring cause of the sale.³⁸

where it was not required by statute to maintain a fence. *Missouri, K. & T. Ry. Co. v. Bandy*, 75 Okl. 57, 181 P. 313.

A judgment sustaining an attachment is conclusive until reversed or vacated, and a defendant in an attachment suit cannot, when sued on a forthcoming bond, under which the property was returned to him, avail himself of the fact that the property attached was, at the time it was seized under the order of attachment, exempt. *Lane Implement Co. v. Lowder*, 65 P. 926, 11 Okl. 61.

³² *Kniseley v. Ham*, 136 P. 427, 39 Okl. 623, 49 L. R. A. (N. S.) 770.

³³ *Becker v. Fitch* (Okl.) 167 P. 202, 2 A. L. R. 340.

³⁴ *Daniel v. Tolon*, 53 Okl. 666, 157 P. 756, 4 A. L. R. 704.

³⁵ *McClelland v. Schmidt*, 110 P. 901, 26 Okl. 585.

³⁶ *Board of Com'rs of Custer County v. De Lana*, 57 P. 162, 8 Okl. 213.

³⁷ *Brooks v. Garner*, 97 P. 995, 20 Okl. 236, denying rehearing 94 P. 694, 20 Okl. 236.

³⁸ *Wheelan v. Hunt*, 133 P. 52, 37 Okl. 523.

§ 953. Contracts

The burden of proof is on the party who seeks to avoid a contract because it is against public policy or illegal,³⁹ or because it was procured by fraud.⁴⁰

In an action to recover for breach of a contract, the burden is upon the plaintiff to show that a remedy in damages is not adequate.⁴¹

Where the plaintiffs who seek the aid of a court of equity to rescind a contract alleged to have been procured by fraud, have been guilty of unreasonable delay after discovery of the fraud, in instituting and prosecuting their action, they must not only allege the impediments which delayed them, but must also produce evidence explaining their delay; and if they fail to do so the court, upon its own motion, may refuse to grant relief.⁴²

³⁹ *Horn v. Gibson*, 103 P. 563, 24 Okl. 481.

⁴⁰ Where, in an action for goods bought, the answer admits the contract and the receipt of the goods, and the only defense is that the contract is illegal and procured by fraud, the burden of proof is on defendant. *J. W. Ripy & Son v. Art Wall Paper Mills*, 136 P. 1080, 41 Okl. 20, 51 L. R. A. (N. S.) 33.

Where written contract is attacked for fraud, it will be upheld unless fraud is established by clear and convincing evidence, and it cannot be predicated on mere future promises. *Lusk v. White*, 58 Okl. 773, 161 P. 541.

Where a seller seeks to rescind a sale for the reason that the buyer fraudulently represented himself solvent, the burden of proof is upon the seller, and a demurrer to the evidence is properly sustained if he fails to prove the insolvency of the buyer. *Flohr v. Schwartzberg*, 59 P. 666, 9 Kan. App. 215.

In an action to rescind a contract of exchange on the ground that defendant fraudulently represented that the property conveyed by him was unincumbered, while in fact it was mortgaged, plaintiff has the burden of showing his ignorance of the mortgage, where it was recorded, and its existence was also shown by an abstract of title furnished plaintiff. *Ferguson v. Willig*, 46 P. 936, 57 Kan. 453.

A party seeking to set aside a written instrument on the ground of fraud assumed the burden of proving the same by clear, positive, and convincing evidence. *Herron v. M. Rumley Co.*, 116 P. 952, 29 Okl. 317.

⁴¹ *Howerton v. Kansas Natural Gas Co.*, 108 P. 813, 82 Kan. 367, 34 L. R. A. (N. S.) 46, reversing judgment 106 P. 47, 81 Kan. 553, 34 L. R. A. (N. S.) 34, on rehearing; *Day v. Kansas City Pipe Line Co.*, 109 P. 186, 82 Kan. 861; *Wheeland v. Fredonia Gas Co.*, 109 P. 187, 82 Kan. 862.

⁴² *Skinner v. Scott*, 118 P. 394, 29 Okl. 364.

§ 954. — Bailment

That proof of bailment and loss or injury makes out a prima facie case does not shift the burden of proof but merely shifts the burden of evidence.⁴³

In an action against a bailee for loss of property by a fire, it is error to instruct that the burden is on the defendant to prove that he was not negligent; the burden being on plaintiff to make a prima facie case outweighing an affirmative defense.⁴⁴

Where the plaintiff showed that the defendant failed to deliver a shipment in a safe condition within a reasonable time, the burden was then on the defendant to excuse itself from negligence,⁴⁵ or to prove that the shipment was made under a special contract which released it from liability.⁴⁶

In an action for injuries to an intrastate shipment, the burden is on defendant to establish its contention that the shipment is an interstate one, which is not subject to the constitutional article as to a notice or demand.⁴⁷

Under a bill of lading reciting that goods were received in apparent good order, issued by the initial carrier as agent for the delivering carrier, the burden is on the delivering carrier to show that the goods were not in the condition recited.⁴⁸

⁴³ *Standard Marine Ins. Co., Limited, of Liverpool v. Traders' Compress Co.*, 46 Okl. 356, 148 P. 1019.

⁴⁴ *Stone v. Case*, 124 P. 960, 34 Okl. 5, 43 L. R. A. (N. S.) 1168.

⁴⁵ *St. Louis & S. F. R. Co. v. Peery*, 138 P. 1027, 40 Okl. 432.

Where, in a common-law action for breach of a contract to safely transport cattle within a reasonable time, defendant's noncompliance is shown, the burden is on it to excuse itself therefrom. *St. Louis & S. F. R. Co. v. Shepard*, 139 P. 833, 40 Okl. 589.

Burden rests on delivering carrier to show that injury to goods shipped occurred without its fault or negligence. *St. Louis, & S. F. R. Co. v. Akard*, 60 Okl. 4, 159 P. 344.

⁴⁶ *St. Louis & S. F. R. Co. v. Cox, Peery & Murray*, 138 P. 144, 40 Okl. 258.

⁴⁷ *Chicago, R. I. & P. Ry. Co. v. Harrington*, 44 Okl. 41, 143 P. 325; Const. Okl. art. 23, § 9.

⁴⁸ *St. Louis & S. F. R. Co. v. Jamieson*, 95 P. 417, 20 Okl. 654.

In an action against the delivering carrier for injury to and loss of a portion of goods delivered to the initial carrier as one shipment and under a single contract of carriage, not only over its line but the connecting line, the bill of lading issued by the initial carrier, reciting that the goods were received in apparent good order, casts the burden on the delivering carrier to rebut such prima facie presumption of delivery and apparent good order, or to show that the alleged injury or loss occurred before the goods reached it. *Id.*

Where a live stock bill of lading required notice of damage before stock was removed or mingled with other stock, the burden was on plaintiff, in an action thereunder, to show that the notice was given within the time provided.⁴⁹

§ 955. Bills and notes—Execution

Where the execution of the note sued on is denied under oath by the defendants, who are the alleged makers, the burden is on the plaintiff to prove the execution of the note by at least a prima facie showing, before the note is entitled to be introduced in evidence, and the burden of proof is on the holder to prove the genuineness of the signature of the makers.⁵⁰

In an action by one other than the payee, where the assignment to plaintiff and his ownership are in issue, the burden is on plaintiff to prove them.⁵¹

Where the execution of a note is denied under oath, and on the trial the genuineness of the signatures to the note are admitted, but it is claimed that a material alteration has been made in the note subsequent to its execution, the presumption will be entertained that all alterations or interlineations were made prior to and with the consent of the makers, and the burden will be on the one alleging such alterations to show that they were made subsequent to

⁴⁹ Chicago, R. I. & P. Ry. Co. v. Conway, 125 P. 1110, 34 Okl. 356.

In an action against a carrier for injuries to live stock, plaintiff's evidence that he prepared a written notice of such injury, as required by the bill of lading, and left it with his commission firm at destination of the stock, and that they afterwards wrote him that they had filed with defendant, was incompetent. Chicago, R. I. & P. Ry. Co. v. Conway, 125 P. 1110, 34 Okl. 356.

⁵⁰ Richardson v. Fellner, 60 P. 270, 9 Okl. 513.

In an action by the indorsee of a note, wherein a properly verified answer contains a general denial, the burden is on the indorsee to prove by a preponderance of the evidence the execution of the indorsement, and when he offers no evidence thereof, evidence is insufficient to sustain judgment for him. Lambert v. Harrison (Okl.) 171 P. 45.

⁵¹ Jones v. Wheeler, 101 P. 1112, 23 Okl. 771.

In a transferee's action on a note to which the maker set up defenses, held, that under Comp. Laws, 1909, §§ 4041, 4657, the burden was on plaintiff to prove that the note was indorsed by the payee. Gault v. Kane, 44 Okl. 763, 145 P. 1128.

Where, in a mortgage foreclosure suit, the execution and genuineness of the note and mortgage are conceded and the answer sets up only defensive matter, the burden is on defendants. Johnson v. Young, 47 Okl. 741, 150 P. 664.

the execution of the instrument, and without the consent of the makers.⁵²

In an action on a note, setting forth as consideration the construction of a railroad by a given time, where an answer is filed setting up a distinct contract for the conveyance of certain land as a consideration for the note, and where the reply denies under oath any such contract, the burden of proving the execution and delivery thereof is on defendant, and a failure to prove the execution and delivery precludes the admission of such contract in evidence.⁵³

§ 956. — Holder

Where the title of any person who has negotiated a negotiable instrument is shown to be defective, the burden is on the holder to show that he is a holder in due course.⁵⁴

⁵² Richardson v. Fellner, 60 P. 270, 9 Okl. 513; Kapp v. Levyson, 58 Okl. 651, 160 P. 457; Cavitt v. Robertson, 142 P. 290, 42 Okl. 619; West v. Naten, 49 Okl. 249, 152 P. 342.

⁵³ Sparks v. Oklahoma Const. Co., 91 P. 839, 19 Okl. 55.

⁵⁴ State v. Emery (Okl.) 174 P. 770, 6 A. L. R. 234; Brinton v. Maxey, 59 Okl. 33, 157 P. 1048; Critser v. Steele, 62 Okl. 203, 162 P. 795; Price v. Winnebago Nat. Bank, 79 P. 105, 14 Okl. 268.

Rule placing burden of proof on holder of negotiable instrument to show that he is holder in due course obtains where there is fraud in inception of note. Voris v. Birdsall, 62 Okl. 286, 162 P. 951.

Where title of any person who has negotiated negotiable instrument was defective, burden is on holder to prove that he or some one under whom he claims acquired title as holder in due course, except as provided in Rev. Laws 1910, § 4109. Lambert v. Smith, 53 Okl. 606, 157 P. 909.

When title of any one negotiating an instrument is defective, the burden is on the holder to prove that he or some one under whom he claims acquired title as a holder in due course without notice, save under exception provided in Rev. Laws 1910, § 4109, and otherwise he cannot recover against maker. Daniels v. Bunch (Okl.) 172 P. 1086.

Where the defense to a note is that it was obtained by the payee's fraud, which is established, the burden is on plaintiff to show that he purchased it without notice of the fraud. Mangold & Glandt Bank v. Utterback (Okl.) 174 P. 542.

Where the maker of a note shows that the note has been negotiated in violation of agreement, the burden is on the holder to prove acquisition of title as a holder in due course, without notice of any infirmity. Gourley v. Pioneer Loan Co., 51 Okl. 434, 151 P. 1072.

Where a negotiable instrument is shown to have been obtained by false representations, the burden is on the subsequent holder to show himself a bona fide purchaser for value without notice. Cox v. Kirkwood, 59 Okl. 183, 158 P. 930.

Defenses available between the acceptor and drawer of a bill of exchange

If a draft is not indorsed to a person asserting ownership different from that shown on its face, such person has the burden of proving such ownership.⁵⁵

Where a note remains with the original payee, he is presumed to know the relation the parties to the note sustain to each other, and, where he denies such knowledge, the burden is on him to overcome such presumption by proof to the contrary.⁵⁶

A payee's possession of a note is prima facie evidence of ownership, though the note shows an indorsement by him uncanceled.⁵⁷ In other words, one in possession of a note payable to his order is presumed to be the owner and holder of same for value.⁵⁸

§ 957. Consideration

"The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it."⁵⁹

are not available in an action by the payee against the acceptor if the payee is a bona fide holder for value, and the burden of overcoming the presumption that the payee is not a bona fide holder for value is on the acceptor, who seeks to set up such defenses against the payee. *Morrison v. Farmers' & Merchants' Bank*, 60 P. 273, 9 Okl. 697.

In an action on a note which a bank had discounted, depositing the proceeds to the seller's credit, the burden was on defendant to show that such proceeds had not been paid out. *National Bank of Commerce v. Armbruster*, 142 P. 393, 42 Okl. 656.

⁵⁵ *First Nat. Bank of Poteau v. Moniot*, 50 Okl. 85, 150 P. 1040.

⁵⁶ *Stovall v. Adair*, 60 P. 282, 9 Okl. 620.

⁵⁷ *Waldock v. Winkler*, 51 Okl. 485, 152 P. 99.

⁵⁸ *Ringer v. Wilson*, 55 Okl. 41, 154 P. 1145.

⁵⁹ *Rev. Laws 1910*, § 935.

Where want of consideration is pleaded, but execution of the written contract admitted, the burden is on defendant to prove want of consideration. *Ball v. White*, 50 Okl. 429, 150 P. 901.

In action on note, burden of proving affirmative defense that consideration therefor is illegal is upon the defendant. *Chandler v. Lack* (Okl.) 170 P. 516; *Tinker v. Midland Valley Mercantile Co.*, 105 P. 333, 25 Okl. 160.

Where the execution of a written instrument was admitted because of want of verification of the reply, but want of consideration was set up, the party pleading want of consideration has the burden of proof, under *Rev. Laws 1910*, §§ 934, 935. *St. Louis & S. F. R. Co. v. Bruner*, 52 Okl. 349, 152 P. 1103; *Reeves & Co. v. Dyer*, 52 Okl. 750, 153 P. 850.

Under express provision of *Rev. Laws 1910*, § 934, a bond, being a "written instrument," is presumptively supported by a consideration. *Liverpool & London & Globe Ins. Co. v. Biggers* (Okl.) 175 P. 242.

Where the execution of a release of damages for personal injuries is admitted, the burden of proving fraud and want of consideration is upon the

When a confidential relation exists between a parent and child, and the child is mentally weak, and the parent exercises an influence over the child, everything is presumed against a conveyance to the parent by the child for the parent's benefit, and the burden of proof is on the person benefited to show that the transaction was fairly conducted.⁶⁰

§ 958. Insurance—In general

If a policy has not been issued or delivered, the insured must show that a contract of insurance was entered into.⁶¹

Where a policy insured generally against a particular peril and contained a clause exempting the insurer from liability for loss caused in a certain manner, the burden was on the insurer to prove that the loss fell within the exemption.⁶²

The burden of proof of waiver of a concurrent insurance clause in a fire policy, by knowledge of the agent of the existence thereof at the time of the delivery of the policy, is on the insured.⁶³

Under a policy insuring property against fire while contained in a described building, it is incumbent on the insured to allege and prove that the loss occurred while the property was in such building.⁶⁴

The burden is on an insurer to show that it has given notice of forfeiture, in accordance with the law which is made controlling by provisions of the policy.⁶⁵

Where the insured accepted a certain sum in compromise of his claim, which was denied, he has the burden, in a subsequent action, to overcome the defense of compromise by convincing evidence

party executing the release. *St. Louis & S. F. R. Co. v. Bruner*, 61 Okl. 313, 161 P. 788.

When party having burden of proving title introduces in evidence duly acknowledged warranty deed, correct in form, the opposite party, who pleads lack of consideration, has burden of proving defenses. *Jordan v. Jordan*, 62 Okl. 171, 162 P. 758.

⁶⁰ *Parker v. Parker*, 75 Okl. 234, 182 P. 697, 11 A. L. R. 720.

⁶¹ *McCracken v. Travelers' Ins. Co. of Hartford, Conn.*, 57 Okl. 284, 156 P. 640.

⁶² *Fidelity & Casualty Co. of New York v. First Bank of Fallis*, 142 P. 312, 42 Okl. 662.

⁶³ *Western Nat. Ins. Co. v. Marsh*, 125 P. 1094, 34 Okl. 414, 42 L. R. A. (N. S.) 991.

⁶⁴ *German-American Ins. Co. of New York v. Lee*, 51 Okl. 28, 151 P. 642.

⁶⁵ *Jones v. New York Life Ins. Co.*, 122 P. 702, 32 Okl. 339.

that it was procured by fraud or that it was not his free and voluntary act.⁶⁶

§ 959. — Proof of loss

In an action on a policy requiring proofs of loss to be furnished within 60 days, evidence of the furnishing of such proofs is essential, unless the proofs have been waived.⁶⁷

Where the plaintiff testified he furnished proof of loss in writing within the time required, and no evidence as to the proof was introduced, it will be presumed that it was sufficient.⁶⁸

In action on fraternal benefit certificate, the plaintiff must prove reasonable compliance with requirements of association as to furnishing proofs of loss.⁶⁹

§ 960. — Misrepresentation or breach

Contracts of fidelity insurance will be liberally construed to accomplish the purpose of indemnity for which they are made; and, where the defense is a breach of the warranty by the insured, the burden of proof rests upon the insurer to establish the allegations charging such breach.⁷⁰

The burden of proving the falsity of statements of insured in his application for a policy which by the terms of the policy are made warranties, and that a condition of the policy essential to its validity

⁶⁶ Pacific Mut. Life Ins. Co. of California v. Coley, 62 Okl. 161, 162 P. 713.

⁶⁷ Palatine Ins. Co. v. Lynn, 141 P. 1167, 42 Okl. 486.

⁶⁸ German-American Ins. Co. of New York v. Lee, 51 Okl. 28, 151 P. 642.

⁶⁹ Haskew v. Knights of Modern Maccabees, 58 Okl. 294, 159 P. 493.

⁷⁰ Southern Surety Co. v. Tyler & Simpson Co., 30 Okl. 116, 120 P. 936.

In an action on a benefit certificate, where liability was denied on the ground of a false statement in the application and plaintiff claimed that insured did not execute the application, defendant has the burden of proving insured's execution of the application and the falsity of the statement. Sovereign Camp of Woodmen of the World v. Hutchins, 60 Okl. 181, 159 P. 920.

In an action on a life insurance policy, the burden is on the insurer to show a breach of insured's warranty that he had not had medical advice during the previous five years. National Union v. Kelley, 140 P. 1157, 42 Okl. 98.

The burden of proving the materiality of a misrepresentation or concealment in the application for insurance, as well as the fraudulent intention of the insured, is upon the insurance company, and is not shifted by showing that the insured made an untrue answer concerning other insurance. Owen v. United States Surety Co., 38 Okl. 123, 131 P. 1091.

has been violated by the insured is upon the insurer seeking to avoid the policy on such grounds.⁷¹

In an action on a life insurance policy where the defense is the suicide of insured, the burden of establishing suicide by a preponderance of the evidence is upon the insurer.⁷²

Though the beneficiary forwarded an ex parte statement of an acting coroner that death of insured was suicide, it was not sufficient to cast on the beneficiary the burden of proving that the insured did not commit suicide.⁷³

Where the constitution of a fraternal life insurance company provides that if a member holding a certificate becomes so far intemperate as to impair his health, or dies from disease resulting from his intemperate habits, the certificate shall be null and void, the burden is on defendant to prove that deceased was addicted to the use of injurious drugs mentioned in the policy to such an extent as to impair his health, or that he died because of his intemperate habits, and an instruction to that effect and also to the effect that defendant must show that deceased would not have died at that time "but for the impairment of his health," is not reversible error; the latter part of the instruction being descriptive of what is meant by impairment of health.⁷⁴

§ 961. Indians

The burden of proof is on one who controverts the rights of an Indian to lands which have been allotted to him.⁷⁵

⁷¹ Capital Fire Ins. Co. v. Carroll, 109 P. 535, 26 Okl. 286.

Under the statute providing that statements in an application for insurance procured without medical examination shall, in the absence of fraud, be deemed representations and not warranties, the burden is on the insurer to prove that such statements are willfully false or misleading. Continental Casualty Co. v. Owen, 38 Okl. 107, 131 P. 1084; American Bankers' Ins. Co. v. Hopkins (Okl.) 169 P. 489.

⁷² Modern Brotherhood of America v. White (Okl.) 168 P. 794, L. R. A. 1918B, 520.

⁷³ Modern Brotherhood of America v. White (Okl.) 168 P. 794, L. R. A. 1918B, 520.

⁷⁴ Woodmen of the World v. Gilliland, 67 P. 485, 11 Okl. 384.

⁷⁵ Where, in ejectment of an allottee of the Cherokee Tribe of Indians, plaintiff, in support of her title, showed that the land was allotted to her, and such allotment is not denied, and her claim of possession is based on the allotment certificate, the burden is on defendant, who controverts plaintiff's

The burden is upon the Indian, asserting title to surplus lands which he had attempted to alienate, to show that the lands were not subject to alienation.⁷⁶

§ 962. Statute of limitations

Where a petition or bill of particulars shows that the asserted cause of action is barred by limitations, and the statute is pleaded as a defense, then the burden is on plaintiff to prove facts relieving the action from the bar of the statute;⁷⁷ but in an action on a note where the defendant pleads limitations, without denying the execution of the note, the burden is on him to make a prima facie case.⁷⁸

rights thereunder. *Denver, W. & M. Ry. Co. v. Adkinson*, 119 P. 247, 28 Okl. 1.

In ejectment by an allottee of the Chickasaw Tribe of Indians, where plaintiffs show that the lands in controversy were allotted to them and certificates of allotment issued to them therefor, and that said certificates have never been canceled, and where defendant's only defense to the action is that their grantor selected said lands as his allotment before the same were allotted to plaintiffs, but admit that the selection of said lands as allotment for their grantor has been canceled by the Secretary of the Interior, the burden is on defendants to show the order of cancellation invalid in order to overcome the presumption of plaintiffs' right to possession of the lands arising from the certificates of allotment to them, and obtaining by reason of section 23 of the Supplemental Treaty with the Chickasaw and Choctaw Tribes of Indians (32 Stat. 644). *Sorrels v. Jones*, 110 P. 743, 26 Okl. 569.

⁷⁶ In a suit to quiet title by a three-fourth Creek Indian enrolled on June 20, 1899, as of 11 years, who received an allotment which he mortgaged on September 30, 1915, the burden of proving that surplus lands were not subject to alienation was upon plaintiff, in view of Supplemental Creek Agreement June 30, 1902, § 16, and Act Cong. May 27, 1908, restricting alienation. *Gum Bros. Co. v. Morton* (Okl.) 175 P. 350.

⁷⁷ *Torrey v. Campbell* (Okl.) 175 P. 524.

Where the issue framed is the statute of limitations, and whether the debt has been taken out of the statute by a part payment, the burden of proof is on plaintiff to show, not only that payment was made by the maker to the payee, but that it was intended as a payment upon the identical note upon which the action has been brought. *Easter v. Easter*, 24 P. 57, 44 Kan. 151.

Where a defendant, as a defense to an action arising in another state, avers that he came into this state more than three years prior to the commencement of the suit, the burden is upon him to maintain the plea. *Smith-Frazer Boot & Shoe Co. v. White*, 51 P. 790, 7 Kan. App. 11.

⁷⁸ *Bradford v. Brennan*, 12 Okl. 333, 71 P. 655.

§ 963. Damages

In an action for damages, the burden of establishing the amount thereof sustained always rests upon the plaintiff, unless the defendant specifically admits such amount in his answer; and, where no such admission is contained in the answer, it is error for the trial court to require defendant to assume the burden of proof.⁷⁹

The burden of proving mitigation of damages is on the party guilty of the wrong.⁸⁰

In order to warrant a verdict for future pain, where the injury is subjective, there must be evidence by an expert witness that plaintiff, with reasonable certainty, will experience future pain as a result of the injury; but if the injury is objective, and it is plainly apparent that the plaintiff must undergo pain in the future, the jury may infer that fact from proof of the injury.⁸¹

§ 964. Malicious prosecution

The plaintiff in an action for malicious prosecution has the burden of proving that the prosecution complained of has finally terminated in his favor,⁸² and that there was a want of probable cause.⁸³

⁷⁹ *Smock v. Carter*, 50 P. 262, 6 Okl. 300.

In an action for breach of warranty, the buyer must prove the breach and amount of damages. *Spaulding v. Howard*, 51 Okl. 502, 152 P. 106.

A lessor, claiming, as damages for failure of lessee on demand to execute release of forfeited oil and gas lease, his loss on an alleged contract for sale of a lease on the same land, must prove either that he had a valid contract, or that the prospective purchaser would have completed the contract, regardless of its enforceability. *Rogers v. Milliken Oil Co.*, 62 Okl. 147, 161 P. 799.

⁸⁰ *Sackett v. Rose*, 55 Okl. 398, 154 P. 1177, L. R. A. 1916D, 820.

Burden is on railroad, in action for personal injuries, to show damages could have been reduced by ordinary care. *Missouri, K. & T. Ry. Co. v. Edmonds* (Okl.) 174 P. 1052.

The burden of reducing the damages by proof that plaintiff could have obtained other employment is on defendant. *Mitzler Dry Goods Co. v. Sanders*, 44 Okl. 678, 146 P. 17.

⁸¹ *Muskogee Electric Traction Co. v. Doss*, 50 Okl. 224, 154 P. 909.

² *Patterson v. Morgan*, 53 Okl. 95, 155 P. 694.

⁸³ *Jones Leather Co. v. Woody* (Okl.) 190 P. 874; *El Reno Gas & Electric Co. v. Spurgeon*, 30 Okl. 88, 115 P. 397; *Sims v. Jay*, 52 Okl. 154, 155 P. 615; *Herrick v. Devorak*, 56 Okl. 420, 155 P. 1153.

Where a United States commissioner discharges accused, and the jury indicts him, these two facts neutralize each other, and plaintiff, to sustain his case, must produce other evidence of want of probable cause. *Lindsay v. Couch*, 95 P. 973, 22 Okl. 4, 15 Ann. Cas. 69.

§ 965. Negligence

To entitle the plaintiff to recover damages in action for negligence, he must prove by a preponderance of the evidence the negligence of defendants, and that the negligence alleged and proved was the proximate cause of his injury.⁸⁴

In an action against a municipality for personal injuries, there is no presumption that either party is guilty of negligence, and to entitle plaintiff to recover he must show that the injuries were caused by reason of the negligence of the defendant,⁸⁵ and the burden is on the defendant to prove the plaintiff's contributory negligence.⁸⁶

⁸⁴ *Lusk v. White*, 58 Okl. 773, 161 P. 541; *Patterson v. Seals*, 51 Okl. 347, 151 P. 591; *St. Louis & S. F. R. Co. v. Davis*, 132 P. 337, 37 Okl. 340; *Atchison, T. & S. F. Ry. Co. v. St. Louis & S. F. Ry. Co.*, 41 Okl. 80, 135 P. 353, 48 L. R. A. (N. S.) 509.

The mere occurrence of injury creates no presumption of negligence. *St. Louis & S. F. R. Co. v. Fick*, 47 Okl. 530, 149 P. 1126; *Chicago, R. I. & P. Ry. Co. v. Watson*, 127 P. 693, 36 Okl. 1; *Chicago, R. I. & P. Ry. Co. v. Tate*, 57 Okl. 215, 156 P. 1182.

Const. art. 23, § 6, which requires that the question of contributory negligence or assumption of risk be left to the jury, does not relieve plaintiff from the burden of proving negligence of defendant constituting the proximate cause of the injury. *Chicago, R. I. & P. R. Co. v. Duran*, 38 Okl. 719, 134 P. 876.

The principle expressed by the formula "res ipsa loquitur" is that, where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if proper care be used, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from lack of proper care. *Muskogee Electric Traction Co. v. McIntire*, 133 P. 213, 37 Okl. 684, L. R. A. 1916C, 351.

The burden of proving that negligence in running train without headlight was the proximate cause of death is on plaintiff, seeking recovery therefor. *Kansas City Southern Ry. Co. v. Langley*, 62 Okl. 49, 160 P. 451.

In an action for injury to stock due to defective cattle guards, the burden was on plaintiff to prove the negligence charged; the accident itself raising no presumption of negligence. *Midland Valley R. Co. v. Bryant*, 131 P. 678, 37 Okl. 206.

⁸⁵ *Oklahoma City v. Reed*, 87 P. 645, 17 Okl. 518, 33 L. R. A. (N. S.) 1083.

It is incumbent upon the plaintiff to show, if he was injured, that it was caused by reason of the negligence of defendant in not keeping its streets and sidewalks in repair, and that in passing upon the street he used reasonable and ordinary care. *City of Guthrie v. Thistle*, 49 P. 1003, 5 Okl. 517.

⁸⁶ *Town of Fairfax v. Giraud*, 131 P. 159, 35 Okl. 659.

If a person attempts to pass over a sidewalk, bridge or other structure, knowing the same to be in a dangerous condition, and in such attempt receives an injury, his knowledge of the danger will presumptively establish

In a personal injury action against an electric light company, evidence that plaintiff was injured on a public street without fault on his part by improper insulation or derangement of defendant's appliances raises a presumption of negligence by defendant, casting on it the burden of showing that it exercised due care.⁸⁷

If the evidence of plaintiff shows that plaintiff was guilty of contributory negligence, a demurrer to plaintiff's evidence should be sustained.⁸⁸

A child under 7 years of age, or, in the absence of evidence of capacity, between 7 and 14 years of age, is presumed to be incapable of guilt of more than technical trespass, as affecting the question of duty of a landowner as to dangerous condition of the premises.⁸⁹

contributory negligence; but such presumption is not conclusive. *Pitman v. City of El Reno*, 37 P. 851, 2 Okl. 414, judgment reversed *Pittman v. Same*, 46 P. 495, 4 Okl. 638.

⁸⁷ *Shawnee Light & Power Co. v. Sears*, 95 P. 449, 21 Okl. 13.

The placing and maintaining of electric light wires so close to telephone wires that they come in injurious contact presumably constitutes negligence on the part of the owner of the former. *Weleetka Light & Water Co. v. Northrop*, 140 P. 1140, 42 Okl. 561.

⁸⁸ *Pitman v. City of El Reno*, 46 P. 495, 4 Okl. 638.

⁸⁹ *City of Shawnee v. Cheek*, 137 P. 724, 41 Okl. 227, 51 L. R. A. (N. S.) 672, Ann. Cas. 1915C, 290.

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ARTICLE V

ADMISSIBILITY

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DIVISION I.—RELEVANCY AND MATERIALITY

§ 966. Pertinent to issues

Evidence is admissible only when relevant to the facts in issue.⁹⁰ Any evidence which does not support any issue made by the pleadings should be excluded,⁹¹ such as entries in books of account where they do not relate to the transaction which is the subject of inquiry,⁹² and proof of any fact which does not tend to prove or disprove any matter in controversy.⁹³

⁹⁰ *Waters v. Dore*, 50 Okl. 183, 150 P. 885.

⁹¹ *Indian Land & Trust Co. v. Clement*, 109 P. 1089, 22 Okl. 40.

Where a wife brought an action to cancel a mortgage executed by herself and husband to defendant, on a homestead owned by her, on the ground that the consideration of \$5,000 mentioned therein had wholly failed, because defendant had not paid, advanced, or loaned any part thereof, and defendant, after admitting the execution and recording, denied only generally the allegations of the petition, it was not competent for defendant to show, by written contracts, letters and other testimony between the husband and himself that defendant received such mortgage as collateral security for the payment of debts of the husband, when it appeared from the evidence of defendant that he had never had any conversation with the wife before or after the execution

⁹² *Drumm-Flato Commission Co. v. Edmiston*, 87 P. 311, 17 Okl. 344, judgment affirmed 28 S. Ct. 367, 208 U. S. 534, 52 L. Ed. 606.

⁹³ *Neosho Valley Inv. Co. v. Hannum*, 66 P. 631, 63 Kan. 621.

It is proper for the court to permit to be shown the circumstances surrounding a transaction in controversy and the relations of the parties to the action for the purpose of aiding the jury in judging of the reasonableness of the respective claims of the parties who testify, directly contradictory to each other, with reference thereto.⁹⁴

Evidence as to the general condition of property at different times is admissible.⁹⁵

Evidence as to character and general reputation is generally inadmissible.⁹⁶

Specific acts of misconduct are not ordinarily admissible upon

of the mortgage, and when the husband, as the witness of defendant, testified that, in making all of his arrangements with defendant, he acted for himself alone and not for anybody else. *Donaldson v. Everhart*, 32 P. 405, 50 Kan. 718.

⁹⁴ *Holman v. Raynesford*, 44 P. 910, 3 Kan. App. 676.

⁹⁵ T. bought 400, and O. 200, sheep out of the same flock, of B. The sheep had, at the time of sale, an infectious disease, though unknown to either party to the sale. They were placed in one flock for the sake of cheapness, and became so commingled that they could not be distinguished. In an action brought by T. against B. for breach of warranty that the sheep sold T. were sound and healthy, held, that testimony showing the general condition of all the sheep after they had been in one flock some time was admissible; the commingling of the flock not being for the purpose of defrauding B., nor of concealing or manufacturing evidence. *Broquet v. Tripp*, 14 P. 227, 36 Kan. 700.

⁹⁶ In action for fraud in contract for exchange of real estate, admission of evidence that plaintiff's general reputation for truth and honesty was good was error. *Wyrick v. Campbell* (Okl.) 170 P. 267.

Evidence of the general reputation of insured for truth and honesty was inadmissible to rebut direct evidence tending to establish the defense of fraud in the procurement of the insurance. *Great Western Life Ins. Co. v. Sparks*, 38 Okl. 395, 132 P. 1092, 49 L. R. A. (N. S.) 724.

Where the complaint, in an action for a balance alleged to be due as a result of mutual transactions, charges fraud and wrongful neglect by defendant, a judgment for defendant will not be reversed for the admission of evidence tending to show his good standing and character in the community. *Allison v. McClun*, 20 P. 125, 40 Kan. 525.

Where plaintiff was ejected from a railroad train, and evidence was offered to show that before his ejection he used vile, obscene, and profane language in a car filled with passengers, including many women and children, evidence on his part, by a witness, "that he never heard him use half a dozen oaths in his life," and by another that "he never heard him use obscene language in public, but might have heard him make use of an oath some time, but not frequently," is incompetent. *Atchison, T. & S. F. R. Co. v. Gants*, 17 P. 54, 38 Kan. 608, 5 Am. St. Rep. 780.

an issue of the character of one of the parties to the action, where it arises collaterally.⁹⁷

Evidence of the pecuniary condition of a party is admissible, where such condition becomes material to the issues.⁹⁸

Where the intent of the party is material and the facts and circumstances shown in evidence leave the question in doubt, the character of the party charged may be shown to aid in the determination of the question.⁹⁹

Where, by reason of demanding and receiving a bill of sale in the nature of a chattel mortgage covering the goods involved in the controversy, defendant was estopped to claim ownership thereof under a prior bill of sale from plaintiff's vendor, evidence offered by defendant concerning a state of facts existing prior to plaintiff's purchase of the goods was properly excluded.¹

Matters explanatory of facts in evidence are admissible to rebut the presumptions which might otherwise arise.²

Evidence as to facts not directly a part of the subject-matter of the action, which happened either a long time before or a long time after the transaction in question, are inadmissible, as being too remote.³

⁹⁷ *Lowrey v. Missouri, K. & T. Ry. Co.*, 133 P. 719, 90 Kan. 180.

⁹⁸ Where, in an action by a wife to cancel a lease made by her husband of land standing in her name, defendant claims that in fact the land belonged to the husband, and was put in the wife's name to defraud creditors, he may give evidence of judgments against the husband, and of a lease, signed by them and their daughter, of land standing in the daughter's name. *Burtiss v. Lanyon Zinc Co.*, 75 P. 1030, 68 Kan. 827.

⁹⁹ *Sovereign Camp, Woodmen of the World, v. Welch*, 83 P. 547, 16 Okl. 188.

¹ *Ridenour-Baker Grocery Co. v. Perkins*, 61 P. 459, 9 Kan. App. 835.

² In a factory employé's action for injuries, subpoenas issued by plaintiff for witnesses who were present when the employé was hurt, but who failed to appear and testify at the trial, were properly admitted in evidence. *Curtis & Gartside v. Pribyl*, 38 Okl. 511, 134 P. 71, 49 L. R. A. (N. S.) 471.

Where the bona fides of the vendor was attacked, and it appeared that the vendor told the buyer that he sold because he had had trouble with a girl, it was error to refuse to permit the question what kind of trouble he said he had had. *Schuster, Tootle & Co. v. Stout & Wingert*, 2 P. 642, 30 Kan. 529.

³ Evidence of the manner in which engines were inspected two years before the fire, to recover damages for which the action is brought, is not admissible as bearing on the inspection of the locomotive which set the fire. *Atchison, T. & S. F. R. Co. v. Briggs*, 43 P. 289, 2 Kan. App. 154.

In an action for damages, caused by the laying of a railroad track through an alley to lots abutting, statements of the value of said lots, made by the

Evidence of facts which are relevant to facts in issue and explains facts in issue and relevant facts, and which support or rebut inferences from such facts, is admissible.⁴

To recover on an account stated, the plaintiff must declare on an account stated, and if he proceeds upon original cause of action, the rules of evidence governing actions on account stated will not apply.⁵

Where the form of the question discloses that the answer would not prove any issue, an objection to the question should be sustained.⁶

Under a general denial the defendant is entitled to introduce any evidence which controverts any fact the plaintiff must prove to establish his case.⁷

Technical abstract phrases defining the rules for the admissibility of evidence will not be applied to hinder and delay justice.⁸

§ 967. Materiality

A fact from which the question in issue may be determined is material.⁹

party whose administrator brings the action, may ordinarily be introduced in evidence by the opposite party; but where such statements are either made a long time before or a long time after the laying of said track, and the values of property in that locality have been fluctuating, they may be rejected. *Central Branch U. P. R. Co. v. Andrews*, 14 P. 509, 37 Kan. 162, judgment reversed 16 P. 338, 37 Kan. 641.

⁴ *Kaufman v. Christy*, 148 P. 617, 93 Kan. 554.

In an action against a sheriff for levy, on the property of a wife, of an attachment against her husband, it is not error to permit proof that the sheriff required plaintiff to indemnify him against loss and afterwards sold the property. *Sale v. Shipp*, 58 Okl. 598, 160 P. 502.

In a bank's action on a note, wherein defendant claimed the right to offset the balance remaining in a special escrow account, held, that checks drawn on such account by the cashier, distributing a portion thereof to himself and others, were admissible as showing the amount in the account when the checks were drawn. *First State Bank of Indianola v. Menasco*, 55 Okl. 748, 153 P. 261.

⁵ *Oklahoma Hay & Grain Co. v. T. D. Randall & Co.* (Okl.) 168 P. 1012.

⁶ *Turner v. Maxey*, 45 Okl. 125, 144 P. 1064.

⁷ *Turnbaugh v. Husselton* (Okl.) 180 P. 368.

⁸ *Rogers v. O. K. Bus & Baggage Co.*, 46 Okl. 289, 148 P. 837, Ann. Cas. 1917B, 581.

⁹ In an action on an accident policy, where total inability to work for 52 weeks was alleged, plaintiff's testimony as to continued pain and resulting operations, and that at the end of the period of indemnity his arm had not

Where a town ordinance, requiring brokers to procure a license, was primarily to raise revenue, its exclusion, in an action by a broker for compensation, is not error.¹⁰

Evidence of the execution, delivery, and loss of a deed which would supply a missing link in a chain of title in a suit to quiet title, together with evidence of long peaceable possession without adverse claim and payment of taxes, is admissible on the question whether the lost deed ever existed.¹¹

In an action on a life policy evidence that insured was intoxicated at the time of his death is inadmissible to show that he had falsely represented in his application that he had not been intoxicated during five years previous thereto.¹²

Representations made in the insurance application do not exclude proof that statements made in the application were wilfully false, fraudulent, or misleading by the introduction of the application, even where the policy contains no reference thereto.¹³

On the issue of fraud any evidence competent by other rules of law and which tends to prove or disprove the issue is admissible.¹⁴

recovered so as to be of use, was competent. *Continental Casualty Co. v. Wynne*, 129 P. 16, 36 Okl. 325.

A letter written by an adjuster more than 60 days after a fire, and tending to prove denial of liability within the 60 days allowed for making proof of loss, held admissible for the purpose of corroboration only. *Continental Ins. Co. v. Chance*, 48 Okl. 324, 150 P. 114.

Where A. brought suit in replevin to recover chattels seized in attachment against the property of B., and defendants in the replevin action attempted to justify under the writ on the ground that B. had transferred the property to A. to defraud his creditors, evidence tending to show that A. was without any means of her own, prior to such transfer, and that she exchanged real estate which had been given her by B. for the property involved in the replevin action, and that B. was insolvent at the time of such transfer and gift, is proper. *Marrinan v. Knight*, 54 P. 656, 7 Okl. 419.

In an action on a fire policy containing a three-fourths clause and providing that the insurer should not be liable beyond the actual cash value, it was not error to permit a witness to testify that the cotton destroyed was worth \$2 per hundred at the time of loss, and to state on cross-examination that in his judgment it would have brought that amount net after it had been ginned. *Scottish Union & National Ins. Co. v. Moore Mill & Gin Co.*, 143 P. 12, 43 Okl. 370.

¹⁰ *Campbell v. Thomas*, 56 Okl. 779, 156 P. 647.

¹¹ *Adkins v. Wright*, 131 P. 686, 37 Okl. 771.

¹² *Mutual Life Ins. Co. v. Johnson*, 64 Okl. 222, 166 P. 1074.

¹³ *Continental Casualty Co. v. Owen*, 38 Okl. 107, 131 P. 1084.

¹⁴ *Hooker v. Wilson* (Okl.) 169 P. 1097; *Hankins v. Farmers' & Merchants' Bank*, 141 P. 272, 42 Okl. 330.

In action for fraud inducing purchase of corporate stock, evidence of state-

Circumstantial evidence of fraud is often admissible as a whole though some circumstances considered separately would be incompetent. The whole transaction involving the alleged fraud may be given in evidence.¹⁵

Under the facts of the case on trial it may be proper to admit evidence which is not as definite as it could have been made.¹⁶

In an action for the recovery of real estate from one in possession the claimant must be able to show a complete chain of title, and evidence thereon is admissible if competent and pertinent thereto.¹⁷

ment of defendant as to its value, held admissible to show false statements. *Javanagh v. Johannessen*, 57 Okl. 149, 156 P. 289.

In an action to recover real property, it is competent to prove that an instrument of conveyance relied upon to show title in a third person as a defense to the suit was made with an intent to defraud creditors, or that it was made to secure a debt, and not to pass a title. *Rauer v. Thomas*, 55 P. 285, 60 Kan. 71.

In an action for the assessment of damages for the fraudulent procurement of a contract for the sale of property, a witness' testimony as to why he advised his wife to loan plaintiffs money to pay on the purchase price held properly excluded. *Stroupe v. Hewitt*, 133 P. 562, 90 Kan. 200.

In an action on a note by a transferee thereof, defendant cannot introduce evidence as to fraud and failure of consideration until he first substantiates his allegation challenging plaintiff's claim of a bona fide purchase for value before maturity. *First Nat. Bank v. Walker*, 136 P. 408, 39 Okl. 620, 50 L. R. A. (N. S.) 1115.

¹⁵ *Mangold & Glandt Bank v. Utterback* (Okl.) 174 P. 542.

Where defendant, in an action in the nature of ejectment, claims possession under a deed, and one of the questions at issue is whether such deed is fabricated and forged, it is competent to show what steps were taken by the party claiming under such deed to obtain title and possession, and to show that, just prior to the execution of the deed, he attempted to get another person to execute to him a false deed to the same land. *Redden v. Tefft*, 29 P. 157, 48 Kan. 302.

In an action to subject to judgment land conveyed without consideration and in fraud of creditors, held, that evidence was admissible on the issue of fraud and want of consideration to show what the true consideration was. *Oklahoma Nat. Bank v. Cobb*, 52 Okl. 654, 153 P. 134.

¹⁶ A paper describing land as "476 acres of land near H., Kan., that W. B. & Co. got from Z. M." held sufficiently definite to identify the land in controversy and authorized admission of the paper in evidence in ejectment. *Work v. Work*, 136 P. 236, 90 Kan. 683.

A government surveyor, who had also served as county surveyor, and had established one of the lines in dispute, may testify in what quarter section of land the disputed strip belonged. *Conrad v. Sackett*, 56 P. 507, 8 Kan. App. 635.

¹⁷ In ejectment by defendant's father, where defendant set up gift, follow-

Where the pleadings clearly put in issue the existence and subject-matter of the rules of a traction company, a conductor may testify as to those rules.¹⁸

In an action against the owner of a building for injury to a tenant's visitor from the negligent management of the elevator in the owner's control, the introduction of an ordinance alleged to have been violated is proper, though its violation would not have been negligence per se.¹⁹

In an action for negligence in performing a contract of carriage the exclusion of the written contract upon which the action is based is reversible error.²⁰

In an action on a note by the indorsee before maturity, before the maker may offer in evidence a written contract between himself and the payee to show that the consideration of the note failed before its maturity, he must show that the indorsee had notice of such contract and of the failure of the consideration before the purchase of the note.²¹

In replevin of personal property alleged to have been wrongfully taken by possession and improvements, testimony that plaintiff's wife, defendant's mother, approved the gift, was immaterial, where not offered to show title derived from her. *Cook v. Cook*, 161 P. 625, 99 Kan. 351.

Where title to real property is shown to have vested in seven trustees for the benefit of a church, a deed subsequently executed by two of them and two other persons assuming to act in behalf of the church, in the absence of showing that the other persons were trustees or that the four had authority to bind the church, is no evidence of title when offered against a stranger to the deed, who is in possession, by one who fails to show that either he or any one through whom he claims ever had possession. *Robertson v. Rock Island Lumber & Mfg. Co.*, 85 P. 799, 74 Kan. 117, judgment affirmed 87 P. 1134, 74 Kan. 117.

Exclusion of the evidence of plaintiff in ejectment that the title under which defendant claimed had been canceled after date of the judgment on which it was based held error. *Reynolds v. Brooks*, 49 Okl. 188, 152 P. 411.

In ejectment, where owner of land claimed a strip under a boundary agreement and by adverse possession, evidence that property was carried on tax rolls by original descriptions held admissible. *Hinnen v. Artz*, 163 P. 141, 99 Kan. 579.

¹⁸ Testimony of the conductor as to certain rules of the company was competent under pleadings alleging the making of such rules and authority to make same. *Shawnee-Tecumseh Traction Co. v. Wollard*, 54 Okl. 432, 153 P. 1189.

¹⁹ *Lander v. Hornbeck* (Okl.) 179 P. 21.

²⁰ *Midland Valley R. Co. v. Ezell*, 62 Okl. 109, 162 P. 228.

²¹ *Steward v. Commonwealth Nat. Bank*, 119 P. 216, 29 Okl. 754.

ly detained by the agents of a subsequent purchaser of the property, evidence that the subsequent purchaser had actual notice, at the time of the transaction by which it acquired possession of the property, that plaintiff had a mortgage on such property, is admissible.²²

In trespass against the owner of cattle, which had broken through the fences and destroyed the plaintiff's crops evidence to show that the corn was grown and remained in the shocks on Indian land, cultivated by a lessee whose lease had not been approved by the Secretary of the Interior, is properly excluded.²³

Where a person borrows money from a bank to purchase personal property for a third person, the question of the soundness of the property or breach of warranty is immaterial, in an action by the bank on the note.²⁴

In an action for money paid out and expended, it is improper to prove items which are purely elements of damage.²⁵

Where statements of account are received without objection within a reasonable time all circumstances as to failure to object are proper to go to the jury in determining whether statements became accounts stated.²⁶

Where a landlord retakes unqualified possession, he may not show in evidence facts on a theory inconsistent with his former election.²⁷

Where a receiver sold mortgaged chattels pursuant to the court's order, it was error, on the trial of the foreclosure suit, to exclude evidence of the mortgagor's purchase of the property at the receiver's sale.²⁸

²² Strahorn-Hutton-Evans Commission Co. v. Florer, 54 P. 710, 7 Okl. 499.

²³ Holden v. Lynn, 30 Okl. 663, 120 P. 246, 38 L. R. A. (N. S.) 239.

²⁴ First Nat. Bank v. Jeffrey, 113 P. 710, 27 Okl. 702.

²⁵ Where an action is brought for money paid out and expended for the use of another, it is error to admit proof of items which are purely elements of damage for breach of an invalid contract, and that constitute losses sustained by the plaintiff, instead of money actually paid out and expended. Fox v. Easter, 62 P. 283, 10 Okl. 527.

²⁶ Oklahoma Hay & Grain Co. v. T. D. Randall & Co. (Okl.) 168 P. 1012.

²⁷ Where the landlord, after abandonment by the tenant, took unqualified possession and acted in a manner inconsistent with a continuation of the lease, held, that evidence as to the conducting of an hotel therein at a loss thereafter was inadmissible. Hargrove v. Bourne, 47 Okl. 484, 150 P. 121.

²⁸ J. I. Case Threshing Mach. Co. v. Barney, 54 Okl. 686, 154 P. 674.

Evidence of the identity of a person described by different names is admissible.²⁹

A deed from one not shown to have any interest in the land to be conveyed is inadmissible as evidence of title in ejectment.³⁰

Evidence of repairs or alterations in a railroad embankment and bridge subsequent to a loss is not competent as showing negligence in the original construction of the embankment and bridge.³¹

A mere agent of an insurance company is not a competent witness to testify as to the policy of the company in a particular matter.³²

Remote facts and circumstances may be shown, where they will throw light on the question at issue; but the courts will not permit testimony on matters entirely foreign to the issue.³³

²⁹ *Bacon v. Dawson*, 53 Okl. 689, 157 P. 1033.

³⁰ *McBride v. Steinweden*, 83 P. 822, 72 Kan. 508.

³¹ *Missouri, K. & T. Ry. Co. v. Johnson*, 126 P. 567, 34 Okl. 582.

³² It was not error to refuse to allow a special adjuster, not an officer of the company and with no power to decide whether a loss should be paid, to testify as to whether or not the company had refused to pay the loss because of concealment of additional insurance. *Springfield Fire & Marine Ins. Co. v. Null*, 133 P. 235, 37 Okl. 665.

³³ In determining issue of insane delusions, jury might consider testator's nature and temperament, his advanced age, the circumstances under which statements by him were made, his habits of life, and general conduct of contestant and her sister towards him. In *re Allen's Estate*, 177 Cal. 668, 171 P. 686. Where belief of testator that contestant and her sister, testator's daughters, had large sums of money loaned out and in bank, was the chief delusion alleged to have contributed to making the will, evidence of contestant's wealth was competent. *Id.*

In a bank's action on a note, held, that certain checks drawn by defendant on a special account and his individual account in the bank were admissible to show tender of payment and a request by defendant that the balance of the special account be applied on his note. *First State Bank of Indianoma v. Menasco*, 55 Okl. 748, 155 P. 261.

In action for damages to reputation of plaintiff from newspaper publication that a mysterious illness had occurred at her rooming house, termed a notorious resort, stating that she refused to give information to police or to receive reporters, the testimony of a police sergeant to show the conduct and demeanor of defendant's reporters was admissible. *World Pub. Co. v. Minahan* (Okl.) 173 P. 815, L. R. A. 1918F, 283.

Evidence of the repetition of a charge first made on an occasion of qualified privilege held admissible to show malice, but not to increase the damages. *Beshiers v. Allen*, 46 Okl. 331, 148 P. 141, L. R. A. 1915E, 413.

Where the petition charged defendant with having uttered slander on his own authority, and counsel for defendant in his statement admits publication of slander of the statement of a third person named at the time, testimony of

In an action for publishing a report of criminal proceedings the indictment and other court records tending to show the truth of the charge against plaintiff are admissible in evidence on the issue whether the accusation was true or false.³⁴

§ 968. Value

While it is always proper, when practicable, to show the market value of land, where its value is in question, yet, if there have been few or no sales of like property in that vicinity at or about the time in question, then its reasonable value can be determined by considering all the facts upon which values are usually predicated.³⁵

To prove the market value of the land, proof of its value within a reasonable time before and after the transaction may be received.³⁶

defendant to that effect was competent to show absence of malice and to mitigate the damages. *Wallace v. Kopenbrink*, 31 Okl. 26, 119 P. 579.

Evidence tending to prove that the matter charged as defamatory was true held competent, as tending to prove that the action for slander was malicious and without reasonable provocation. *Smith v. Gillis*, 51 Okl. 134, 151 P. 869.

Where an alleged libel contained only excerpts from a brief, the entire brief is admissible on the issue whether the publication was a fair and true report of the proceedings. *Cobb v. Oklahoma Pub. Co.*, 140 P. 1079, 42 Okl. 314.

In action upon note by one who under contract with Indian agency had constructed a ditch, defended on ground of duress and fraud, evidence for defendant that superintendent of agency at time of making an approval of lease to defendant was thereafter discharged for misconduct or malfeasance in office was properly excluded, where it related to matters foreign to the lease and note. *Huston v. Domeny* (Okl.) 173 P. 805.

Exclusion of testimony, offered on the theory that it tended to support defendant's allegation that plaintiff instituted the present action maliciously and without reasonable provocation, under Rev. Laws 1910, § 4961, held not error. *Smith v. Gillis*, 51 Okl. 34, 151 P. 869.

In an action for defamation, evidence that plaintiff has a brother not a party to the action or a witness, who is a fugitive from justice, held incompetent. *Kimberlin v. Ephraim*, 136 P. 1097, 41 Okl. 39.

In an action for specific performance of a contract to exchange real estate, wherein the defense was misrepresentations as to the value of the land defendant was to receive, the exclusion of evidence of statements by plaintiff as to such value some time before execution of the contract held not error. *Ross v. Cox*, 144 P. 227, 93 Kan. 338.

³⁴ *Cobb v. Oklahoma Pub. Co.*, 140 P. 1079, 42 Okl. 314.

³⁵ *Wickstrum v. Carter*, 58 P. 1020, 9 Kan. App. 439.

³⁶ *Constant v. Lehman*, 34 P. 745, 52 Kan. 227.

Where, in the purchaser's action for fraud, the issue was whether defendant M. acted as agent for defendants S. and H. in the transaction, held that the exclusion of evidence that he paid S. and H. a certain sum for land in the

Where witnesses as to the value of property use the words "fair value" as synonymous with "market value" or "real value," the evidence is not incompetent.³⁷

Evidence of the market value of property in the nearest market, with the usual cost of marketing it, is competent to show the value of the property.³⁸

Where a shipping contract provides that in case of loss or damage to goods the amount shall be computed at their value at place of shipment, the admission of evidence as to their value at the place of destination is not proper.³⁹

Where the evidence does not give the market value and the witness is not qualified, or shown to be qualified it should be rejected.⁴⁰

Evidence of the original cost may be considered in determining the value in some instances.⁴¹

In an action for breach of warranty, the price is evidence of the value of the property.⁴²

same tract and sold it for a much larger sum, which he retained, was error. *Swanson v. Peel*, 60 Okl. 124, 158 P. 564.

³⁷ *Ft. Scott, W. & W. Ry. Co. v. Jones*, 28 P. 978, 48 Kan. 51.

³⁸ *Le Roy & W. Ry. Co. v. Butts*, 19 P. 625, 40 Kan. 159.

In determining the amount of recovery in an action for triple damages under Gen. St. c. 113, it is not error to receive testimony of the market value of the wood cut and carried away at the place where the trees stood; and, if it had no market value there, then proof of such value at the nearest point where a market existed may be offered. *Arn v. Mathews*, 18 P. 65, 39 Kan. 272.

The market price of stock cattle at Garden City is largely governed by the price at Kansas City, less the freight, and, in an action to recover damages for failure to purchase and receive such cattle at Garden City, it is competent to show their market price at Garden City at such time; the rule being that the best evidence of which a case is susceptible should be produced. *Evans v. Moseley*, 114 P. 374, 84 Kan. 322, 50 L. R. A. (N. S.) 889.

³⁹ *St. Louis & S. F. R. Co. v. First Nat. Bank (Okl.)* 171 P. 467.

⁴⁰ *Midland Valley R. Co. v. Ezell*, 129 P. 734, 36 Okl. 517.

⁴¹ In an action for the value of a building destroyed by fire, evidence as to the cost of rebuilding is not competent without evidence showing the original cost and the depreciation from age and use. *Chicago, R. I. & P. Ry. Co. v. Galvin*, 59 Okl. 258, 158 P. 1153, L. R. A. 1917A, 365.

In an action to recover the value of fixtures wrongfully removed by a tenant, it is not error to admit evidence of the original cost to be considered in determining the value at the time of the removal. *Kilgore v. Lyle*, 30 Okl. 596, 120 P. 626.

⁴² *Gutenberg Mach. Co. v. Husonian Pub. Co.*, 54 Okl. 369, 154 P. 346.

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In an action for price and to enforce a vendor's lien, evidence of the value of the land at the time of purchase is admissible.⁴³

Evidence of the probable yield under proper cultivation and of the value of such yield, when ready for sale, and the probable cost of maturing and gathering the crop and transporting it to market, may be considered in determining the value of a growing crop.⁴⁴

In an action for injuries to fruit trees upon plaintiff's land by fire started by a locomotive, evidence of the value of the trees while growing on the land is competent to show the amount of damage.⁴⁵

Where property sought to be delivered is not the same as should be delivered, evidence as to the difference in value is admissible.⁴⁶

When the question is the value of the use and occupation of property, the rental price during the time may be shown to help in determining the value of the use.⁴⁷

Evidence of the value of time and reasonableness of expenses in pursuit of property is necessary in order to recover therefor.⁴⁸

⁴³ *Whitehead v. Jefferson*, 51 Okl. 42, 151 P. 681.

⁴⁴ *De Arman v. Oglesby*, 49 Okl. 118, 152 P. 356.

To determine the value of a growing crop, its probable yield under proper cultivation, the value of such yield when matured and ready for sale, and the expense of such cultivation, as well as the cost of its preparation and transportation to market, may be shown. *Chicago, R. I. & P. Ry. Co. v. Johnson*, 107 P. 662, 25 Okl. 760, 27 L. R. A. (N. S.) 879.

⁴⁵ *Chicago, R. I. & P. Ry. Co. v. Swinney*, 60 Okl. 115, 150 P. 484.

⁴⁶ Plaintiff claimed to have delivered to defendant for storage old corn of a certain grade, under an agreement that corn of the same quality should be returned, and that the corn returned was new corn, from the succeeding crop. Held, that evidence of the value of old corn, and the difference in value between old corn and new, was admissible. *Kansas Elevator Co. v. Harris*, 49 P. 674, 6 Kan. App. 89.

⁴⁷ Where a party has obligated himself to pay another the value of the use and occupation of certain real property during a particular period, it is not reversible error to permit the plaintiff to show what the property actually rented for during such period. Such proof is not controlling as to the rental value, but is proper to be considered by the jury, under proper instructions by the court, in determining the reasonable value of the use and occupation of the property. *Richardson v. Penny*, 61 P. 584, 10 Okl. 32.

⁴⁸ *Fitch v. Green*, 39 Okl. 18, 134 P. 34; *Rev. Laws 1910*, § 2875.

In an action by a passenger for wrongful ejection from a train, plaintiff's loss of time cannot be considered in assessing his damages, in the absence of evidence as to the value of his time. *Chicago, R. I. & P. Ry. Co. v. Newburn*, 110 P. 1065, 27 Okl. 9, 30 L. R. A. (N. S.) 432.

§ 969. Reasonable compensation

In action for reasonable compensation for services under a contract to buy property the jury may consider testimony of competent witnesses as to the nature of the transaction and the character of services.⁴⁹

§ 970. Damages

Negligence may be established by proof of other facts and circumstances and the causal connection between the evidence alleged and the injuries received by proof of such facts as logically create the inference that the negligence contributed to the injury;⁵⁰ likewise, by the proof of such facts as would create the inference of the lack of negligence, a defense may be established.⁵¹

The evidence must have some material bearing on the issues involved.⁵²

In an action for exemplary damages, evidence of the financial condition of the defendant is competent to enable the jury to determine the amount of such exemplary damages.⁵³

⁴⁹ *McEwen v. Vollentine* (Okla.) 170 P. 490.

⁵⁰ *Ferris v. Shandy* (Okla.) 174 P. 1060.

Evidence of setting of other fires by other locomotives is admissible, where they are practically identical in construction. *Missouri, O. & G. Ry. Co. v. Gentry*, 122 P. 537, 31 Okla. 579.

⁵¹ In a suit against a railroad for negligently injuring an animal, where the proof shows it to have been injured by becoming entangled in a wire fence in the course of construction along defendant's right of way, it was error to exclude evidence that the fence at the time was being constructed by an independent contractor. *Missouri, K. & O. R. Co. v. Ferguson*, 96 P. 755, 21 Okla. 266.

In an action for damages to an automobile, due to a defective railroad crossing, evidence that there was another safe crossing by which plaintiff could have crossed the tracks without inconvenient interruption to his journey was improperly excluded. *Ft. Smith & W. R. Co. v. Seran*, 44 Okla. 169, 143 P. 1141, L. R. A. 1915C, 813.

Evidence that other stock had gone over the defendant railroad company's cattle guards was not competent to establish the insufficiency of the cattle guard, in the absence of evidence tending to show the size, length, depth, and construction of the guards. *Midland Valley R. Co. v. Bryant*, 131 P. 678, 37 Okla. 206.

⁵² Evidence of a statement by the engineer in response to a question by the conductor after the accident that he was looking back and did not see the wagon until he struck it at the crossing, held immaterial. *Missouri, O. & G. Ry. Co. v. Adams*, 52 Okla. 557, 153 P. 200.

⁵³ *Smith v. Autry* (Okla.) 169 P. 623.

In action against constable for a forcible and malicious levy, it was proper
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In an action for assault the defendant may be examined as to his financial condition, for the purpose of assessing exemplary damages.⁵⁴

In an action for slander, alleging that defendant had said that plaintiff was a thief, evidence of dishonest acts of plaintiff is admissible in mitigation of damages, though not a justification.⁵⁵

Where it is first shown that the premises are in substantially the same condition as at the time of the injury, the condition at a subsequent time may be shown.⁵⁶

Evidence of the condition of the place a reasonable time before the injury is admissible, as tending to show its condition at the time of the injury, especially where it appears that those conditions have not changed.⁵⁷

Evidence that defendant's factory had been inspected by the state factory inspector, though not conclusive, is admissible as tending to acquit the defendant of negligence resulting in injury to his servant.⁵⁸

In an action for the nondelivery of a message containing an offer to make a contract, evidence that if the message had been delivered, the offer would have been accepted, is competent.⁵⁹

to inquire into his financial condition, so that the finding as to punitive damages might be intelligently made. *Townsend v. Seefeld*, 102 Kan. 302, 189 P. 1157.

⁵⁴ *Willet v. Johnson*, 76 P. 174, 13 Okl. 563.

⁵⁵ *Vorhees v. Toney*, 122 P. 552, 32 Okl. 570.

⁵⁶ Evidence of the condition, three weeks after the accident, of the platform from which a brakeman was alleged to have fallen held admissible, where it appeared that no change had been made therein, except the usual wear due to the elements. *St. Louis & S. F. Ry. Co. v. Clappitt*, 55 Okl. 686, 154 P. 40.

It is not error to refuse to permit a witness to testify as to the condition at the scene of an accident several hours after it occurred, where the alleged defect in the instrumentality complained of was such that its correction could have been effected in a few minutes, and when no attempt is made to show that no changes had been made since the accident. *Hicks v. Davis*, 32 Okl. 195, 120 P. 260.

Admission of evidence of the condition of a crossing eight or nine weeks after an accident, without evidence that it was in substantially the same condition at the time of the accident, held error. *St. Louis & S. F. R. Co. v. Hart*, 45 Okl. 659, 146 P. 436.

⁵⁷ *Great Western Coal & Coke Co. v. Cunningham*, 143 P. 26, 43 Okl. 417.

⁵⁸ *Burk v. Hobart Mill & Elevator Co.*, 48 Okl. 470, 150 P. 458.

⁵⁹ *Western Union Telegraph Co. v. Sights*, 126 P. 234, 34 Okl. 461, 42 L. R. A. (N. S.) 419, Ann. Cas. 1914C, 204.

In a servant's action for master's breach of a common-law duty, evidence of acts amounting to negligence may be shown, although such acts may also show a violation of a statute enacted for the benefit of the public generally, and not for a class of persons to whom the servant belongs.⁶⁰

Evidence admissible for a specific purpose only must be limited to that alone.⁶¹

Evidence of the relations of the parties may be introduced to show motives.⁶²

In an action for a wrongful levy, evidence showing good or bad faith is proper.⁶³

In an action by a landlord after his tenant's breach of the lease to recover for rent for the time the building was unoccupied after the tenant's abandonment, evidence as to the landlord's intention in taking possession and reletting the property after the expiration of the lease is admissible.⁶⁴

⁶⁰ *Slick Oil Co. v. Coffey* (Okl.) 177 P. 915.

⁶¹ In trespass for wrongful eviction, evidence that plaintiff's mother, who lived with him, took cold from exposure, from which she died two weeks later, was inadmissible to increase either actual or exemplary damages, and could only be received to show that defendants chose an unduly cold and disagreeable day for the eviction. *Sanders v. Cline*, 101 P. 267, 22 Okl. 154.

In an action for breach of marriage promise, any evidence tending to disclose actual relation of the parties is admissible. *Baumle v. Verde*, 124 P. 1083, 33 Okl. 243, 41 L. R. A. (N. S.) 840, Ann. Cas. 1914B, 317.

In an action against a railway for failing to water cattle before dipping them, though plaintiff contends that the contract for dipping was an independent oral contract, exclusion of the shipping contract set up as a defense is error. *Missouri, K. & T. Ry. Co. v. Skinner*, 61 Okl. 189, 160 P. 875.

⁶² Evidence of the previous relations of the parties, which led up to the transaction causing the prosecution to be instituted, is admissible, if it tends to show the motives of the parties. *Allison v. Bryan*, 50 Okl. 677, 151 P. 610.

⁶³ Defendant, a sheriff, sold under attachment goods which plaintiff claimed to have bought of the debtor, and to have paid for with certain negotiable notes executed to the debtors. The notes were alleged to have been delivered to persons who indorsed for the debtors as collateral security. Held, in an action for damages for such seizure, that defendant might have shown whether the notes were paid, and when and by whom paid, as those facts bore on the question of the good faith of the alleged sale to plaintiff. *De Ford v. Orvis*, 21 P. 1105, 42 Kan. 302.

⁶⁴ *Higgins v. Street*, 92 P. 153, 19 Okl. 45, 13 L. R. A. (N. S.) 398, 14 Ann. Cas. 1086.

§ 971. — Personal injuries

The expectation of life of one injured by another's negligence may be shown, in order to estimate the damages, where the evidence shows the injury is permanent.⁶⁵

Under the statute, a passenger, suing for personal injuries, is entitled to show the profits of his business, which depended on his personal exertions, for the purpose of assessment of his damages, though the business required the investment of a small capital.⁶⁶

Evidence of subsequent repairs is usually inadmissible as evidence of negligence.⁶⁷

Evidence is admissible as to the general reputation of a party to a civil action for peace and quiet in the community where he lives.⁶⁸

Circumstances showing that the defendant had knowledge of defects are provable to show negligence.⁶⁹

⁶⁵ *City of Shawnee v. Slankard*, 116 P. 803, 29 Okl. 133.

⁶⁶ *Muskogee Electric Traction Co. v. Eaton*, 49 Okl. 344, 152 P. 1109; *Rev. Laws 1910*, § 2872.

⁶⁷ Evidence of alterations or repairs subsequent to an accident or injury is not admissible as an admission of negligence. *Shawnee Gas & Electric Co. v. Motesenbocker*, 138 P. 790, 41 Okl. 454; *City of Cushing v. Bowdlear* (Okl.) 177 P. 561.

Where the servant's death is alleged to have resulted from defendant's failure to provide safe appliances, evidence of alterations, repairs, and precautions made after the accident to avoid a recurrence is inadmissible. *Sloan v. Warrenburg*, 129 P. 720, 36 Okl. 523.

In action for injuries from negligent failure to furnish appliances for elevation of hand cars in repair shops, admission of evidence that general foreman, shortly after injury, ordered a crane for elevating the cars, was reversible error. *Chicago, R. I. & P. Ry. Co. v. Jackson*, 63 Okl. 32, 162 P. 823.

In an action for damages, alleged to have been caused by being struck by lightning gathered on the wires of an electric light plant and conveyed into the plant, where plaintiff was working, evidence of installation of additional lightning arresters after the injury was inadmissible. *City of Wynnewood v. Cox*, 122 P. 528, 31 Okl. 563, *Ann. Cas.* 1913E, 349.

⁶⁸ Where in a civil action for assault the evidence was conflicting as to whether plaintiff was the aggressor, evidence of plaintiff's general reputation for peace and quiet in the community where he lived was properly admitted. *Breckenridge v. Drummond*, 55 Okl. 351, 155 P. 555.

Where it was proper to show the character of the party in an action for assault it was not error to permit witnesses to answer questions as to his character as a fighting and quarrelsome man, as well as questions as to what his general reputation was. *Spain v. Rakestraw*, 101 P. 466, 79 Kan. 758.

⁶⁹ In an action to recover for injuries caused by a defective bridge, plaintiff can show other defects in the bridge than those that caused the accident,

In an action for injury to a fireman from a collision between his truck and a street car, evidence that he had previously ridden on the truck at a similar speed, or that he knew when he boarded it that the truck would proceed at any particular rate of speed is inadmissible to show his contributory negligence.⁷⁰

§ 972. — Wrongful death

In an action for wrongful death evidence is admissible to show decedent's probable duration of life,⁷¹ his condition of health as bearing on the pecuniary value of his life to the plaintiff,⁷² the property owned, wage earning capacity, and disposition of the deceased to contribute support.⁷³ It has been held that evidence is admissible as to the number, age, and sex of decedent's children depending upon him.⁷⁴

Mortality tables are not admissible to prove plaintiff's life expectancy.⁷⁵

In an action by parents for the wrongful death of a child, evidence as to the amount of property owned by the parents is admissible.⁷⁶

to show that the city had knowledge of the defects, or that they should have had knowledge thereof. *City of Kingfisher v. Altizer*, 74 P. 107, 13 Okl. 121.*

In action for injuries to an employé by reason of defective track, orders by train dispatcher, calling attention to the condition of the road and directing the rate of speed to be maintained, are admissible to show notice to defendant of condition of the track at place of accident. *Ferris v. Shandy* (Okl.) 174 P. 1060.

Evidence in an action against the defendants, as individuals, for personal injury to plaintiff on account of their negligence as members of the board of county commissioners in failing and refusing to inspect and repair a bridge, held to reasonably support a verdict for defendants. *Strong v. Day* (Okl.) 176 P. 401.

⁷⁰ *Oklahoma Ry. Co. v. Thomas*, 63 Okl. 219, 164 P. 120, L. R. A. 1917E, 405.

⁷¹ *Coffeyville Mining & Gas Co. v. Carter*, 70 P. 635, 65 Kan. 565.

⁷² *Coffeyville Mining & Gas Co. v. Carter*, 70 P. 635, 65 Kan. 565.

⁷³ *Berry v. Dewey*, 172 P. 27, 102 Kan. 593; *Coffeyville Mining & Gas Co. v. Carter*, 70 P. 635, 65 Kan. 565; *Berry v. Dewey*, 172 P. 27, 102 Kan. 593.

In an action for wrongful death, under Code, § 418, it is competent for plaintiff to show the relation existing between the deceased and his family, as bearing upon the question of pecuniary injury suffered by them in his death. *Union Pac. Ry. Co. v. Sternberger*, 54 P. 1101, 8 Kan. App. 131.

⁷⁴ *Coffeyville Mining & Gas Co. v. Carter*, 70 P. 635, 65 Kan. 565.

⁷⁵ But the admission of mortality tables to prove the expectancy of the plaintiff is error. *Missouri, O. & G. Ry. Co. v. Lee* (Okl.) 175 P. 367.

⁷⁶ *Kali Inla Coal Co. v. Ghinelli*, 55 Okl. 289, 155 P. 606.

The customs and habits of the parties are admissible.⁷⁷

In an action for death of a railroad employé, it is competent to inquire into manner of construction and location of tracks of railroad, though the inquiry involves an engineering question.⁷⁸

In an action for the death of a 9 year old boy from falling into a pit maintained in a dangerous condition by the defendant city the character of the decedent's trespass is a circumstance to be considered in ascertaining whether he was guilty of contributory negligence.⁷⁹

In an action for the death of a section foreman, removing motor-car from the track, the admission of evidence that the whistle was not blown or bell rung at a highway crossing a certain distance from the place of the accident is admissible as bearing on defendant's negligence.⁸⁰

Evidence as to whether deceased, who was struck by a train, was a licensee or a trespasser is immaterial, where it is conceded that the engineer and fireman were keeping a sharp lookout.⁸¹

In an action for the death of a railroad employé, petition for re-

⁷⁷ On issue whether person killed in crossing accident looked and listened for train, his habit in that regard may be shown. *Angell v. Chicago, R. I. & P. Ry. Co.*, 156 P. 763, 97 Kan. 688, rehearing denied 157 P. 1196, 98 Kan. 268.

In an action for the death of a brakeman, held that evidence of an habitual practice of brakemen at stations to alight from moving trains was admissible. *St. Louis & S. F. Ry. Co. v. Clappitt*, 55 Okl. 686, 154 P. 40.

In a suit for the death of an engineer by collision with a switch engine, it was error to exclude evidence of a custom that a rule requiring decedent to take a side track, which he failed to do, had been abandoned and disregarded with knowledge of defendant employer. *Clemens v. St. Louis & S. F. R. Co.*, 131 P. 169, 35 Okl. 667.

Evidence that the deceased was habitually negligent prior to the explosion is inadmissible to prove contributory negligence. *Great Western Coal & Coke Co. v. McMahan*, 143 P. 23, 43 Okl. 429.

Defendant's evidence that plaintiff, a boy 11 years old, was in the habit of crawling beneath cars when he found the track blocked, held inadmissible. *St. Louis & S. F. R. Co. v. Hodge*, 53 Okl. 427, 157 P. 60.

⁷⁸ *Missouri, O. & G. Ry. Co. v. Overmyre*, 58 Okl. 723, 160 P. 933.

⁷⁹ *City of Shawnee v. Cheek*, 137 P. 724, 41 Okl. 227, 51 L. R. A. (N. S.) 672, Ann. Cas. 1915C, 290.

⁸⁰ *Dickinson v. Granbery* (Okl.) 174 P. 776.

⁸¹ *Lusk v. Haley*, 75 Okl. 206, 181 P. 727.

Evidence as to whether there was anything to prevent engineer from seeing deceased upon the track was admissible to show whether engineer saw deceased on track. *Lusk v. Haley*, 75 Okl. 206, 181 P. 727. Evidence as to

moval and bond filed by defendants are properly excluded from the jury, as the question whether the action was removable was not one which the jury were required to consider.⁸²

Where there is no proof as to how a fatal accident occurred, the manner of its occurrence may be shown by circumstantial evidence from which jury may infer its manner and cause, if the inference is a reasonable, although not a necessary, resulting fact.⁸³

§ 973. Negative evidence

On an issue of custom and a question as to the requirements of reasonable care, negative evidence, not raising collateral or impertinent issues, is admissible.⁸⁴

§ 974. Will contest

In determining the admissibility of evidence on the issue of sanity and testamentary capacity, a large latitude is allowable, both as to

whether engineer rang bell or sounded whistle after passing a crossing before he struck deceased was admissible on question of due care, in view of fact that engineer had discovered deceased in a place of peril. *Id.*

⁸² *Lusk v. Phelps* (Okl.) 175 P. 756.

⁸³ *Silurian Oil Co. v. Morrell* (Okl.) 176 P. 964.

In an action for death from an explosion of gas which the master had negligently allowed to accumulate, in violation of Rev. Laws 1910, §§ 3975, 3982, evidence that gas had accumulated in the mine at times prior to the explosion held not inadmissible as too remote. *Great Western Coal & Coke Co. v. Cunningham*, 143 P. 26, 43 Okl. 417; *Kali Inla Coal Co. v. Ghinelli*, 55 Okl. 289, 155 P. 606.

In action for the negligent death of a servant, recovery may be had on circumstantial evidence if sufficient to prove the master's negligence culminating in death. *Ft. Smith & W. R. Co. v. Knott*, 60 Okl. 175, 159 P. 847.

Where, in an action for the death of a mine employé from an explosion, the defense was that decedent's negligence in preparing his shot caused a "windy shot," plaintiff's evidence that frozen dynamite furnished by defendant to decedent would cause a "windy shot" was properly admitted in rebuttal. *Great Western Coal & Coke Co. v. Coffman*, 143 P. 30, 43 Okl. 404; *Same v. Boyd*, 143 P. 36, 43 Okl. 438.

In an action for the death of a shot firer from gases, by the explosion of a windy shot by reason of the reversing of an air fan at the time of the explosion, evidence was admissible that the general superintendent at, or immediately after, the installation of the fan prior to the accident, had notice of a defect in its adjustment. *Coalgate Co. v. Hurst*, 107 P. 657, 25 Okl. 588, writ of error dismissed 32 S. Ct. 838, 225 U. S. 697, 56 L. Ed. 1262.

⁸⁴ *Cook v. Leavenworth Terminal Ry. & Bridge Co.*, 165 P. 803, 101 Kan. 103, rehearing denied 166 P. 498, 101 Kan. 437.

the subject-matter of the evidence and the period of time considered.⁸⁵

A witness may testify whether the testator in his business relations acted like a rational man.⁸⁶

⁸⁵ In a will contest, involving the issue of testamentary capacity, court properly permitted both parties great latitude in evidence as to conduct, acts, and declarations of testator, both before and after executing will. In *re Allen's Estate*, 177 Cal. 668, 171 P. 686.

In a will contest witnesses may testify whether the testator's appearance and manner was rational or irrational as regards both his actions and sayings. In *re Baker's Estate*, 176 Cal. 430, 168 P. 881.

⁸⁶ In *re Wax's Estate*, 39 P. 624, 106 Cal. 343.

On an issue of testamentary capacity, contestant may show the manner in which deceased acquired the property disposed of by the will. In *re Wilson's Estate*, 49 P. 172, 117 Cal. 262; *Wilson v. McConnachie*, *Id.*

Though declarations of testatrix not a part of the *res gestæ* are inadmissible to show undue influence, whether made before or after the will, yet where undue influence is the issue, such declarations are competent to show the condition or state of mind of testatrix. In *re Snowball's Estate*, 107 P. 598, 157 Cal. 301. In a will contest, evidence of a conversation between testatrix and a contestant 10 months prior to the execution of the will, in which testatrix stated she wished to make a will, and that she would leave the other contestant \$3,000 or \$4,000, the children \$1,000 apiece, and the ranch to "you boys," and that L, her daughter, already had enough, was admissible as bearing on testatrix's state of mind with reference to her various children, and particularly toward contestants; the will being materially different from the disposition mentioned. *Id.*

That testator committed suicide and left his property away from his mother and brothers held proper for consideration on the issue of testamentary capacity. In *re Wasserman's Estate*, 170 Cal. 101, 148 P. 931.

Whether evidence regarding testator's insanity for some 50 years prior to his death is too remote rests largely in trial court's discretion. In *re Baker's Estate*, 176 Cal. 430, 168 P. 881. Evidence regarding testator's insanity for some 50 years prior to his death held admissible, where contestants claimed insanity was permanent and of long standing. *Id.*

In an action to contest a will, evidence of the condition of testator's mind both before and after the date of the will is admissible, but only for the purpose of showing the condition of mind at the precise date when the will was executed. In *re Dole's Estate*, 81 P. 534, 147 Cal. 188.

Adjudication of the testator's mental capacity in a proceeding to appoint a guardian held admissible upon the issue of his mental capacity to make the will. In *re Loveland's Estate*, 123 P. 801, 162 Cal. 595.

Where insanity of the testator is alleged, and his disease was a progressive one, a witness may testify as to the condition of his mind prior to the execution of the will. In *re Dalrymple's Estate*, 7 P. 906, 67 Cal. 444.

In an action to revoke the probate of a will on the ground of unsoundness of mind of the testator, the contestant offered in evidence a part of the great register of the county to show that the age of the testator was not what he had stated it to be in the will. The evidence was admitted over the objection

The condition of testator's mind may be discovered by evidence of his declarations made prior to his death and by the facts and circumstances surrounding him during the latter part of his life.⁸⁷

of the defendant. Held that this was error, and under the rule that all error is presumed to work injury, it is sufficient ground for granting a motion for a new trial. *Estate of Crozier*, 15 P. 618, 74 Cal. 180.

In a suit contesting a will for mental incapacity, exclusion of testimony regarding a real estate transaction by testator is proper where it was not shown, nor offered to be shown, that the testator's conduct was abnormal. In *re Ross' Estate*, 159 P. 603, 173 Cal. 178.

It is not competent, on the issue of undue influence on the part of the proponent widow, to show that nine years before the will was made, and six years before their marriage, testator having then another wife, he and proponent went together on a camping trip, proponent being introduced as his wife. In *re Flint's Estate*, 34 P. 863, 100 Cal. 391.

Evidence that testator had expressed his disapproval of contestant's marriage, which occurred in March, 1879, was admissible, its remoteness affecting its weight rather than its admissibility. In *re Higgins' Estate*, 104 P. 6, 156 Cal. 257.

⁸⁷ Declarations of testatrix not a part of the *res gestæ* are competent as bearing on her condition or her state of mind if that is material, whether made before or after the will. In *re Snowball's Estate*, 107 P. 598, 157 Cal. 301; In *re Chevallier's Estate*, 113 P. 130, 159 Cal. 161.

In a will contest on the ground of undue influence, in which contestant claimed that testator's marital troubles had so affected his mind that he was easily influenced by the daughter, who was claimed to have influenced him in making the will, evidence as to his unhappy married life, showing that he was greatly distressed by his wife's divorce, was admissible. In *re Lavinburg's Estate*, 119 P. 915, 161 Cal. 536.

In a will contest case, so much of a conversation by testator to his half-brother 26 days after the execution of a will and 2 days prior to his death as disclosed testator's feelings and desires with respect to the disposition of his property held admissible on the issue of insanity. In *re Jones' Estate*, 166 Cal. 108, 147, 135 P. 288, 293.

On the contest of a will on the ground of mental incapacity, declarations of testator are admissible to explain his peculiar actions only when made at about the time of such actions, and therefore a letter by him is not admissible to explain certain conduct, where it is without date, and there is nothing to show when it was written. *Clements v. McGinn*, 4 Cal. Unrep. 163, 33 P. 920.

In a will contest, witnesses may testify, as bearing on an issue of mental capacity, to general conversations had with the testatrix, embraced within a reasonable time before and after the making of the will, where they are limited exclusively to showing the condition of testatrix's mind. In *re McKenna's Estate*, 77 P. 461, 143 Cal. 580.

On an issue as to testator's mental capacity, evidence of statements or actions by testator indicating his belief that he would marry a certain lady was competent. *Huyck v. Rennie*, 90 P. 929, 151 Cal. 411.

Circumstances attending the execution of a will and the conduct of the tes-

On an issue of undue influence upon a testator, every fact from which the inference might be drawn that such influence had or had not been exerted, or had or had not been effective, is admissible, if not too remote.⁸⁸

tator at the time are admissible on the issue of testamentary capacity. In *re Johnson's Estate*, 93 P. 1015, 152 Cal. 778.

Statements of testator a few minutes after executing his will are inadmissible, unless part of the *res gestæ*, to show undue influence. In *re Gleason's Estate*, 130 P. 872, 164 Cal. 756. Statements of testator, though made only a few minutes after executing his will, that he "had to do it right," and, if he had not, it would be extremely uncomfortable at home, being the mere expression of his opinion regarding a past occurrence, are not part of the *res gestæ*. *Id.*

In a will contest for undue influence, evidence of personal differences existing between proponents and contestants, or either of them, and testatrix was admissible in so far as it tended to show testatrix's state of mind with relation to her children at times not too remote from the date of the execution of the will. In *re Snowball's Estate*, 107 P. 598, 157 Cal. 301.

On an issue as to testator's mental capacity, a lease, identified by testator's attorney who drew the will as one executed by testator after negotiations conducted in witness' presence, was admissible to show testator's business capacity; a proper foundation having been laid by the witness' testimony as to the execution of the lease, together with the proof of due execution afforded by the notarial certificate of acknowledgment attached, as provided by Code Civ. Proc. §§ 1948, 1951. *Huyck v. Rennie*, 90 P. 929, 151 Cal. 411. While evidence as to testator's mental condition at times more or less remote from the date of the will is admissible, the time to which the witness' testimony relates must be specified, and must have reference to a time when the witness came in contact with testator. *Id.* Where, on an issue of testamentary capacity, it did not appear that witness saw testator on the date the will was executed, a question calling for witness' opinion as to whether testator possessed sound and disposing mind and memory on that day was properly disallowed. *Id.*

Statements or declarations of a testator, whether made before or after the execution of the will, are not competent as direct evidence of undue influence, but are only admissible to show the mental condition of the testator at the time of making the will, and his susceptibility to the influences by which he was surrounded at the time. In *re Donovan's Estate*, 73 P. 1081, 140 Cal. 390.

Where, on an issue of testamentary capacity, it was contended that testatrix was the victim of hereditary insanity, acquired both from her mother's and father's people evidence that her father had never shown any trace of insanity in his lifetime, but was a man of exceptional mental vigor and business capacity, who by his own efforts amassed a large fortune, was admissible. In *re Dolbeer's Estate*, 86 P. 695, 149 Cal. 227, 9 Ann. Cas. 795; *Schander v. Gray*, *Id.* On an issue of testamentary capacity, the verdict of a coroner's inquisition on the body of testatrix's mother and on testatrix's body, both having committed suicide, was properly excluded. *Id.*

⁸⁸ See note 88 on following page.

Declarations of the testator are admissible to show testator's friendliness to one of his heirs, but it is error not to limit them to that purpose.⁸⁹

⁸⁸ Welch v. Barnett, 125 P. 472, 34 Okl. 166.

That testatrix's husband accompanied her to the attorney's office where she made her will, and remained in the office within hearing, and in a position so that he could see the parties in executing the will, and left the office with testatrix, was properly shown on an issue whether he exercised undue influence over her. In re Olson's Estate, 126 P. 171, 19 Cal. App. 379.

In proceedings to probate a will contested on the grounds of testamentary incapacity and undue influence, alleged to have been exerted by proponent sustaining confidential relations to testatrix, evidence showing the actual transaction of the business of testatrix by proponent held admissible. In re De Laveaga's Estate, 133 P. 307, 165 Cal. 607. The manner in which testatrix was treated by her family is not, taken alone, competent substantive evidence to prove incompetency, but it is proper evidence when given in connection with the conduct of testatrix under such treatment as illustrating and explaining such conduct. *Id.*

A husband, in contesting the will of his deceased wife giving all of her property to her mother, may show that the mother and her family would not allow him to have anything to do with the funeral or to see her body. In re Tibbetts' Estate, 69 P. 978, 137 Cal. 123.

In proceedings to probate a will of testatrix, 52 years old, contested on the ground of testamentary incapacity, evidence of the contents of a letter of testatrix's father, accompanying his will, in which he recommended testatrix to the care of her eldest sister and a brother on account of her weak mind, forming part of a transaction in the presence of the family following the

⁸⁹ In re Lavinburg's Estate, 119 P. 915, 161 Cal. 536.

Declarations of the testatrix that she intended to leave her property to her daughter are admissible, in an action to revoke probate, only to show the relation between the two, and are entitled to little or no weight in establishing undue influence. In re Kilborn's Estate, 162 Cal. 4, 120 P. 762.

Declarations of testatrix subsequent to execution of the will are never admissible as proof by themselves of undue influence or fraud. Declarations of testatrix, not part of the *res gestæ*, are admissible, on a contest of her will giving all her property to one of her children, not to prove the exercise of undue influence on her, but only to illustrate her relations to her children, her feelings towards them, and her condition of mind or belief as to their respective claims or rights to participate in her estate. In re Ricks' Estate, 117 P. 532, 160 Cal. 450.

Evidence of certain unfriendly treatment of testatrix by her husband is not admissible to show that she intended to exclude him from her will. Estate of Stratton, 112 Cal. 513, 44 P. 1028.

Where a will is contested on the ground that the husband, while sick, was importuned by his wife to make it in her favor, against his wishes, the court properly restricted evidence of the inharmonious life led by the parties to the last three or four years of testator's life. Mitchell v. Donohue, 34 P. 614, 100 Cal. 202, 38 Am. St. Rep. 279; In re Kaufman's Estate, 49 P. 192, 117 Cal. 288, 59 Am. St. Rep. 179; King v. Borchard, *Id.*

In a contest on the sole ground of undue influence, evidence as to the soundness of mind and sanity of the deceased should be excluded.⁹⁰

father's death, when testatrix was 17 years old, she remaining silent during the reading of the letter and the discussion about it, held admissible. In *re De Laveaga's Estate*, 133 P. 307, 165 Cal. 607.

Where, in a will contest, it was claimed that the execution of the will and the revocation of a former one was induced by false representations that one of contestants who was the general business manager and trustee for testatrix had abused the trust reposed in him, evidence by contestants of the extent and character of testatrix's estate in charge of contestant, of the general nature of the business transacted by him for her, and of the causes which led her to give him a power of attorney, was admissible. In *re Arnold's Estate*, 82 P. 252, 147 Cal. 583.

It may be shown that a portion of the property disposed of by will had been conveyed to testator without consideration, to give him credit in business, by his sisters, to whom he left nothing by his will. In *re Ruffino's Estate*, 48 P. 127, 116 Cal. 304.

Evidence that the testator was opposed to the marriage of one of his daughters, which occurred after execution of the will, is admissible; the testator having left his property to nephews instead of his next of kin. In *re Allen's Estate*, 177 Cal. 668, 171 P. 686.

Where it was contended that a will executed by testatrix leaving all her property to her physician was the result of his undue influence, but there was no evidence to connect him with any refusal to admit persons to see her during her last illness, a general inquiry to a witness as to whether all persons who called to see testatrix were admitted was properly excluded. In *re Wickes' Estate*, 72 P. 902, 139 Cal. 195.

Evidence that the person who was alleged to have exerted the undue influence was a penurious woman is inadmissible to show that she used such influence in favor of her son, the husband of testatrix. *Estate of Calkins*, 112 Cal. 296, 44 P. 577.

In the contest of a will, on the ground of undue influence, declarations of testatrix as to statements and acts of those by whom it is alleged that she was induced to make the will are inadmissible to prove such statements or acts. *Estate of Calkins*, 112 Cal. 296, 44 P. 577.

Whenever the declarations of the testator constitute narratives of the exercise of the undue influence, or of the effect of such influence upon him, they are inadmissible for that purpose, whether made before or after the execution of the will, but, if made at the time of its execution, they may be admissible, if they are so made as to constitute part of the *res gestæ*; and, if they are of such character that they also reveal his condition of mind, they may be admissible for that purpose, though not of the *res gestæ*, but their effect must be carefully limited to the question of his condition of mind, and they must not be considered as narrations of the exercise or effect of the undue influence. Evidence that two former wills were substantially the same, and that shortly before the execution of the contested will testatrix had an unabated

⁹⁰ In *re Stone's Estate*, 174 Cal. 778, 164 P. 643.

Where the attestation clause of the witnesses is not attached to the will, it can be shown by competent evidence that the will was attested as required by law; the absence of the clause simply changing the mode of proof that the will was duly witnessed.⁹¹

Hearsay evidence should be carefully excluded on an application for probate of a will.⁹² A statement, made by the testator several months after the execution of the will, to the effect that he was sorry that one of his daughters was not in the will, is not competent to impeach its validity.⁹³

The court having ordered proponents to make formal proof of execution of the will before proceeding with the contest, and they having refused to introduce any testimony, probate may be denied.⁹⁴

For the purpose of determining whether a will has been executed in proper manner, the intention of the testator in executing it is entitled to no consideration.⁹⁵

The evidence introduced in a will contest after probate must relate to facts discovered after probate of the will.⁹⁶

Before heirs contesting a will on the ground of revocation can interest in two charitable institutions, for which she had provided in the two former wills and which she disregarded in the last one, was proper. In *re Arnold's Estate*, 82 P. 252, 147 Cal. 583.

⁹¹ *Ward v. Board of Com'rs of Logan County*, 70 P. 378, 12 Okl. 267.

⁹² On application for the probate of an alleged will, which was contested by one named as executor in a former will, on the ground that it was a forgery or procured by undue influence, contestant was permitted to offer testimony and to testify to declarations made by deceased, about the time the alleged will bore date, that the persons charged with procuring such will were hounding her pretty nearly to death, trying to get her to make such a will, and that thereafter and shortly before her death she repeatedly said she had made no will since the one in which contestant was named as executor. Held, the reception of such testimony was error, since testimony of declarations of an alleged testator as to menace or duress or as to the fact of his signature is hearsay, and should not be received. In *re Gregory's Estate*, 65 P. 315, 133 Cal. 131.

Evidence of testator's declarations, made prior to execution of the will, that he intended to leave his property to beneficiaries under the will, is admissible. In *re Allen's Estate*, 177 Cal. 668, 171 P. 686.

⁹³ In *re Kaufman's Estate*, 49 P. 192, 117 Cal. 288, 50 Am. St. Rep. 179; *King v. Borchard*, Id.

⁹⁴ In *re Smith's Estate*, 176 Cal. 729, 171 P. 289.

⁹⁵ In *re Seaman's Estate*, 80 P. 700, 146 Cal. 455, 106 Am. St. Rep. 53, 2 Ann. Cas. 726; *Albright v. North*, Id.

⁹⁶ In *re Blackfeather's Estate*, 54 Okl. 1, 153 P. 839; Rev. Laws 1910, § 6219.

offer parol testimony of the provisions of a revoking instrument, they must first show the existence of such instrument, and a spoliation thereof, or that a diligent and fruitless search was made therefor.⁹⁷

That a codicil is written upon the same piece of paper as a purported will, and that no other will is produced, may be considered as tending to identify the purported will as the one referred to by the codicil.⁹⁸

Declarations of one whose will is attacked as a forgery are admissible to show the actual knowledge of deceased at time of the making of the alleged will and that this knowledge was at variance with the statements made as facts therein.⁹⁹

§ 975. Divorce

In determining whether a divorce should be granted, the court may consider facts showing failure of the parties to live happily together prior to and during the pendency of another action wherein a divorce had been denied to either party.¹

Where defendant charged infidelity on the part of plaintiff at a certain time and place, testimony that she was not guilty of misconduct at such time and place is improperly excluded.²

In an action for divorce for refusal of the wife to cohabit with her husband, where the complaint alleges that her neglect of duty commenced more than 5 years theretofore, and the answer alleged that she had always fulfilled her marital duties, testimony as to declarations and conduct of the wife from 7 to 12 years before the action, tending to show hatred of her husband, and to corroborate his testimony as to her long-continued refusal, is properly admitted.³

⁹⁷ *Caeman v. Van Harke*, 6 P. 620, 33 Kan. 333.

⁹⁸ *In re Plumel's Estate*, 90 P. 192, 151 Cal. 77, 121 Am. St. Rep. 100.

⁹⁹ *In re Thomas' Estate*, 101 P. 798, 155 Cal. 488.

¹ *Lynn v. Lynn*, 147 P. 1117, 95 Kan. 141, Ann. Cas. 1916B, 932.

² *Lyon v. Lyon*, 39 Okl. 111, 134 P. 650.

³ *Leach v. Leach*, 27 P. 131, 46 Kan. 724.

§ 976. Fraud

Where a written instrument is attacked for fraud, all the circumstances leading up to its execution, as well the motives of the maker, may be shown.⁴

Evidence showing how the fraud was committed is proper.⁵

In a father's action to set aside for fraud a deed conveying land to his daughter as a gift, evidence is admissible that absent adult children of grantor are financially better off than the grantee to corroborate defendant's contentions as to the lack of fraud in the transaction.⁶

Where a sale was attacked as in fraud of creditors, the creditors are allowed considerable latitude in evidence owing to the inherent difficulties of the case.⁷

⁴ *Thompson v. Vaught*, 61 Okl. 195, 160 P. 625.

In a suit by decedent's sole heir to set aside a conveyance, acquittance, and receipt preliminary to the contest of decedent's will bequeathing the property conveyed to a stranger upon the grounds of want of testamentary capacity, fraud, and undue influence, where it was alleged that the fraud and undue influence was a link in the chain of fraud whereby defendant obtained the conveyance, the facts in relation to the execution of the will were material evidence. *Gidney v. Chappell*, 26 Okl. 737, 110 P. 1099.

In an action on a note for a large amount purporting to have been given by one since deceased where the plaintiff claims that the note was accidentally lost or destroyed, but that it represented bona fide loan, and the claim for defendant is that no note had ever been given, and that the claim is fraudulent, testimony is properly admitted that plaintiff was financially embarrassed about the time the note was given and without means to make a loan. *Heines v. Goodlander*, 84 P. 986, 73 Kan. 183.

Where a mortgage is executed without consideration and by reason of fraudulent representations of the mortgagee, such fraud and want of consideration may be shown by the mortgagors in an action by the mortgagee to foreclose. *Alton-Dawson Mercantile Co. v. Staten*, 91 P. 892, 19 Okl. 252.

⁵ Where a retail merchant makes false and fraudulent statements to representatives of commercial agencies, for the purpose of establishing a basis of credit for himself, and such statements are incorporated into the books of such agencies, and circulated among the wholesale trade, by reason whereof credit is extended to him, it is not error to admit such statements and reports to be introduced in evidence on a trial in an action brought to recover the possession of the goods, which it is alleged were sold and delivered on the strength of such statements. *Salisbury v. Barton*, 66 P. 618, 63 Kan. 552.

⁶ *Nowlin v. Melvin*, 47 Okl. 57, 147 P. 307.

⁷ *Crisp v. Gillespey*, 50 Okl. 541, 151 P. 196.

In a suit attacking a conveyance of land as in fraud of creditors, the inquiry extends to all the circumstances bearing on the question. *Webster v. Clopeck Fish Co.*, 51 Okl. 702, 152 P. 379.

On an issue between an assignee of an insolvent firm and a creditor claim-

In an action by trustee in bankruptcy to set aside a conveyance under Bankruptcy Act, § 60b, as amended by Act June 25, 1910 (U. S. Comp. St. § 9644), evidence that the bankrupt was reputed in the community to be insolvent at date of the conveyance is admissible.⁸

§ 977. Insurance

In an action on a life insurance policy where the person insured has not been heard of for many years, evidence of inquiries for the missing man, a widely extended publication of an offer of reward for information concerning him, and the lapse of time since a former trial on the same cause of action are all proper matters of consideration in determining whether death should be presumed.⁹

§ 978. Marriage

Marriage may be proved by circumstantial evidence.¹⁰

Declarations of the man and woman who lived together as to whether their relation was matrimonial or meretricious are admissible.¹¹

On issue whether relation between a deceased man and woman was matrimonial, declarations of friends and relatives that they had lived openly as husband and wife for more than a year prior to birth

ing certain securities as collateral as to the bona fides of a deposit of the securities in a bank vault, to which the insolvent pledgors had access, where the burden of proof was upon the assignee, it was error to allow him to prove, in chief, that the pledgors had handled and treated the securities as still belonging to them, without also proving knowledge of such acts by the creditor and lack of dissent by him. *Matthewson v. Caldwell*, 52 P. 104, 59 Kan. 126.

Where, after a voluntary assignment, the goods are attached, and an action is brought by the assignee against the sheriff for their value, it is material error to exclude testimony of acts and statements of the assignor prior to the assignment tending to show that it was made with a fraudulent intent, and to hinder and delay creditors. *Smith v. Hunter*, 45 P. 911, 4 Kan. App. 377.

⁸ *First Bank of Maysville v. Alexander*, 49 Okl. 418, 153 P. 646.

⁹ *Modern Woodmen of America v. Gerdorn*, 94 P. 788, 77 Kan. 401.

¹⁰ *Linsey v. Jefferson* (Okl.) 172 P. 641.

Evidence to show that the parents of an infant plaintiff in proceeding to establish rights in the father's estate had entered into a marriage relation according to rules of the common law is proper. *In re Sanders' Estate* (Okl.) 168 P. 197.

¹¹ Where a man and woman lived together, and question is whether their relation is matrimonial or meretricious, their declarations during such relation as to the nature thereof are admissible. *Coleman v. James* (Okl.) 169 P. 1064.

of plaintiff, and were generally reputed to be such, was competent to show valid marriage.¹²

Repeated acknowledgments by a man, since deceased, of his marriage with a certain woman constitute direct evidence of marriage.¹³

Evidence is admissible to show marriage according to common law or tribal custom.¹⁴

§ 979. Price

Evidence of the inadequacy of the price paid by the purchaser is admissible as tending to support the issue that he had notice of an unrecorded mortgage,¹⁵ or escrow deed.¹⁶

In an attorney's action under an oral contract for fees contingent on success, testimony showing the interest of third parties and their receipt of part of the amount paid to defendant for the property

¹² *Linsey v. Jefferson* (Okla.) 172 P. 641.

¹³ *Linsey v. Jefferson* (Okla.) 172 P. 641.

¹⁴ In a case involving the title to the allotment of a deceased full-blood Choctaw Indian, evidence held to fairly support the findings of the trial court as to tribal marriage, etc. *Johnson v. Dunlap* (Okla.) 173 P. 359.

In an action to try title to lands in Creek Nation allotted to an Indian woman dying in 1914 leaving a minor child, evidence held to sustain a finding that the father of the child was her lawful husband under a common-law marriage. *Hughes v. Kano* (Okla.) 173 P. 447.

Evidence for plaintiffs, attacking validity of the marriage of a defendant on ground that she married a man who had a wife living and undivorced, held sufficient to sustain burden of proving that first marriage had not been dissolved by divorce or lawful separation. *Copeland v. Copeland* (Okla.) 175 P. 764.

On trial of an issue involving the existence of a common-law marriage, it was error to exclude evidence that the woman was a prostitute, as it would greatly weaken the probative force. *Warren v. Canard*, 30 Okla. 514, 120 P. 599. In trying an issue of common-law marriage, evidence as to reputation of the woman as a prostitute was properly excluded as such reputation might follow her after her reform. *Id.* On trial of an issue of a common-law marriage, it was proper to admit in evidence a certified copy of the application for enrollment of a child of the parties, as filed with the Commission to the Five Civilized Tribes, under Act May 27, 1908, c. 199, § 3, 35 Stat. 313. *Id.*

Evidence held to show a common-law remarriage between deceased and his alleged surviving wife. *Thomas v. James* (Okla.) 171 P. 855.

Where the validity of an irregular Indian marriage is the issue, testimony of the general reputation of the woman or of her acts far removed in point of time, tending to show that she is a prostitute, is inadmissible. *Butler v. Wilson*, 54 Okla. 229, 153 P. 823.

¹⁵ *Engelkemeier v. Lillis*, 54 Okla. 282, 153 P. 877.

¹⁶ *Wood v. French*, 136 P. 734, 39 Okla. 685.

involved is admissible to show how much defendant realized for the property;¹⁷ also evidence of an order of revivor made by the attorney on the death of a party not represented by him is competent on the issue as to the character of legal services.¹⁸

In an action to set aside contracts in settlement of a claim for seduction, where the plaintiff testified he had not had intercourse with the girl, her testimony as to their relations is admissible.¹⁹

§ 980. Title

It is error to admit oral evidence, except as to inheritance, to prove title to real estate.²⁰

In an action in which the ownership of a piano was in issue, evidence that a certain man had offered to mortgage the piano and to sell it was admissible for the purpose of disproving the claim of ownership in a third party.²¹

§ 981. Services

In addition to a detailed statement of what was done, the value of personal services may be established circumstantially by proof of relevant facts calculated to show the real value of the services as charged, their beneficial result, or lack of it, their dangerous or disgusting character, and the degree of physical strength, acquired skill, or other qualifications required for success. Where the value of professional services is in issue, the professional standing of the person rendering such services is relevant, as is also evidence of the annual income of such person. The opinion of competent witnesses may also be given to the jury, together with the basis of their estimate.²²

§ 982. Condemnation proceedings

On appeal from an award of commissioners in condemnation proceedings, evidence as to effect of operation of the enterprise located on the land taken as it existed at the time of the trial is admissible.²³

¹⁷ *Cornelius v. Smith* (Okl.) 175 P. 754, 9 A. L. R. 233.

¹⁸ *Cornelius v. Smith* (Okl.) 175 P. 754, 9 A. L. R. 233.

¹⁹ *Matthews v. McNeill*, 157 P. 387, 98 Kan. 5.

²⁰ *Arnold v. State*, 15 Okl. Cr. 519, 178 P. 897.

²¹ *Wade v. Sumner*, 30 Okl. 784, 120 P. 1011.

²² 22 *Corpus Juris*, 190.

²³ *Incorporated Town of Sallisaw v. Priest*, 61 Okl. 9, 159 P. 1093.

What the land condemned might be used for and what its possible mineral worth might be is not admissible in proving the damages in condemnation.²⁴ A plat of a proposed town site is admissible.²⁵

§ 983. Agency and partnership

The extent of his authority may not be proved by the declarations of the agent.²⁶

In an action against a corporation for personal injuries in being struck by an automobile, it is error to admit the statements of a purported agent of defendant in attempting to settle the case that he was defendant's agent to prove his agency; there being no evidence independent thereof to establish his authority.²⁷

In an action by physicians against a company for services rendered its employé, where defendant seeks to avoid liability on the ground that its manager did not contract for or request the services, and that, if he did, he was without authority to bind the company, it is error to refuse to permit defendant's manager to testify as to what his authority was, and that he had no authority from the company to employ physicians to serve its employés.²⁸

²⁴ In condemnation proceeding pursuant to Comp. Laws 1909, §§ 948-956, and sections 1370-1374, report of United States geological survey held not admissible. *Lawton Rapid Transit Ry. Co. v. City of Lawton*, 122 P. 212, 31 Okl. 458. In condemnation proceedings pursuant to Comp. Laws 1909, §§ 948-956, and sections 1370-1374, testimony to show mere possible uses or schemes of owner with reference to land to be condemned held inadmissible. *Id.* A booklet purporting to advertise as a health resort land sought to be condemned held inadmissible in evidence. *Id.* In condemnation proceedings after introduction of evidence that the most profitable use to which the land could be put was for farming purposes, admission of testimony that its value for that purpose was \$3 per acre held not error. *Id.* In condemnation proceedings pursuant to Comp. Laws 1909, §§ 948-956, and sections 1370-1374, exclusion of testimony as to revenue derived by city from water used from dam to be condemned held not error. *Id.*

²⁵ In condemnation proceedings, defendant, to show the amount of his damage and the adaptability of the land for town-site purposes, and that it had been surveyed and platted into an addition, could introduce a map made by the county surveyor from actual measurements, and a plat to show the manner in which the railroad runs over and divides the land in controversy. *Wichita Falls & N. W. Ry. Co. v. Holloman*, 114 P. 700, 28 Okl. 419, Ann. Cas. 1912D, 287.

²⁶ *Whitcomb v. Oller*, 137 P. 709, 41 Okl. 331.

²⁷ *Oklahoma Automobile Co. v. Benner* (Okl.) 174 P. 567.

²⁸ *Chickasha Cotton Oil Co. v. Lamb & Tyner*, 114 P. 333, 28 Okl. 275.

It is error to exclude evidence showing that defendant in an unlawful detainer action against a tenant holding over, is the agent for a corporation and is lawfully in possession of the premises under a contract with the plaintiff, and that he is merely holding the possession as such agent.²⁹

A person is not bound by the declarations of another as to the existence of a partnership between them where they were not made in his presence.³⁰

Admissions of members of an alleged firm, tending to prove the existence of the firm are admissible against the parties making them.³¹

Books, papers, accounts, and similar writings are admissible to show a partnership between persons who are described or referred to therein as partners.³²

§ 984. Unlawful arrest

In an action for unlawful arrest, where the defense is that the defendant had possession of liquor with intent to violate the prohibitory law, and the question of the officer's good faith is involved on the measure of damages, evidence of the surrounding circumstances is competent.³³

If an arrest was unlawful, the jury could consider plaintiff's occupation in estimating the damages.³⁴

§ 985. Entire conversation or transaction

Where part of a transaction or conversation has been introduced by one party, the whole may be introduced by the other party.³⁵

²⁹ *Turnbaugh v. Husselton* (Okla.) 180 P. 368.

³⁰ *Salinas City Bank v. Same*, 31 P. 744, 97 Cal. 78; *Howard v. Woodward*, 34 P. 348, 52 Kan. 106.

³¹ *Hoteling v. McCarty*, 46 Okl. 541, 149 P. 142.

³² *Cobb v. Martin*, 123 P. 422, 32 Okl. 588.

³³ *Holmes v. Le Fors*, 129 P. 718, 36 Okl. 729.

³⁴ *Holmes v. Le Fors*, 129 P. 718, 36 Okl. 729.

³⁵ Where a number of letters constituting part of a correspondence relating to the action have been introduced in evidence by plaintiff, defendant may introduce the entire correspondence. *Tishomingo Electric Light & Power Co. v. Gullett*, 52 Okl. 180, 152 P. 849.

Where plaintiff called defendant as a witness, and caused him to use certain memoranda for the purpose of proving that he was insolvent, it cannot object to similar use thereof by him, as a witness in his own behalf, to prove

§ 986. Telephone conversations

The admission of evidence as to conversations over telephone are governed by the rules relating to ordinary statements, except that identity of the persons against whom a statement is to be used must be established.³⁶

§ 987. Motive or intent

Where the motive or belief of a person is a material fact, he may testify directly to it in connection with his testimony and detail the circumstances, under which he was acting.³⁷

In a controversy as to the making of an agreement, one of the

the contrary, on the ground that it was not a paper of original entries. *Kingman v. Conway*, 59 P. 1084, 61 Kan. 859.

That a written instrument, no part of which was included in evidence, was referred to on cross-examination, did not render erroneous its exclusion, when it was offered in evidence by the opposite party. *San Bois Coal Co. v. Resetz*, 143 P. 46, 43 Okl. 384.

On an appeal from an award of damages for a right of way for a railroad through a farm, the railroad company offered testimony of the sales of other similar farms in the same neighborhood for a less price than was claimed by the owner of the land in question. The landowner then offered testimony tending to show that his land was superior in quality and of greater value than that with which it was compared. Held, that the admission of the latter testimony was not error. *Chicago, K. & W. R. Co. v. Emery*, 32 P. 631, 51 Kan. 16.

Where, in an action against a dentist for malpractice in not disinfecting his instruments, defendant is allowed to introduce evidence of persons who had seen him disinfect such instruments at other times, plaintiff may properly rebut such incompetent evidence by evidence of other persons who testified that they had never seen defendant disinfect his instruments. *Roark v. Greeno*, 59 P. 655, 61 Kan. 299, reversing judgment in *Greeno v. Roark*, 56 P. 329, 8 Kan. App. 390.

An entire conversation, the details of which it was sought to prove, held competent, though a part of the conversation disclosed the contents of documents not introduced in evidence. *Smith v. St. Louis & S. F. R. Co.*, 148 P. 759, 95 Kan. 451.

³⁶ *Williamson-Halsell-Frasler Co. v. King*, 58 Okl. 120, 158 P. 1142.

Evidence of conversation over telephone is not inadmissible because it is uncertain, unreliable, and easily manufactured. *Heckman v. Davis*, 56 Okl. 483, 155 P. 1170. That a party testifying to telephone conversation could not identify voice of person speaking, does not render conversation incompetent. *Id.* Telephone conversation may be received in evidence, though witness is not identified positively as the person speaking, the uncertainty going only to weight of evidence. *Id.*

³⁷ *Bowers v. Atchison, T. & S. F. Ry. Co.*, 107 P. 777, 82 Kan. 95.

While circumstances attending an assault are competent evidence of the state of mind of defendant in making it, his own testimony as to his motive

parties cannot testify as to what he had in mind in the preliminary negotiations, nor state his unexpressed intent in making such negotiations.³⁸

Facts that may have a direct bearing on the motive may be shown.³⁹

and intent is also competent. *Eckerd v. Weve*, 118 P. 870, 85 Kan. 752, 38 L. R. A. (N. S.) 516; *Cobb v. Oklahoma Pub. Co.*, 140 P. 1079, 42 Okl. 314.

Where a conveyance is alleged to be fraudulent towards creditors, the grantee may testify as to his good faith, purpose, and intention. *Gentry v. Kelley*, 30 P. 186, 49 Kan. 82.

On an issue whether a transfer of property was made to hinder, delay, or defraud creditors, it is competent where the one making the transfer is a witness, to ask him whether he made the transfer to hinder, delay, or defraud his creditors. *Gardom v. Woodward*, 25 P. 199, 44 Kan. 758, 21 Am. St. Rep. 310; *Bice v. Rogers*, 34 P. 796, 52 Kan. 207.

Where the intent with which members of a Ladies Aid Society of a church raised certain money was in issue, such members were properly permitted to testify to their intent. *Slinker v. Sumner County Building & Loan Ass'n*, 153 P. 537, 96 Kan. 672.

In an action against a carrier, based on the act of a Pullman conductor in discriminating against a negro passenger on account of his race, the conductor was properly permitted to testify as to the state of his mind during the transaction complained of; the element of malice being involved. *Williams v. Chicago, R. I. & P. Ry. Co.*, 135 P. 671, 90 Kan. 478.

In an action against a railway company for damages caused by its employé riding a railroad tricycle over a highway crossing in a reckless manner frightening plaintiff's horse and injuring the owner, the employé is a competent witness as to his motive at the time. *Baker v. Missouri, K. & T. Ry. Co.*, 116 P. 816, 85 Kan. 263, 35 L. R. A. (N. S.) 822, Ann. Cas. 1912D, 1042.

³⁸ *Cornelius v. Atchison, T. & S. F. Ry. Co.*, 87 P. 751, 74 Kan. 599.

³⁹ Testimony of neighbors as to physical appearance of insured was admissible as to his good faith in making statements contained in application. *Sharrer v. Capital Life Ins. Co. of Colorado*, 171 P. 622, 102 Kan. 650.

In an action by a seller of goods against his agents for misrepresentations as to the financial responsibility of the purchaser, one of the principal issues was whether plaintiff made the sale upon the representations of the purchaser in his order for the goods, certified by defendants, or upon a personal investigation made by plaintiff's traveling agent, who closed up the sale. Held, that the traveling agent, when on the stand as a witness for plaintiff, could state whether, in closing with the purchaser he relied on the representations contained in the order sent in by defendants. *Avery Planter Co. v. Murphy*, 49 P. 626, 6 Kan. App. 29.

In an action by a wife for the alienation of the affections of her husband, in order to show that defendant entertained a feeling of hatred toward her, it would be competent to show that he had made improper overtures to her which resulted in disappointment to him. *White v. White*, 90 P. 1087, 76 Kan. 82.

DIVISION II.—RES GESTÆ

§ 988. What constitutes

"Res gestæ" consists in a spontaneous statement of a present condition or fact accompanying an act to such an extent as to actually become a part of the transaction itself.⁴⁰

§ 989. Discretion

The admissibility of statements as part of the res gestæ is in a great measure to be left to the determination of the trial court and is largely discretionary.⁴¹

§ 990. Declarations

Statements are not admissible as part of the res gestæ when they merely concern acts which would not be admissible without such declarations, and to be admissible the statements must be material.⁴²

Declarations as to ownership of land, by one in possession, who is not a party to the action, and which are not against his interests and do not accompany the execution of a conveyance, or any act of possession, nor relate to the extent of his possession, and have no legitimate connection with any act which is the subject of inquiry, are not a part of the res gestæ.⁴³

In an action for specific performance of a contract to convey, declarations and letters by the vendor subsequent to the vendee's taking possession are not admissible, as part of the res gestæ, to impeach the vendee's title.⁴⁴

Declarations made by a person while in possession of personal

⁴⁰ Prickett v. Sulzberger & Sons Co., 57 Okl. 567, 157 P. 356.

For declarations to become part of the res gestæ, they must accompany the act characterized or explained, and must so harmonize as to be clearly one transaction, and must exclude the idea of a narration of past occurrences. Smith v. Chicago, R. I. & P. Ry. Co., 142 P. 398, 42 Okl. 577.

⁴¹ Herring v. Hood, 55 Okl. 737, 155 P. 253; Chicago, R. I. & P. Ry. Co. v. Tate, 57 Okl. 215, 156 P. 1182; St. Louis & S. F. R. Co. v. Flick, 47 Okl. 530, 149 P. 1126; Smith v. Chicago, R. I. & P. Ry. Co., 142 P. 398, 42 Okl. 577.

⁴² Chicago, R. I. & P. Ry. Co. v. Jackson, 63 Okl. 32, 162 P. 823.

⁴³ Crawford v. Crawford, 55 P. 842, 60 Kan. 126.

⁴⁴ Osborne v. Osborne, 6 P. 271, 33 Kan. 257.

property, in disparagement of his title, or explanatory of the character of his possession, are admissible as part of the *res gestæ*.⁴⁵

In an action to recover corporate stock represented by a certificate, declarations of ownership by the person, since deceased, among whose papers the certificate was found after his death, are admissible as part of the *res gestæ* to explain his possession of the certificate.⁴⁶

§ 991. Injury and pain

No definite rule can be laid down as to the preliminary evidence requisite before admitting declarations of a party as to present pain or suffering.⁴⁷

Declarations by plaintiff, made immediately after an accident, as to the part of the body in which she was hurt are admissible.⁴⁸

Declarations of a party with regard to a present and existing pain or suffering, or with regard to the present condition of the body or mind, may generally be shown by any person who heard the same.⁴⁹

Declarations made by an injured employé after the accident, if wanting in spontaneity, form no part of the *res gestæ*.⁵⁰

In an action for the death of an engineer, a declaration by a fireman as to the cause of the explosion, made shortly after he recovered consciousness, were admissible as *res gestæ*.⁵¹

⁴⁵ *Wiggins v. Foster*, 55 P. 350, 8 Kan. App. 579; *Relley v. Haynes*, 16 P. 440, 38 Kan. 259, 5 Am. St. Rep. 737.

⁴⁶ *Kimball v. Edwards*, 137 P. 943, 91 Kan. 298.

⁴⁷ *St. Louis & S. F. R. Co. v. Chaney*, 94 P. 126, 77 Kan. 276.

Declarations of plaintiff in a personal injury suit made subsequent to the injury complained of are inadmissible to show that he was suffering from a disease alleged in his petition to have been produced by the injury. *Union Pac. Ry. Co. v. Hammerlund*, 79 P. 152, 70 Kan. 888.

Where a railway switchman was injured while uncoupling cars, and thereupon told the foreman to call some one, that he wanted to make a statement, and the engineer came to his side, and in response to a question the switchman narrated how the accident happened, his declarations were no part of the *res gestæ*. *Atchison, T. & S. F. Ry. Co. v. Logan*, 70 P. 878, 65 Kan. 748.

⁴⁸ *City of Topeka v. High*, 51 P. 306, 6 Kan. App. 162.

⁴⁹ *Atchison, T. & S. F. R. Co. v. Johns*, 14 P. 237, 36 Kan. 769, 59 Am. Rep. 609; *St. Louis & S. F. R. Co. v. Burrows*, 61 P. 439, 62 Kan. 89.

⁵⁰ *Smith v. Chicago, R. I. & P. Ry. Co.*, 142 P. 398, 42 Okl. 577.

⁵¹ *Denver v. Atchison, T. & S. F. R. Co.*, 150 P. 562, 96 Kan. 154, Ann. Cas. 1917A, 1007.

§ 992. Acts and statements

Acts and statements accompanying or connected with the transaction or event in question are generally admissible as part of the *res gestæ*.⁵²

So, also, acts and statements before or after the event may become a part of the *res gestæ* where they are so intimately connected with it as to form part of the transaction itself.⁵³ But such acts or statements must not be too remote.⁵⁴

⁵² Where, in an action on a note by a bank, one of the defendants testified that he went to the bank and inquired about the note, and was told to see the president, that he went through the rooms occupied by the tellers, cashier, and others, and was directed into a room which bore the sign "President," and found a man there, and asked him if he was the president, the statement that he was, and, on inquiry if the bank held the note, "I will look and see," and, after going into the other rooms where the tellers and cashier were, and on his return, "We have no such paper," were verbal acts, contemporaneous with his conduct as an officer of the bank, and part of the *res gestæ* admissible against the bank. *Olson v. Houston Nat. Bank*, 96 P. 853, 78 Kan. 592.

The conduct of an insolvent debtor, at the time of and immediately after a claimed fraudulent transfer of property, may be shown as part of the *res gestæ*, for the purpose of proving the intent with which such transfer was made. *Haskett v. Auhl*, 45 P. 608, 3 Kan. App. 744.

In an action by a wife against her father-in-law for alienating the affections of her husband, plaintiff offered testimony of the declarations of defendant to his son, during the time she alleged that he was accomplishing the alienation, to the effect that he did not desire his son to live with plaintiff, and that he would not give him any money if he continued to do so, etc. Defendant denied these statements, and by his own and other testimony sought to show that, during the period mentioned, he had told his son, at different times, to bring his wife to defendant's home, and that he ought to live with her. Held, that such declarations were inadmissible, as not part of the *res gestæ*. *Eagon v. Eagon*, 57 P. 942, 60 Kan. 697.

⁵³ In an action for death of servant falling down elevator shaft, testimony that witness warned decedent to be sure elevator was there and he replied that it was, is competent as part of the *res gestæ*. *Prickett v. Sulzberger & Sons Co.*, 57 Okl. 567, 157 P. 356.

Expressions by those in charge of defendant's engine, immediately after collision causing death of plaintiff's decedent, which were instinctive and spontaneous, are admissible as *res gestæ*. *King v. Missouri Pac. Ry. Co.*, 156 P. 728, 97 Kan. 769.

In an action for injuries due to a defective floor, held, that evidence that defendant's manager stated shortly after the injury that he knew the floor was defective and had neglected to repair it, was admissible as part of the *res gestæ*. *Herring v. Hood*, 55 Okl. 737, 155 P. 253.

In an action for damages resulting from an accident, testimony relating to matters so intimately connected with the accident as to form a part of the

⁵⁴ See note 54 on following page.

A medical expert may testify to patient's statement to him as to his condition, symptoms, and feelings, when they are necessary to examination for treatment; such testimony not being independent evidence of facts stated, except when competent as part of *res gestæ*.⁵⁵

Testimony of expressions of a natural and spontaneous character,

res gestæ is admissible, though such matters occurred after the accident. *Ott v. Cunningham*, 58 P. 126, 9 Kan. App. 886.

In an action to recover damages resulting from failure to deliver promptly a telegram addressed to the plaintiff's attorneys, and concerning the bringing of an attachment action, a statement respecting such failure made by the agent of the telegraph company at the receiving office to the said attorneys when handing them the telegram, three days after its date, was a part of the *res gestæ*, and was properly admitted in evidence. *Western Union Tel. Co. v. Getto-McClung Boot & Shoe Co.*, 61 P. 504, 9 Kan. App. 863.

Evidence as to acts and statements of person receiving personalty from another soon after acquiring possession, and while in possession, was admissible as part of the *res gestæ* on an issue as to whether the conversations constituted a sale or bailment. *Greer v. Davis Mercantile Co.*, 121 P. 1121, 86 Kan. 686.

⁵⁴ A witness' testimony as to a statement made by one of defendant's employes four or five hours after the accident held not part of the *res gestæ*. *Chicago, R. I. & P. Ry. Co. v. Foltz*, 54 Okl. 556, 154 P. 519.

A statement by the engineer, after collision with a wagon and the train had stopped, in response to a question by the conductor, held not admissible as part of the *res gestæ*, where it appeared that is was a mere narrative of the occurrence. *Missouri, O. & G. Ry. Co. v. Adams*, 52 Okl. 557, 153 P. 200.

Statements by the cashier of a bank in conversation with one of the makers of a note, made eighteen months and also four years after the assignment of the note to the bank, and after suit had been brought thereon, as to how the bank held the note, are inadmissible as part of the *res gestæ*, when it is not shown that the cashier acted for the bank in the transaction by which the note was assigned to it, and when there was no transaction pending at the time of the conversation. *Gillespie v. First Nat. Bank*, 95 P. 220, 20 Okl. 768.

Where deceased fell off a train between 1 and 2 o'clock at night, statements made by him, on being discovered after daylight, relative to the cause of the accident, were not admissible as part of the *res gestæ*. *Smith v. Chicago, R. I. & P. Co.*, 142 P. 398, 42 Okl. 577.

A person having in his possession a bottle of wood alcohol, inviting a neighbor to drink with him, said: "It is good. I got it of Chase Brown." Two days afterwards he died, apparently from wood alcohol poisoning, and his administratrix sued Brown for negligence in selling the alcohol without a proper label. Held, that the admission of the statements of deceased was prejudicial error. *Campbell v. Brown*, 106 P. 37, 81 Kan. 480, 26 L. R. A. (N. S.) 1142.

The deceased having been run over by a train, declarations of the engineer are not *res gestæ* when made after he had stopped the train and five minutes after the accident. *Tennis v. Rapid Transit Ry. Co.*, 25 P. 876, 45 Kan. 503.

⁵⁵ *Chicago, R. I. & P. Ry. Co. v. Jackson*, 63 Okl. 32, 162 P. 823.

indicating present bodily pain, is competent; but declarations as to past feelings and symptoms are hearsay, and should be rejected.⁵⁶

§ 993. Directions

Directions by a depositor accompanying a deposit, as to credit to be given, are provable by a banker after decease of depositor.⁵⁷

DIVISION III.—SIMILAR MATTERS

§ 994. In general

Before evidence as to similar facts and transactions will be admitted, it must be shown that such similarity actually exists, and that the result of the controversy in question does not depend entirely upon peculiar characteristics of the particular subject-matter of the action.⁵⁸

§ 995. Fraud

When a party is charged with fraudulent representations, similar representations, made about the same time to other persons, may be

⁵⁶ *Sly v. Powell*, 87 Kan. 142, 123 P. 881.

Exclamations of present pain or suffering made by an injured person may be received in evidence in connection with his appearance and conduct, where they appear to be the natural and spontaneous expressions of present feeling. *Federal Betterment Co. v. Reeves*, 93 P. 627, 77 Kan. 111, 15 Ann. Cas. 796.

⁵⁷ *Washbon v. State Bank of Holton*, 121 P. 515, 86 Kan. 468.

Directions by depositor, given after a credit properly made, as to credit to be given, held not admissible as part of *res gestæ*. *Fidelity & Deposit Co. of Maryland v. State Bank of Holton*, 139 P. 370, 91 Kan. 740.

⁵⁸ Report of factory inspector as to another saw of different type and make, belonging to defendant and located in another part of defendant's mill, held inadmissible. *Jones v. Oklahoma Planing Mill & Mfg. Co.*, 47 Okl. 477, 147 P. 999.

On an issue of the condition of hominy prepared in Oklahoma City, sold from sample, evidence that the seller afterwards sold hominy put up by the same company to others in Oklahoma City without complaint was inadmissible to contradict that of the vendee that the hominy was worthless. *T. S. Reed Grocery Co. v. Miller*, 128 P. 271, 36 Okl. 134.

In an action to recover plaintiff's share of profits from the purchase of land by himself and defendants, it is not error to exclude testimony concerning a separate business of dealing in real estate on commission, in which plaintiff and defendants were partners. *Van Fossen v. Mosher*, 17 P. 95, 38 Kan. 417.

In an action to recover money alleged to have been loaned, where defendant claims that the money was furnished to him for the purpose of investing in cattle at plaintiff's risk, evidence of similar contracts between defendant and third persons is inadmissible. *Roberts v. Dixon*, 31 P. 1083, 50 Kan. 436.

shown as bearing upon motive, but such statements made by others in the absence of the person charged are incompetent.⁵⁹

If a person against whom fraud is alleged should be proven to have been guilty of it in a number of instances, still, if the particular act sought to be avoided is not shown to be tainted with fraud, it cannot be affected by the other frauds.⁶⁰

§ 996. Custom—Accidents—Value

When regularity in the custom and course of business becomes an issue, lack of such regularity may be shown by other instances of a similar nature.⁶¹

Evidence of other injuries or accidents, from the same or similar causes, are admissible;⁶² but it must be shown that the conditions are actually similar.⁶³

⁵⁹ *Atchison Savings Bank v. Potter*, 164 P. 149, 100 Kan. 407.

In action for fraud, representations made by supposed agent to other parties at about the same time as to value of stock sold are competent to show a definite plan to defraud. *Amazon Fire Ins. Co. v. Bond* (Okl.) 165 P. 414.

Where a party claims a contract was procured through fraudulent representations, evidence that the same party made like representations about the same time to other parties, with whom he was attempting to make similar contracts, is admissible to show motive or intent. *McCauley v. Custer*, 143 P. 489, 93 Kan. 27.

In action on note defended on ground that plaintiff was not a holder without notice of infirmity because of knowledge of its agent, that note was obtained from defendant maker by false representations for stock in an insolvent bank, evidence of other frauds in sale of other stock for notes to plaintiff was relevant. *Atchison Sav. Bank v. Potter*, 104 Kan. 373, 179 P. 319.

When it is alleged that a contract to supply water for irrigation and to purchase for the grantee certain land was fraudulent and not carried out by the grantor, it is competent to show that the same party made similar, but not identical contracts with other grantees about the same time which were not carried out, as tending to show system, motive, or intent. *People's Bank of Minneapolis v. Reid*, 120 P. 339, 86 Kan. 245.

⁶⁰ *Price v. Winnebago Nat. Bank*, 79 P. 105, 14 Okl. 268.

⁶¹ In an action for the amount entered by a bank on a passbook, where the defense was predicated on correctness of bank's records and method of business, plaintiff might show its errors as to deposits affecting other parties. *L. J. Brosius & Co. v. First Nat. Bank* (Okl.) 174 P. 269.

⁶² In an action against a city, to recover for personal injuries, caused by a defective crossing, evidence that, previous to the accident in suit, other accidents had occurred on the crossing, was admissible to show its condition. *City of Junction City v. Blades*, 41 P. 677, 1 Kan. App. 85.

⁶³ On an appeal from an award in proceedings to condemn a right of way for a railroad over a highway, where the fee was in plaintiff, it was error for the court to permit evidence as to damages to the farm of plaintiff by reason

So, also, in proving value evidence as to the value of similar property, under similar circumstances and conditions, is admissible.⁶⁴

In an action for the reasonable value of personal services, evidence of what others received for the same services in the same locality is competent.⁶⁵

DIVISION IV.—DOCUMENTARY EVIDENCE

Subdivision I.—Statutes, Ordinances, and Public Records

§ 997. Acts of Congress—Statute books—Legislative journals

"The printed books containing the acts of the Congress of the United States, purporting to be published by authority of Congress, or by authority of the United States, shall be evidence of the laws, public or private, general, local or special, therein contained."⁶⁶

"The printed statute books of this state, printed under authority, shall be evidence of the acts therein contained."⁶⁷

of the location of another railroad, other than that of defendant, along the same highway. *Chicago, K. & W. R. Co. v. Hoffman*, 32 P. 382, 50 Kan. 697; *Same v. Alley*, 32 P. 383, 50 Kan. 701.

⁶⁴ In an action to recover the value of a jack killed by a railroad train, evidence of the value of jacks in general is competent to prove the value of plaintiff's particular jack. *Atchison, T. & S. F. R. Co. v. Gabbert*, 8 P. 218, 34 Kan. 132.

In an action to recover the value of a tract of land appropriated by a railway company for right of way, which, at the time of its condemnation, was not platted as a part of a city, but was in use as farming land, it is erroneous to permit witnesses to testify to the value and size of lots on the principal business street of a city near by. *Kansas City & T. Ry. Co. v. Splitlog*, 25 P. 202, 45 Kan. 68.

The issue of what an owner should receive for land condemned cannot be determined by some exceptional sale in the neighborhood, but on cross-examination witnesses as to value may be asked as to sales of other property. *Kansas City, O., L. & T. Ry. Co. v. Weidenmann*, 94 P. 146, 77 Kan. 300.

Where defendants transferred a stock of goods to plaintiffs on conveyance of a farm, and agreed to furnish a buyer of a one-half interest for a certain sum, and failed to do so, the amount received on the sale of such one-half interest at an auction of which defendants had knowledge is some evidence of such value, but defendants could show a greater value. *George v. Lane*, 102 P. 55, 80 Kan. 94.

⁶⁵ *Anthony v. Nourse*, 127 P. 491, 34 Okl. 795.

⁶⁶ Rev. Laws 1910, § 5102.

⁶⁷ Rev. Laws 1910, § 5100.

The legislative journals may be examined to determine the existence of an act the enrolled bill of which is lost.⁶⁸

§ 998. Foreign laws

"Printed copies in volumes of statutes, codes or other written law, enacted by any other state or territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts or tribunals of such state, territory or government, shall be admitted by the courts and officers of this state, on all occasions, as presumptive evidence of such laws. The unwritten or common law of any other state, territory, or foreign government, may be proved as facts by parol evidence; and the books of reports of cases adjudged in their courts, may also be admitted as presumptive evidence of such law."⁶⁹

"Copies of any act, law or resolution, contained in the printed statute books of the states and territories of the United States, purporting to be printed by authority, and which are now or may be hereafter deposited in the office of the secretary of state and required by law to be kept there, certified under the hand and seal of the office of the secretary of state, shall be admitted as evidence."⁷⁰

The best evidence of statutory law of another state or foreign government is the statute itself.⁷¹

Upon pleadings in a suit on a judgment rendered by a foreign justice of the peace, and in the absence of any demurrer or motion to make the petition certain, the statutes of such foreign state, authorizing judgment, are admissible.⁷²

§ 999. Ordinances

"Printed copies of any of the ordinances, resolutions, rules, orders and by-laws of any city or incorporated town in this state purporting to be published by authority of such city or incorporated town, or manuscript copies of the same, certified under the

⁶⁸ Johnson v. Grady County, 50 Okl. 188, 150 P. 497.

⁶⁹ Rev. Laws 1910, § 5097.

⁷⁰ Rev. Laws 1910, § 5101.

⁷¹ Cole v. District Board of School Dist. No. 29, McIntosh County, 123 P. 426, 32 Okl. 692, Ann. Cas. 1914A, 459; Atchison, T. & S. F. Ry. Co. v. Lambert, 123 P. 428, 32 Okl. 665.

⁷² Beckman v. Ash, 103 Kan. 437, 173 P. 920.

hand of the proper officer, and having the corporate seal of such city or town affixed thereto, shall be received as evidence.”⁷³

§ 1000. Congressional documents

“Public documents, purported to be edited or printed by authority of Congress, or either house thereof, shall be evidence to the same extent that authenticated copies of the same would be.”⁷⁴

§ 1001. Copies—Public records

“Copies of all papers authorized or required by law to be filed or recorded in any public office, or of any record required by law to be made or kept in any such office, duly certified by the officer having the legal custody of such paper or record, under his official seal, if he have one, may be received in evidence with the same effect as the original when such original is not in the possession or under the control of the party desiring to use the same.”⁷⁵

§ 1002. Official books and records

“The books and records required by law to be kept by any county judge, county clerk, county treasurer, register of deeds, clerk of the district court, justice of the peace, police judge or other public officers, may be received in evidence in any court; and when any such record is of a paper, document, or instrument authorized to be recorded, and the original thereof is not in the possession or under the control of the party desiring to use the same, such record shall have the same effect as the original; but no public officer herein named or other custodian of public records, shall be compelled to attend any court, officer or tribunal sitting more than one mile from his office with any record or records belonging to his office or in his custody as such officer.”⁷⁶

⁷³ Rev. Laws 1910, § 5106.

A city ordinance, certified under the hand of the proper officer and having the city corporate seal, may be received in evidence. *Cunningham v. Ponca City*, 113 P. 919, 27 Okl. 858.

⁷⁴ Rev. Laws 1910, § 5103.

⁷⁵ Rev. Laws 1910, § 5099.

The county clerk is required on request to certify to a true copy of the chattel mortgage filed, which copy shall be admitted in evidence without further certification. *Sess. Laws 1919*, p. 40, c. 23.

⁷⁶ Rev. Laws 1910, § 5115.

Enrollment records admissible to show quantum of Indian blood and patent

A transcript of a judgment from a circuit court of another state, duly authenticated by the proper officers, is admissible in evidence, though it does not show that it was signed by the presiding judge.¹⁷

records competent to show whether allotments are restricted. *Smith v. Williams*, 78 Okl. 297, 190 P. 555.

Where the complaint in an action for rent, states the cause of action under Rev. Laws 1910, § 3802, copies of allotment and homestead patents, properly exemplified under section 5112, are admissible, and their admissibility is not governed by Act Cong. April 26, 1906, § 8. *Mullen v. Howard*, 143 P. 659, 43 Okl. 531.

Kansas cases.—A volume of records of permanent surveys of the county surveyor, forming the public records of the county, is not discredited as evidence because it may contain an original paper of a survey instead of a copy thereof. *Scott v. Williams*, 87 P. 550, 74 Kan. 448.

Gen. St. 1868, c. 25, § 67, requires the county treasurer to keep a just and true account of the receipt and expenditure of all moneys coming into his hands by virtue of his office in a book or books to be kept by him for that purpose, but does not prescribe the kind of account books he shall keep. Laws 1876, c. 34, § 89, require him whenever he receives any tax money to give a receipt therefor. Held, that any book essential or convenient for the purpose will suffice, and a tax receipt stub book which is a part of the records of the treasurer's office, showing payment of taxes, the amounts and years for which they were made, and the persons for whom and by whom made, is a book required to be kept under the statute and admissible in evidence. *Hudson v. Herman*, 107 P. 35, 81 Kan. 627.

On an issue whether a tax deed was issued within six months from the assignment of the sale certificate, a bound book of stubs of tax sale certificates, showing their respective dates of issuance, in regard to which it was shown only that it was found in the vault of the county treasurer's office, and was the stub book of tax sale assignments, was not admissible. *Noble v. Douglass*, 42 P. 328, 56 Kan. 92.

The verified report of the examination of the county treasurer's office made by the probate judge and two examiners appointed to assist him, under the provisions of paragraphs 1708, 1709, Gen. St. 1889, is not competent evidence as to the condition of the treasury when the examination was made. *State v. Krause*, 50 P. 882, 58 Kan. 651.

A copy of the redemption notice required to be given before the execution of a tax deed certified by the county treasurer, is not admissible under Comp. Laws, c. 80, § 372, providing that copies of papers required to be recorded, certified by the legal custodian of the records, shall be admissible in evidence with the same effect as the original, etc., since by chapter 107, § 121, such notices are required to be filed with the county clerk and the treasurer is not the legal custodian of them. *Bergman v. Bullitt*, 23 P. 938, 43 Kan. 709.

The certified record of a county surveyor's report of a survey, recorded with the county clerk, is admissible in evidence, with the same effect as the original. *Dent v. Simpson*, 105 P. 542, 81 Kan. 217.

Certified copies of statements, made for taxation and preserved in the of-

¹⁷ *Dean v. Stone*, 35 P. 578, 2 Okl. 12.

Record of a board of health, showing a person's birth, is competent evidence of such person's age, when the law makes it the duty of the board to keep such record, etc.⁷⁸

file of the county clerk, are admissible where the originals would be competent, but were not in the possession of the party introducing them. *Bowersock v. Adams*, 41 P. 971, 55 Kan. 681.

Gen. St. 1901, par. 4820, providing that copies of papers authorized or required by law to be filed or of any record required by law to be made or kept, may be admitted in evidence when properly certified, does not authorize the admission in evidence of a certificate of the probate judge of the county wherein decedent in his lifetime was a resident, to prove that no administrator has ever been appointed by said court for such decedent, or that there is no record of any administration on behalf of said decedent. *Chicago, R. I. & P. Ry. Co. v. Vance*, 68 P. 606, 64 Kan. 686.

A tax roll completed by the county clerk and placed in the hands of the county treasurer for the collection of taxes is competent evidence in a controversy between a landlord and tenant to show the amount of the taxes levied, which the tenant had agreed to pay. *Smith v. Scully*, 71 P. 249, 66 Kan. 139.

Where a written instrument authorized to be filed for record in the office of the register of deeds has been executed and delivered to defendant, and then subsequently filed for record by him, a certified copy thereof from the register, under his official seal, may be given in evidence by plaintiff with the same effect as the original, since it will be presumed, in the absence of other proof, that the original is in the possession or under the control of defendant. *Eby v. Winters*, 33 P. 471, 51 Kan. 777.

The admission, on the application of plaintiff, of a record copy of a deed of conveyance, when the deed itself is in his possession and control, is error, though plaintiff may at the time be absent from the state and have the deed with him. *West v. Cameron*, 18 P. 894, 39 Kan. 736, judgment affirmed on rehearing, 19 P. 616.

Under Comp. Laws, c. 80, § 372, providing that copies of all papers required by law to be recorded in any public office, duly certified by the officer having the legal custody of the paper or record, may be received in evidence with the same effect as the original, if that is not in the control of the party desiring to use the same, in order to render admissible certified copies of deeds recorded in the office of the register of deeds it is not necessary to show that the originals are lost or destroyed. *Bergman v. Bullitt*, 23 P. 938, 43 Kan. 709.

In replevin against one claiming the property by virtue of a chattel mortgage filed in a county other than that in which plaintiff lives, a certified copy of the mortgage is admissible in evidence without showing that it had been recorded in the county in which it had been filed, where the defendant also relied for his right of possession on another mortgage, recorded in the county of plaintiff's residence. *Parkhurst v. Sharp*, 61 P. 531, 10 Kan. App. 575.

Where a civil action is brought by a county attorney in the name of the state, under Sess. Laws 1881, c. 128, § 18, to enforce a lien for a fine and costs on real estate against the owner of premises, who had knowingly suffered the illegal sale of liquor thereon, and the attorney general does not have any connection therewith, the county attorney is the sole and only representative of

⁷⁸ *Bucher v. Showalter*, 44 Okl. 690, 145 P. 1143.

A printed copy of the final rolls of citizens and freedmen of the Five Civilized Tribes, prepared by the Commission, approved by the Secretary of the Interior, and printed under authority conferred by the act of Congress, is admissible in evidence.⁷⁹

the state; and, on proof that the deeds of the real estate are not in his possession or under his control, certified copies thereof may, under Comp. Laws 1885, c. 22, § 27, be read in evidence with like effect and on the same conditions as the original deeds. *Pfefferle v. State*, 17 P. 828, 39 Kan. 128.

— *Other states*.—A certified copy of a plat on file or record in a public office of another state is not admissible in evidence; but the plat must be identified by the custodian thereof and a copy thereof proved by his oath, before it can be received. *Munkres v. McCaskill*, 68 P. 42, 64 Kan. 516.

A document offered in evidence, and reciting the appointment of a guardian by an Oklahoma probate judge who was his own clerk and having attached thereto the judge's certificate and seal and a complete copy of the letters of guardianship, held to substantially comply with Civ. Code, § 368 (Gen. St. 1909, § 5963), governing the authentication of records and proceedings in courts of other states. *Brack v. Morris*, 132 P. 1185, 90 Kan. 64.

A record of proceedings in the judicial district court of the territory of Utah, duly authenticated under the act of Congress, is admissible in evidence to show that such proceedings have been had. *Friend v. Miller*, 34 P. 307, 52 Kan. 139, 39 Am. St. Rep. 340.

To make a judgment of a justice of the peace in Missouri admissible in evidence, as an offset in an action in Kansas, a transcript of the record of the circuit court in which the transcript of the justice's judgment was filed duly certified, as required by act of Congress, is not sufficient, but a transcript of the justice's judgment must be certified according to the statutes of Kansas; the act of Congress not being applicable. *Hinman v. Missouri, K. & T. Ry. Co.*, 83 Kan. 35, 110 P. 102, 21 Ann. Cas. 1152.

Under Rev. St. U. S. § 905 (U. S. Comp. St. § 1519), providing that the records of courts of any state shall be admitted in any other court within the United States by the attestation of the clerk and the seal of the court with a certificate of the judge, an authentication signed by one A., probate judge and ex officio clerk, certifying that the document to which it is attached is a true copy of a journal entry on the records of the court, and it has been carefully compared, and that A. was the sole custodian of the records, together with a certificate by A., as judge of the probate court, to the effect that A., whose signature as clerk was attached is and was at the time of signing the same ex officio clerk of the probate court, is sufficient. *Brown v. Baxter*, 94 P. 155, 77 Kan. 97, rehearing denied 94 P. 574, 77 Kan. 97.

A copy of a judicial record of another state, not authenticated as required by the federal statute or by Code Civ. Proc. § 371, relating to proceedings in courts of foreign countries, is not admissible in evidence because certified in accordance with section 372, which provides for admission in evidence of copies of records required by law to be kept in any public office; such section having reference only to records kept under the authority of the law of the state or of the United States. *Ayres v. Wm. Deering & Co.*, 90 P. 794, 76 Kan. 149.

⁷⁹ *Lawless v. Raddis*, 129 P. 711, 36 Okl. 616.

Certificates required by statute to be made by officers in the discharge of their duties, as a rule, may be introduced in evidence when material.⁸⁰

The record of a deed, without a notarial seal to the notary's certificate of acknowledgment, is inadmissible in evidence; such deed not being entitled to be recorded.⁸¹

A copy of the charter of a corporation created under the laws of this state, duly certified by the secretary of state, under the seal of the state, is evidence of the creation of such corporation.⁸²

§ 1003. Court records and files

Where, in an action founded on a claim filed against an estate, an appeal is taken to the district court, the records of the court are admissible in evidence to show that complainant had filed her claim for only a portion of the claim now filed.⁸³

An affidavit for a continuance cannot be read as evidence in a case, unless under a condition to admit it as the deposition of the absent witness, upon the refusal of such application.⁸⁴

Where it is sought to prove the contents and existence of a judgment, a duly authenticated copy of the judgment itself is sufficient.⁸⁵

⁸⁰ *Marlow v. School Dist. No. 4, Murray County*, 116 P. 797, 29 Okl. 304. Certificates by a county treasurer and county clerk purporting to state what is shown by the records in their custody, when not authorized by statute are not competent evidence. Id.

⁸¹ *Meskimen v. Day*, 10 P. 14, 35 Kan. 46.

The record of a deed acknowledged before a notary, but not authenticated with his seal, is not admissible, under Laws 1870, c. 87, § 12. *Meskimen v. Day*, 10 P. 14, 35 Kan. 46. Contra, see *Rullman v. Barr*, 39 P. 179, 54 Kan. 643.

⁸² *McCune Min. Co. v. Adams*, 10 P. 468, 35 Kan. 193.

⁸³ *Jordon v. Bevins*, 10 Kan. App. 428, 61 P. 985.

⁸⁴ *Dempster Mill Manuf'g Co. v. Fltzwater*, 49 P. 624, 6 Kan. App. 24.

⁸⁵ *Oliver v. Gimbel*, 38 Okl. 50, 132 P. 144.

A duly-attested copy of a journal entry of a judgment rendered in another county may be read in evidence without proof that the original cannot be produced. *Metzger v. Burnett*, 48 P. 599, 5 Kan. App. 374.

Proceedings in aid of execution before a probate judge, and the orders made therein, are not records of the probate court; and hence copies of the same, certified by the probate judge, are not admissible to show what orders and proceedings were made and had. *Bowersock v. Adams*, 41 P. 971, 55 Kan. 681.

A warrant issued by a justice of the peace for the arrest of a person charged with a criminal offense is a "proceeding," within the meaning of Gen. St.

Where defendant to sustain his plea of *res judicata*, offered the entire record of a former trial between the parties to the present action, and such record showed affirmatively that the subject-matter of the later controversy was not involved in the former action, the evidence is properly rejected.⁸⁶

The identity of the parties must clearly appear, or else the same must be duly shown, before the record is admissible.⁸⁷

In actions for conversion, exclusion of records and files in former suit pleaded in estoppel is error.⁸⁸

The judgment must be shown by the judgment of the court, and not by the files in the case, and so a precedent for a journal entry of a judgment signed by the judge and filed in the cause is not competent evidence of rendition of the judgment.⁸⁹

A judgment rendered upon constructive service only is not competent evidence in support of a counterclaim pleaded by answer alleging the recovery of a personal judgment against plaintiff.⁹⁰

In an action on a guardian's bond, letters of guardianship are competent evidence of the guardian's appointment.⁹¹

The enrollment records are not admissible as to the age of the grantor of a conveyance prior to the enactment of Act Cong. May 27, 1908, where there are living witnesses who testified directly to her age.⁹²

An order of county court adjudging a person incompetent is not admissible as evidence of his incompetency at time of his previous conveyance of real estate.⁹³

1897, c. 97, § 4, providing that copies of proceedings had before a justice of the peace, where the justice is out of office, certified by the justice in possession of the docket and papers of such justice, shall be received in evidence in any court. *Drumm v. Cessnum*, 59 P. 1078, 61 Kan. 467.

⁸⁶ *Winans v. Rosecrans*, 54 P. 508, 8 Kan. App. 455.

⁸⁷ Exclusion of a judgment finding Mrs. J. E. Vandergrift guilty of an offense held not error, where the materiality of the judgment depended on the identity of the party named with Mrs. Larenla T. Vandergrift, and the identity was not shown. *Sarlls v. Hawk*, 46 Okl. 343, 148 P. 1030,

⁸⁸ *Pierce v. Barks*, 60 Okl. 97, 159 P. 323.

⁸⁹ *Bouquot v. Awad*, 54 Okl. 55, 153 P. 1104.

⁹⁰ *Smith v. Kreager*, 51 P. 813, 6 Kan. App. 271.

⁹¹ *Lyons v. Fulsom*, 54 Okl. 84, 153 P. 868.

⁹² *Jackson v. Lair*, 48 Okl. 269, 150 P. 162.

⁹³ *McIntosh v. Reason* (Okl.) 172 P. 446.

A judgment against the principal in a bond is admissible in an action against surety, although surety was not a party to that action, and had no notice thereof, and is at least prima facie evidence against surety, who, however, may defend by showing all matters that might have been asserted by principal on the bond.⁹⁴

Petitions filed in an action instigated long after conclusion of the litigation in which the services sued for were performed, and after termination of such services, are properly excluded.⁹⁵

Where a foreclosure is invalid because the owner of the legal title was not made a party, and the purchaser at foreclosure sale brings a second action against the mortgagor and his grantee, he must prove the existence of the lien sought to be foreclosed, and the findings and judgment in the first proceeding are not competent evidence for that purpose.⁹⁶

A duly certified transcript of the evidence taken before the board of dental examiners is competent evidence.⁹⁷

§ 1004. Records of justice of the peace

"Copies of proceedings before justices of the peace, certified by the justice before whom the proceedings are had, shall be evidence of such proceedings."⁹⁸

"Copies of the proceedings had before a justice of the peace, where such justice is out of office, certified by the justice who is in possession of the docket and papers of such justice, shall be received in evidence in any court in this state."⁹⁹

§ 1005. Departmental records

"Exemplifications from the books of any of the departments of the government of the United States, or any papers filed therein, shall be admitted in evidence in the same manner and with like effect as the originals, when attested by the officer having the custody of such originals."

⁹⁴ Peery v. Merrill, 75 Okl. 55, 179 P. 28.

⁹⁵ Turner v. Maxey, 45 Okl. 125, 144 P. 1064.

⁹⁶ Stough v. Badger Lumber Co., 79 P. 737, 70 Kan. 713.

⁹⁷ Sess. Laws 1919, p. 68, § 22.

⁹⁸ Rev. Laws 1910, § 5104.

⁹⁹ Rev. Laws 1910, § 5105.

¹ Rev. Laws 1910, § 5112.

Census enumeration lists held admissible as to age, if duly authenticated.
Bradshaw v. State (Okl. Cr. App.) 197 P. 715.

This statute makes certified copies from books of any department of the United States government, or any papers filed therein, admissible only where original record would be competent and admissible.²

The certificate is no part of a certified copy of the record of a department of the federal government, nor is it evidence of any fact not appearing in the record proper.³

§ 1006. Land office receipts and records

"The usual duplicate receipt of the receiver of any land office, or, if that be lost or destroyed, or beyond the reach of the party, the certificate of such receiver that the books of his office show the sale of a tract of land to a certain individual, is proof of title equivalent to a patent against all but the holder of an actual patent."⁴

"Copies of all papers and documents lawfully deposited in the office of the register or receiver of any land office of the United States within this state, and copies of any official letter or communication, received by the register or receiver of any such land office, from any department of the government of the United States, when duly certified by the register or receiver having the custody of such paper, document, letter or other official communication, shall be received in evidence in the same manner and with like effect as the originals."⁵

An exemplification, certified by the commissioner of the general land office, of a railway map, is admissible in evidence, with like effect as the original.⁶

² Hughes v. Watkins, 75 Okl. 166, 173 P. 369.

³ Jackson v. McGilbray, 46 Okl. 208, 148 P. 703.

⁴ Rev. Laws 1910, § 5110.

⁵ Rev. Laws 1910, § 5111.

The copy of an official letter received by the register or receiver of any land office of the United States from any department of the government of the United States, that has been duly certified by the register or receiver having the custody of such letter, is admissible in evidence the same as the original; and, where the official character of the letter is apparent upon its face, it is unnecessary for the certifying officer to state in his certificate that it is the copy of an official letter. Darcy v. McCarthy, 12 P. 104, 35 Kan. 722; Hilbard v. Graycraft, 121 P. 198, 32 Okl. 160; Stinson v. Geer, 22 P. 586, 42 Kan. 520.

⁶ Rierson v. St. Louis & S. F. Ry. Co., 51 P. 901, 59 Kan. 32.

§ 1007. Official signatures presumed genuine

"The signature of the officer to any certificate or document hereinbefore mentioned, shall be presumed to be genuine until the contrary is shown."⁷

§ 1008. Authentication

It is error, over objections, to permit a party to testify that certain purported copies of lost agreements were true, when they were not certified, nor supported by the oath of the party purporting to have made them.⁸

Where certified copies of papers filed in a public office are offered in evidence, the certificate should show that they are copies of the original papers, and not of a transcript of them.⁹

§ 1009. — Copies of foreign records

"Copies of records and proceedings in the courts of a foreign country may be admitted in evidence, upon being authenticated as follows:

"First. By the official attestation of the clerk or officer in whose custody such records are legally kept; and,

"Second. By the certificate of one of the judges or magistrate of such court, that the person so attesting is the clerk or officer legally intrusted with the custody of such records, and that the signature to his attestation is genuine; and,

"Third. By the official certificate of the officer who has the custody of the principal seal of the government under whose authority the court is held, attested by said seal, stating that such court is duly constituted, specifying the general nature of its jurisdiction, and verifying the seal of the court."¹⁰

A state is not a foreign country, within the meaning of this stat-

⁷ Rev. Laws 1910, § 5113.

⁸ Kasenberg v. Hartshorn, 30 Okl. 417, 120 P. 956.

⁹ Drumm v. Cessnum, 49 P. 78, 58 Kan. 331.

¹⁰ Rev. Laws 1910, § 5098.

A certified copy of foreign judgment sued on held properly authenticated under Rev. St. U. S. § 905 (U. S. Comp. St. § 1519), though no judgment is shown to have been signed by the trial judge and filed in the court. Shufeldt v. Bank of Mound City, 61 Okl. 194, 160 P. 923; Block v. Schafer, 62 Okl. 114, 162 P. 456.

ute providing for the certification of records in courts of a foreign country.¹¹

§ 1010. Translations

"Whenever any written evidence in a cause shall be in a language other than English, a written translation thereof, in the English language, made by a competent translator, and verified by his affidavit, may be read in evidence instead of the original, if such original be competent evidence."¹²

Subdivision II.—Private Writings

§ 1011. Church records

"When, by ordinance or custom of any religious society or congregation in this state, a record is required to be kept of marriages, births, baptisms, deaths, or interments, such register shall be admitted as evidence."¹³

"Copies of the register referred to in the preceding section, certified by the pastor or other head of any such society or congregation, or by the clerk or other keeper of such register, and verified by his affidavit in writing, shall be received in evidence."¹⁴

§ 1012. Corporate records

The records and minutes of proceedings of a private corporation are not competent evidence to establish a right of the corporation against a stranger, especially in an action to which the corporation is not a party.¹⁵

¹¹ Graham v. Troth, 77 P. 92, 69 Kan. 861.

¹² Rev. Laws 1910, § 5109.

¹³ Rev. Laws 1910, § 5107.

¹⁴ Rev. Laws 1910, § 5108.

When, by the custom of a religious society, a register of baptisms and burials is kept, and a duly-verified copy of the same is offered in evidence to establish that a child registered as having been buried at a certain time is the same one that was registered as having been baptized at an earlier time, and which shows that the entries of baptism and burial were made in different names, its admission, without further evidence tending to show that they were one and the same person, is error. Meconce v. Mower, 15 P. 155, 37 Kan. 298.

¹⁵ Dolan v. Wilkerson, 48 P. 23, 57 Kan. 758.

§ 1013. Written instruments

A properly acknowledged deed may be given in evidence without further proof, though its execution is denied under oath.¹⁶

The mortgage of personal property is one of the evidences of title and may be introduced in support of an allegation of ownership;¹⁷ and the same is true of a certificate of filing given by the register of the United States land office.¹⁸

One who has an interest in information to be obtained from the public records in any county office has a right to examine such records to the extent of his interest.¹⁹

In an action by one tenant to recover a pro rata share from his cotenant of expenses in making improvements, vouchers and receipts for moneys expended are competent evidence.²⁰

Where defendant admits the genuineness of his signature to a note but contends that it has been materially altered after delivery, the note, being regular on its face, is admissible in evidence.²¹

¹⁶ *Dyal v. Norton*, 47 Okl. 794, 150 P. 703.

Rev. Laws 1910, § 1170.

¹⁷ *Hixon v. Hubbell*, 44 P. 222, 4 Okl. 224.

It is not error to admit a deed in evidence, though the certificate of acknowledgment bears date prior to the acknowledgment of the execution of the deed, if from the instrument it appears that it was actually made at the time of its acknowledgment, and the conflict of dates was a clerical error. *Mosler v. Momsen*, 74 P. 905, 13 Okl. 41.

¹⁸ The receipt for the officers' fees for filing a declaratory statement made by a settler on government land, and a certificate of the filing, given by the register and receiver of the United States land office, are admissible in evidence in an action involving the possession of the land filed on to show the good faith and the character of the possession of claimant. *Barnhart v. Ford*, 21 P. 239, 41 Kan. 341. Testimony that a person has been accepted by the United States land officers as entitled to enter public lands is prima facie proof of such qualification. *Id.*

¹⁹ *Boylan v. Warren*, 18 P. 174, 39 Kan. 301, 7 Am. St. Rep. 551.

²⁰ *Uncle Sam Oil Co. v. Richards*, 60 Okl. 63, 158 P. 1187.

²¹ *Cavitt v. Robertson*, 142 P. 299, 42 Okl. 619.

§ 1014. — Recitals in deeds and mortgages

Recitals of heirship in a deed are not binding against strangers to the instrument;²² but they are admissible as to the parties to the instrument.²³

Where a deed misdescribes the tract intended to be conveyed, and the grantors execute a second deed to correct the description of the first, both instruments are admissible to show the ownership of the land.²⁴

Admission in evidence of the chattel mortgage alleged to cover the property sued for in replevin is error where the description, aided by inquiry suggested by the mortgage, does not show that such property was embraced in the mortgage.²⁵

An application for a loan, signed in blank by the mortgagor, and delivered to an agent with the instruction to copy the statements contained in an application to another company, and which is afterwards so filled up by such agent, is an original instrument, and admissible in evidence without producing the application from which the statements were copied.²⁶

§ 1015. Account books

"Entries in books of account may be admitted in evidence, when it is made to appear by the oath of the person who made the entries, that such entries are correct, and were made at or near the time of the transaction to which they relate, or upon proof of the handwriting of the person who made the entries, in case of his

²² *Dyer v. Marriott*, 131 P. 1185, 89 Kan. 515, 45 L. R. A. (N. S.) 93, Ann. Cas. 1915A, 93; *Kelley v. McBlain*, 22 P. 994, 42 Kan. 764.

In an action to recover an undivided half interest in an allotment inherited by E., since deceased, raising the issue of whether plaintiff and one B., alleged aunts of E., were half-sisters and the daughters of the same mother, a deed and an order approving it, reciting that B. was the sole heir of E., were incompetent to establish heirship. *Lauderdale v. O'Neill* (Okla.) 177 P. 113.

²³ Where parents and their children unite in a deed conveying lands belonging to the estate of a deceased member of the family, a statement that the persons joining in the deed are heirs of decedent is admissible as evidence of the identity of a sister of decedent joining in the conveyance as an heir under a surname different from her maiden name. *King v. Hyatt*, 32 P. 1105, 51 Kan. 504, 37 Am. St. Rep. 304; *King v. Hyatt*, 34 P. 461, 51 Kan. 516.

²⁴ *Arn v. Matthews*, 18 P. 65, 39 Kan. 272.

²⁵ *Eoff v. Lair* (Okla.) 156 P. 185.

²⁶ *Farmers' State Bank v. Pennsylvania Inv. Co.*, 38 P. 477, 54 Kan. 386.

death or absence from the county, or upon proof that the same were made in the usual course of business.”²⁷

The admissibility of accounts is to be determined from their appearance and character, the employment and education of the one who kept them, and the manner in which other similar accounts were entered in the book.²⁸

Books of account, consisting of entries made at or near the time of the transactions from reports of salesmen in the form of written memoranda, are “books of original entry” and admissible in evidence as such.²⁹

A book kept by defendant in his business may be introduced against him, whatever the book may be called, and though it may in fact be a “mere blotter.”³⁰

The original passbook containing the original notice of deposits, and the original checks signed by the customer on which the deposits were withdrawn, are competent evidence of the facts disclosed.³¹

²⁷ Rev. Laws 1910, § 5114; *Pacific Mut. Life Ins. Co. of California v. O'Neil*, 130 P. 270, 36 Okl. 792.

In an action by a building contractor for damages for breach of contract by the owner, the contractor's books of original entries are admissible and competent evidence to prove the work done and material furnished and value thereof. *First Nat. Bldg. Co. v. Vandenberg*, 119 P. 224, 29 Okl. 583.

In an action for conversion of cattle sold, there was no error in excluding testimony of the bookkeeper showing entries made from the scale tickets delivered to him by the defendants' employé at the stockyards some days after the delivery of the cattle. *Drumm-Flato Commission Co. v. Edmlsson*, 87 P. 311, 17 Okl. 344, judgment affirmed 28 S. Ct. 367, 208 U. S. 534, 52 L. Ed. 606.

An entry on the account books of an agent of a payment to him for his principal is competent evidence of the fact as against the payor, or where it is shown that the entry was made at the time of the occurrence. *Hastie v. Babbage*, 77 P. 268, 69 Kan. 560.

The fact that a corporation made certain payments may be shown by its books, though it is not a party to the action. *Richolson v. Ferguson*, 124 P. 360, 87 Kan. 411, 40 L. R. A. (N. S.) 855.

Where one in charge of the credits of a company testifies that certain entries on its books were made under his supervision, though not in his presence, and that the entries were made in the regular course of business, they are admissible. *Robertson v. Ridenour-Baker Grocery Co.*, 163 P. 655, 100 Kan. 133.

²⁸ *Holden v. Spier*, 70 P. 348, 65 Kan. 412.

²⁹ *Navarre v. Honea*, 139 P. 310, 41 Okl. 480.

³⁰ *Beyle v. Reid*, 1 P. 264, 31 Kan. 113.

³¹ *Security State Bank v. Fussell*, 129 P. 746, 36 Okl. 527.

In action by bank to recover an overdraft, entries in books of the bank, made in regular course of business, are competent.³²

A book which contains but one entry made by the party producing it, and that simply and solely a memorandum of the transaction testified to by said witness, is inadmissible.³³

In an action to recover usury paid, the exclusion of evidence of a statement of plaintiff's account at a bank is not error, where the bank was not a party to the suit, had no interest in the controversy, and such statement could not be binding upon defendant.³⁴

§ 1016. Memoranda

Memoranda prepared by a witness at the request of a party, who is unable to prepare it himself, are as admissible as if they had been prepared by the party; the circumstances being fully explained to the jury.³⁵

Written computations, based on matters not contained in the records from which the computation is made, are not admissible.³⁶

§ 1017. Letters

Declarations of a husband, included in letters written by him while he was in possession of the land jointly deeded to himself and wife, may be admissible in evidence, when explanatory of the possession and the rights claimed in the land, though it is not clearly shown whether the letters were received by the one to whom they were addressed.³⁷

Where the contents of a letter written by a party to the action to a third party and of a letter of the third party to him are each entirely irrelevant to any issue in the case on trial except that they tend to prove that the party to the suit was negotiating a trade which was afterwards consummated, the letters are competent for that purpose.³⁸

³² *Severy State Bank v. Gragg*, 158 P. 41, 98 Kan. 318.

³³ *Metzger v. Burnett*, 48 P. 599, 5 Kan. App. 374.

³⁴ *Gault v. Thurmond*, 186 P. 742, 39 Okl. 673.

³⁵ *Dighera v. Wheat*, 116 P. 616, 85 Kan. 458.

³⁶ *Kelley v. Stevens*, 50 P. 595, 58 Kan. 569.

³⁷ *Hubbard v. Cheney*, 91 P. 793, 76 Kan. 222, 123 Am. St. Rep. 129.

³⁸ *Gulliford v. McQuillen*, 89 P. 927, 75 Kan. 454.

§ 1018. Maps and photographs

In an action against a railroad company for appropriating plaintiff's land, the admission of a map of the locus in quo, made by the county surveyor from actual measurements, is not error, especially where the jury viewed the premises.³⁹

Accuracy of photographs must be shown by extrinsic evidence as to faithful representation of place as it existed at time involved.⁴⁰

Where photographs are proven to be true representations of whatever they purport to reproduce, they are admissible to aid the jury to understand the evidence.⁴¹

The weight to be given photographs of premises is not of conclusive effect, but depends upon the skill, accuracy, and manner in which they were taken.⁴²

Photographs intended to illustrate hypothetical situations are incompetent.⁴³

Before X-ray plates are admissible in evidence, they must be identified and their accuracy established.⁴⁴

³⁹ *Chicago, K. & N. Ry. Co. v. Davidson*, 31 P. 131, 49 Kan. 589.

⁴⁰ *Colonial Refining Co. v. Lathrop*, 64 Okl. 47, 166 P. 747, L. R. A. 1917F, 890.

⁴¹ *Smith v. Territory*, 69 P. 805, 11 Okl. 669.

Photographs duly verified are admissible in evidence as to the situation of objects or premises relevant to the issue. *St. Louis & S. F. R. Co. v. Dale*, 128 P. 137, 36 Okl. 114. That photographs were taken one or two years after dates of the respective injuries does not render them incompetent, where offered to show the topography of the country and other permanent conditions. *Id.*

Photographs purporting to be of the bank in a shale pit where the injury occurred, identified by the photographer, were properly admitted in evidence. *Griffin v. Fredonia Brick Co.*, 133 P. 574, 90 Kan. 375.

In a passenger's action for injuries from a train wreck, photographs of the wreck taken on the day of the accident while the conditions remained unchanged were properly admitted in evidence. *St. Louis & S. F. Ry. Co. v. Nichols*, 136 P. 159, 39 Okl. 522.

Admission in evidence of a photograph of the land, the value of which was in controversy, held not an abuse of discretion. *Hamilton v. Atchison, T. & S. F. Ry. Co.*, 148 P. 648, 95 Kan. 353.

On an issue of paternity, a photograph of the deceased putative father, proven to be a good likeness of him, was admissible for the purpose of comparison with the child in court. *Shorten v. Judd*, 42 P. 337, 56 Kan. 43, 54 Am. St. Rep. 587.

⁴² *St. Louis & S. F. R. Co. v. Dale*, 128 P. 137, 36 Okl. 114.

⁴³ *Colonial Refining Co. v. Lathrop*, 64 Okl. 47, 166 P. 747, L. R. A. 1917F, 890.

⁴⁴ *Bartlesville Zinc Co. v. Fisher*, 60 Okl. 139, 159 P. 476.

The use of an X-ray photograph of a child's breast to illustrate the witness'

§ 1019. Identification and authenticity

In an action on a promissory note, a document purporting to be a typewritten transcript of the testimony of a witness given at former trial of the cause is not admissible, without same being properly authenticated.⁴⁵

An original marriage license, issued in another state, identified by a witness who knows of the fact, is not inadmissible because produced by one who is not its legal custodian and does not account for his possession.⁴⁶

Testimony of a witness that he saw an instrument signed will authorize its introduction in evidence over the objection that it had not been identified.⁴⁷

A deed regular upon its face purporting to be a valid conveyance for a sufficient consideration and which is duly acknowledged and recorded by the force of the statute is admissible without further proof of execution.⁴⁸

In an action of conversion, passbooks of several banks without identification by the party making the entries are admissible to show defendant's possession.⁴⁹

On a petition for divorce for adultery, the admission of a page

criticism of an X-ray photograph of an adult held not error. *Boddington v. Kansas City*, 148 P. 252, 95 Kan. 189.

⁴⁵ *Kuykendall v. Caldwell* (Okla.) 179 P. 463.

Rev. Laws 1910, § 1792.

⁴⁶ *State v. Pendleton*, 72 P. 527, 67 Kan. 180.

⁴⁷ *Crowder State Bank v. American Powder Mills*, 46 Okla. 105, 148 P. 698.

⁴⁸ *Brockman v. Rees* (Okla.) 173 P. 525.

Under the statute providing that written instruments affecting real estate which are duly acknowledged or proved and certified may be read in evidence without further proof, a mortgage was properly admitted in evidence without proof of its execution. *Stout v. Crosby*, 63 P. 661, 10 Kan. App. 580.

Under Gen. St. 1909, § 1885, providing that when any instrument of writing shall have been on record with the register of deeds for 10 years, and such instrument is not acknowledged, it shall thereafter be valid as though it had been duly acknowledged in the first instance, and the instrument or record thereof or a duly authenticated copy thereof shall be received in evidence without requiring the original to be produced or accounted for, the record of an instrument purporting to be a receiver's final receipt which has been of record in the office of the register of deeds for 10 years may be read as evidence of title in ejectment, though the instrument lacks an acknowledgment, and though the original is not accounted for. *Van Hall v. Rea*, 118 P. 693, 85 Kan. 675.

⁴⁹ *Manning v. Maytubby*, 141 P. 781, 42 Okla. 414.

from a hotel register, inscribed "S. and wife, Room 50," is not permissible, unless identified as that used on the date mentioned, or shown to be in the same condition as on that date.⁵⁰

A lithographic receipt, providing on its face that to be valid it must be countersigned by an authorized agent, not so countersigned, is not admissible until a due and valid execution thereof or its genuineness have been established.⁵¹

An instrument purporting to be a lease executed by the guardian of a minor Indian, but not shown to have been executed on an order of court, is not admissible.⁵²

A circular, purporting to be put out by a certain railroad company as an advertisement of its route, and containing a map of its route, leased lines, and connections, and a list of its agents, but not shown to have been issued by such company, is not admissible for purpose of showing the company was the lessee of a certain railroad.⁵³

A contract executed by the president and cashier of a national bank, sealed with the bank's seal, and relating to the regular business of the bank, is prima facie evidence that it was executed with authority, and is admissible without proof of the officers' authority to execute it.⁵⁴

Where the defendant in a case has testified, and the plaintiff, who had previously taken defendant's deposition, introduces and reads a portion of the same relating to a certain transaction with a view of contradicting the testimony given by defendant on the trial, it is not error for the court to permit defendant to read other parts of the deposition which related to the same subject or transaction.⁵⁵

The law concerning ancient records relates to their admission as evidence rather than to their construction after being admitted, and cannot be made to apply to tax proceedings placed in evidence,

⁵⁰ *Hartshorn v. Hartshorn* (Okl.) 168 P. 822.

⁵¹ *Columbian Nat. Life Ins. Co. v. Wirthle* (Okl.) 176 P. 406.

⁵² *Fisher v. McKeemie*, 143 P. 850, 43 Okl. 577, Ann. Cas. 1917C, 1039.

⁵³ *Atchison, T. & S. F. R. Co. Cruzen*, 3 P. 520, 31 Kan. 718.

⁵⁴ *National Bank of Commerce v. Atchison*, 54 P. 8, 8 Kan. App. 30.

The authority of officers of a railroad company to execute a note having been put in issue by the sworn answer of the company, some preliminary proof of their authority should have been given before the note was read in evidence. *St. Louis, F. S. & W. R. Co. v. Tiernan*, 15 P. 544, 37 Kan. 606.

⁵⁵ *Storch v. Harvey*, 25 P. 220, 45 Kan. 39.

and the rules of construction applicable to them are the same as those applying to other instruments and statutory provisions.⁵⁶

When the execution of a written instrument is denied under oath, before a witness can be permitted to testify to the genuineness of the signature thereto it must be shown: First, that the witness was present and saw the instrument executed; or, second, that he is acquainted with the writing or signature of the party; or, third, that such witness is competent to testify as an expert by a comparison of the disputed signature with other writings or signatures admitted or proven to be genuine.⁵⁷

Entries in books of account may be admitted when shown by person who made them to be correct and made at or near time of transaction, or on proof of handwriting of person who made them in case of death or absence from county, or on proof they were made in usual course of business.⁵⁸

⁵⁶ *Salter v. Corbett*, 102 P. 452, 80 Kan. 327.

⁵⁷ *Archer v. United States*, 60 P. 268, 9 Okl. 569.

In an action on a life insurance policy, an application purporting to be signed by insured by mark held properly excluded from evidence, where the person signing the application as "witness" testified that he did not sign the insured's name, nor witness her mark, nor see any one sign her name, especially where insured was an educated woman who always signed her name in full. *Eminent Household of Columbian Woodmen v. Prater*, 133 P. 48, 37 Okl. 568.

Where a memorandum of sales was made by each salesman, and each day, in the usual course of business, credit entered by the bookkeeper in a day-book, which was a book of original entry, held, that such daybook was admissible in evidence upon the bookkeeper's testimony alone, under Rev. Laws 1910, § 5114. *Navarre v. Honea*, 139 P. 310, 41 Okl. 480.

⁵⁸ *Seneca Co. v. Doss*, 59 Okl. 149, 158 P. 575; *St. Louis & S. F. R. Co. v. Zickafoose*, 39 Okl. 302, 135 P. 406; *Muskogee Electric Traction Co. v. McIntire*, 133 P. 213, 37 Okl. 684, L. R. A. 1916C, 351; *Jackson v. Moore*, 39 Okl. 234, 134 P. 1114; *Blackert v. Lankford* (Okl.) 176 P. 532; *St. Louis & S. F. R. Co. v. Thirlwell*, 88 Kan. 275, 128 P. 199; *Missouri, K. & T. Ry. Co. v. Walker*, 113 P. 907, 27 Okl. 849.

Entries in a book made in the ordinary course of business at or near the time of the transaction to which relating, when sworn to be correct by the person making them, are admissible, but when not verified by the person who made them, and it is not shown that he is dead or absent from the county, they are inadmissible. *Missouri, K. & T. Ry. Co. v. Davis*, 104 P. 34, 24 Okl. 677, 24 L. R. A. (N. S.) 866.

A book of the bank on which a check was drawn, containing a list of depositors, is admissible, on identification by the cashier, to show that defendant was not a depositor, without further proof that it is correct. *State v. McCormick*, 46 P. 777, 57 Kan. 440, 57 Am. St. Rep. 341.

To justify the admission of a party's books of account on his own behalf, it is incumbent upon him to show by proper evidence that the record of the transactions is a faithful and honest one.⁵⁹

Entries in an account book of plaintiff, who could not read or write, made by another on his dictation, may be received in evidence when verified by the testimony of the parties making them and of plaintiff that the items were correctly reported by him.⁶⁰

An unsigned memorandum cannot be introduced against a party, who is not shown to have known about it, to have seen it, or to have had anything to do with it.⁶¹

A letter cannot be admitted in evidence without being properly identified,⁶² and proof that it was written by the person whose signature it purports to bear.⁶³

It is a sufficient identification of letters sought to be introduced against one by whom they are signed that they be received by due course of mail in answer to letters written and mailed to such person by the person who received the answer.⁶⁴

⁵⁹ First Nat. Bldg. Co. v. Vandenberg, 119 P. 224, 29 Okl. 583.

⁶⁰ Merywethers v. Youmans, 105 P. 545, 81 Kan. 309.

⁶¹ Forbes v. Madden, 158 P. 850, 98 Kan. 559.

Where hay is reweighed at destination by association not authorized by statute to do public weighing, its scale tickets are not admissible to show such weights, unless identified and shown to be correct by competent testimony, as required by Rev. Laws 1910, § 5114. Oklahoma Hay & Grain Co. v. T. D. Randall & Co. (Okl.) 168 P. 1012.

⁶² National Surety Co. v. Oklahoma Nat. Life Ins. Co. (Okl.) 165 P. 161.

⁶³ Clark v. Ford, 51 P. 938, 7 Kan. App. 332.

A letter not in response to a letter sent to alleged writer is not admissible until its authenticity has been established, either by proof that it was signed by purported signer or some one authorized to sign for him. Burke v. Smith, 57 Okl. 196, 157 P. 51.

Letters received by mail cannot, over objection, be admitted in evidence without proof of their authorship. Fidelity Mut. Life Ins. Co. of Philadelphia, Pa., v. Dean, 57 Okl. 84, 156 P. 304.

A letter which is not a reply held inadmissible until its authenticity be established. Comanche Mercantile Co. v. McCall Co., 52 Okl. 782, 153 P. 675.

⁶⁴ Huber Mfg. Co. v. Claudel, 80 P. 960, 71 Kan. 441.

In forcible entry and detainer by a grantee taking his deed subject to defendant's lease, letters passing between defendant from his lessor of such nature that they could not have passed between other parties were within the rule requiring authenticity to be established by handwriting, or by other proof. Williamson v. Davis (Okl.) 177 P. 567.

A banker doing business in Kansas, having in his charge collections for a corporation located at Dubuque, Iowa, corresponded through the mails with

Where all the negotiations between the parties to a case are included in letters and telegrams, and plaintiff offers a part of the correspondence, after having identified the same by one of defendants, it is permissible to have the witness, on cross-examination, to identify the balance of the correspondence with relation to the same transaction, and offer the same in evidence in connection with the cross-examination.⁶⁵

As the law presumes that all acts are done in good faith until there is evidence to the contrary, a chattel mortgage, in evidence, containing the statement that the mortgaged property was owned entirely by and was then in possession of mortgagor at his home, fairly tends to prove the same, and will be regarded as *prima facie* evidence of the truth of the statement, in the absence of evidence to the contrary.⁶⁶

On an issue as to what was intended to be done in highway proceedings, some of the oral testimony conflicting with the official record of the proceedings, the court has the right to fall back on the full and accurate record of what was plainly done as the best evidence of what was intended.⁶⁷

A book of account is only presumptive and disputable evidence of the correctness of the entries therein appearing.⁶⁸

Mortality tables in general use by insurance companies, though competent, are not conclusive evidence of the probable duration of life.⁶⁹

Reports and acts of a guardian of minor's property and probate court's orders approving them are evidence of truth of statements

such corporation about the notes and orders in his hands for collection, and, in reply to his letters, received through the mails, from Dubuque, answers purporting to come from the company, and dictated by its secretary, but written with a typewriter. Held, that such letters were properly received as *prima facie* evidence, as having come from the company. *Norwegian Plow Co. v. Munger*, 35 P. 11, 52 Kan. 371.

Where, in an action for specific performance of a sale made by an agent, defendant claimed that he did not authorize the sale, it was error to admit in evidence a letter written by his son empowering the agent to accept the offer made, when there was no evidence that the son was authorized to act for his father. *McGee v. Kroh*, 24 P. 424, 44 Kan. 301.

⁶⁵ *Thayer v. Hoffman*, 37 P. 125, 53 Kan. 723.

⁶⁶ *Cockrell v. Schmitt*, 94 P. 521, 20 Okl. 207, 129 Am. St. Rep. 737.

⁶⁷ *Brack v. Ochs*, 102 P. 479, 80 Kan. 433.

⁶⁸ *Navarre v. Honea*, 139 P. 310, 41 Okl. 480.

⁶⁹ *San Bois Coal Co. v. Resetz*, 143 P. 46, 43 Okl. 384.

contained therein, though not conclusive and rebuttable in action on guardian's bond.⁷⁰

An association is estopped to dispute the accuracy of its corporate minutes.⁷¹

DIVISION V.—PAROL AND EXTRINSIC EVIDENCE

§ 1020. Contracts

In the absence of fraud, duress, accident, or mistake, parol evidence is inadmissible to vary the terms of a valid unambiguous written contract.⁷²

⁷⁰ *Morgan v. American Surety Co. of New York*, 103 Kan. 491, 175 P. 675.

⁷¹ *Great Western Mfg. Co. v. Porter*, 172 P. 1018, 103 Kan. 84.

⁷² *Coyle v. Arkansas Valley & W. Ry. Co.*, 41 Okl. 648, 139 P. 294; *Garber v. Hauser*, 76 Okl. 292, 185 P. 436; *Colonial Jewelry Co. v. Bridges*, 144 P. 577, 43 Okl. 813; *German Stock Food Co. v. Miller*, 136 P. 426, 39 Okl. 634; *Gamble v. Riley*, 39 Okl. 363, 135 P. 390; *Leasure v. Hughes* (Okl.) 178 P. 696; *Spaulding v. Howard*, 51 Okl. 502, 152 P. 106; *J. M. Hoard, Jr., Co. v. Grand Rapids Showcase Co.* (Okl.) 173 P. 844; *Read v. Dodsworth*, 147 P. 799, 95 Kan. 117; *Knote v. Bense*, 146 P. 363, 94 Kan. 294; *Moorehead v. Davis*, 73 P. 1103, 13 Okl. 166; *Futoransky v. Pope*, 57 Okl. 755, 157 P. 905; *L. R. A. 1916F*, 548; *Samuelson v. Palmer*, 152 P. 627, 96 Kan. 587; *Kirkbride Drilling & Oil Co. v. Satterlee*, 121 P. 635, 32 Okl. 22; *Garrison v. Kress*, 91 P. 1130, 19 Okl. 433; *McNinch v. Northwest Tresher Co.*, 100 P. 524, 23 Okl. 386, 138 Am. St. Rep. 803.

Where parties after negotiations commit their agreements to an unambiguous writing, it is to be presumed that every stipulation and material matter has been included therein, and parol evidence of preceding conversations or negotiations in conflict with written contract are inadmissible. *Hudson v. Riley*, 104 Kan. 534, 180 P. 198; *Miller Bros v. McCall Co.*, 133 P. 183, 37 Okl. 634; *Liverpool & L. & G. Ins. Co. v. T. M. Richardson Lumber Co.*, 69 P. 938, 11 Okl. 585.

Where a contract rests partly in parol and partly in writing, the written part cannot be contradicted by parol evidence. *Hope v. Peck*, 132 P. 344, judgment vacated 38 Okl. 531, 134 P. 33.

Parol evidence is inadmissible to vary the terms of a subscription to the capital stock of a corporation. *Huster v. Newkirk Creamery & Ice Co.*, 141 P. 790, 42 Okl. 440, *L. R. A. 1915A*, 390.

The execution of a written contract supersedes all oral negotiations, and where a note is given as a subscription to a railroad, evidence of any representations made at the time of the execution is inadmissible to vary its conditions. *Guthrie & W. R. Co. v. Rhodes*, 19 Okl. 21, 91 P. 1119, 21 *L. R. A.* (N. S.) 490.

In an action for breach of a contract to sell land, testimony that the written contract did not express the agreement of the parties, and that both parties intended merely to make a proposition which either might accept or

An oral agreement altering an agreement in writing is not valid unless executed, and proof of its existence is not competent to vary the terms of the written instrument.⁷³

Parol evidence going to fix a definite time for delivery, where the written contract of sale specifies no time, is inadmissible.⁷⁴

Where a written instrument, in addition to acknowledgment of delivery, contains an agreement to do anything in respect to the property delivered, as to the latter matter it cannot be contradicted or varied by parol testimony.⁷⁵

Parol evidence has been held admissible to show that a written instrument is contemporaneous with another written instrument relating to the same transaction,⁷⁶ the relation of parties to a written contract,⁷⁷ acceptance of an option,⁷⁸ or the meaning of expressions in a tariff sheet.⁷⁹

refuse, was properly excluded as varying the written contract by parol. *Hampe v. Sage*, 125 P. 53, 87 Kan. 536.

An ambiguous contract may be supplemented by extrinsic evidence as to intent. *Kingfisher Mill & Elevator Co. v. Westbrook*, 79 Okl. 188, 192 P. 209.

⁷³ *Page v. Gelser Mfg. Co.*, 87 P. 851, 17 Okl. 110.

⁷⁴ *Cameron Coal & Mercantile Co. v. Universal Metal Co.*, 110 P. 720, 26 Okl. 615.

A Kansas case has held that parol evidence was admissible to supplement and explain the written provisions of a contract containing no time limit. *Kaul v. American Independent Tel. Co.*, 147 P. 1130, 95 Kan. 2.

⁷⁵ *Thompson v. Williams*, 1 P. 47, 30 Kan. 114.

⁷⁶ *Wichita University v. Schweiter*, 50 Kan. 672, 32 P. 352.

⁷⁷ Parol evidence of the relation of the parties to a written contract, showing their profession or business, where not in conflict therewith, is admissible. *Threlkeld v. Steward*, 103 P. 630, 24 Okl. 403, 138 Am. St. Rep. 888.

⁷⁸ Where defendant was in possession under a lease containing an option to purchase, evidence of defendant's parol acceptance of the option was competent to establish right to possession in the landlord's action to recover the same, but not to enforce the contract nor to try title. *Powers v. Myers*, 105 P. 674, 25 Okl. 165.

⁷⁹ Where the terms "compressed cotton, any quantity," and "uncompressed cotton, any quantity," are used in a tariff sheet without further amplifying words, the contemporaneous, practical construction placed thereon by the carrier and shippers as to baled cotton delivered for shipment in an uncompressed state with the understanding that it was to be compressed and then from the place of initial delivery transported to the place of original consignment, where there was no other promulgated tariff rate between the designated point concerning cotton shipments, is competent evidence in determining the meaning of the terms. *Chicago, R. I. & P. Ry. Co. v. Dodson & Williams*, 107 P. 921, 25 Okl. 822, reversing judgment, *Chicago, R. I. & P. Ry. Co. v. Dodson*, 94 P. 673, on rehearing.

It is admissible to show what caused a party to obligate himself in writing to test the question whether he is legally bound, as the writing imports, or whether he is wholly or partially freed from liability thereon.⁸⁰

§ 1021. — Insurance policies

A policy of insurance, if its terms are free from doubt, cannot, at the instance of one of the parties, be altered or contradicted by parol evidence, except in case of fraud, ambiguity, or mutual mistake.⁸¹

§ 1022. Notes and indorsements

The terms of a plain promissory note cannot be varied by parol.⁸²

Parol evidence contradicting indorsements on notes is generally inadmissible.⁸³

⁸⁰ Rice v. Rice, 165 P. 799, 101 Kan. 20.

⁸¹ Deming Inv. Co. v. Shawnee Fire Ins. Co., 83 P. 918, 16 Okl. 1, 4 L. R. A. (N. S.) 607; Brown v. Connecticut Fire Ins. Co., of Hartford, Conn., 52 Okl. 392, 153 P. 173; Gish v. Insurance Co. of North America, 87 P. 869, 16 Okl. 59, 13 L. R. A. (N. S.) 826.

An application for insurance was signed by the applicant without reading it, and he afterwards received the policy issued thereon, which he retained for several months without objection. Held, that in an action on a note given for a premium on the policy, no fraud in the procurement of the application being shown, the statements in the written application, could not be varied or contradicted by parol evidence. Walker v. State Ins. Co., 26 P. 718, 46 Kan. 312.

In action on insurance policy, it was error to admit parol evidence to vary the contract, unless the insurer was estopped to avail itself of the portions of the contract sought to be modified. Mercer v. Germania Fire Ins. Co., 171 P. 412, 88 Or. 410.

⁸² First Nat. Bank of Hays City v. Staab, 102 Kan. 369, 171 P. 3.

Where indorsements on a note give no notice of a denial of ownership urged as a defense, evidence of a parol agreement changing the terms of the note is inadmissible. Roebuck v. Citizens' Bank of Altoona, 100 P. 621, 79 Kan. 862.

Parol evidence is not admissible to show that a promissory note payable one day after date was to become due only after the sale of certain lots. Getto v. Binkert, 40 P. 925, 55 Kan. 617.

⁸³ An indorsement, "Pay B., or order, for account of C.," is a contract in writing, and not subject to contradiction by parol evidence. Armour Bros. Banking Co. v. Riley County Bank, 1 P. 506, 30 Kan. 163.

C., a stranger to a note, took the same from H., one of two makers, with an indorsement plainly written thereon: "Paid by H., this September 5, 1882 [the date of its maturity], and transferred to C." "Without recourse. H.,"—and there was no mistake or fraud in the transaction. Held that, in

While parol evidence will be received to explain that a note was executed by the maker for the accommodation of another, or to be held as collateral, it is inadmissible to defeat recovery thereon, where the payee, on the strength of the execution and delivery of the note, and at the request of the maker, extended credit to a third party.⁸⁴

When it is contended that the note sued on has been altered, fraudulently filled in, or is otherwise a misrepresentation of the contract, parol evidence is admissible.⁸⁵

Where notes are transferred from one bank to another by indorsement, evidence to show the contracts between the banks, as to the purpose of the transfer, is competent.⁸⁶

In an action on a note negotiated by the payee, parol evidence is admissible to show that the words "without recourse," written under name of payee, were intended to apply to him.⁸⁷

§ 1023. Deeds and mortgages

The execution of a deed, the deposit of same, and other acts concerning it, independent of its contents, may be shown by parol.⁸⁸

an action on the note by C.'s assignee, parol proof contradicting the indorsement and changing it to an unconditional transfer, was inadmissible. *Cross v. Hollister*, 28 P. 693, 47 Kan. 652.

⁸⁴ *Willoughby v. Ball*, 90 P. 1017, 18 Okl. 535.

⁸⁵ Where a soliciting agent for an insurance company agreed with applicant that he should have until April 23d to cancel the policy if he wished and have premium note returned, but fraudulently inserted in the application April 1st, the insured could show such facts in discharge of the note. *Phipps v. Union Mut. Ins. Co.*, 50 Okl. 135, 150 P. 1083.

Where purchaser of land agreed to transfer notes as part of price, and after transfer he contended that waiver of protest and notice of protest and guaranty of payment were written on notes after he signed them, evidence to show when the words were written was competent. *Forbes v. Madden*, 158 P. 850, 98 Kan. 559.

In the trial of an action for the reformation of a note, where one of the principal questions is to determine what were the actual terms of the contract as agreed upon by the parties, it is not error for the court to permit one of the parties, in giving his evidence, to tell all that was said at the time the contract was made between the parties, and also to state incidentally what was said by a third party, who assisted in making the contract, although his interest therein, if any, does not appear. *Wendt v. Diemer*, 58 P. 1003, 9 Kan. App. 481.

⁸⁶ *Northrup Nat. Bank v. Yates Center Nat. Bank*, 159 P. 403, 98 Kan. 563.

⁸⁷ *Leahmer v. McCollough*, 162 P. 297, 99 Kan. 451.

⁸⁸ *Morris v. Blazer*, 152 P. 767, 96 Kan. 466.

Parol evidence is admissible when the date given in a deed or mortgage is not the true date.⁸⁹

A bill of sale absolute on its face may, in an action by the vendee for possession of the property, be shown by parol to have been given as security.⁹⁰

The same is true of a deed absolute on its face, when it is in fact a mortgage.⁹¹

In determining whether a transaction was a sale or a mortgage, it is proper to inquire whether the consideration was adequate to induce a sale.⁹²

Where merchandise is traded for land and the difference paid in notes secured by chattel mortgages, and where the mortgagor sells the mortgaged property at public sale, and the mortgagee acting as clerk of the sale retains the proceeds, in an action for conversion of such proceeds, evidence of the entire transaction is admissible.⁹³

Where it is not clear from recitals whether a chattel mortgage

⁸⁹ Parol testimony is admissible to vary the date as expressed in a deed to land, when such date is in issue. *Randolph v. Mullen* (Okla.) 175 P. 512.

When a note and the mortgage securing the same do not set forth the true date of their execution, the actual time at which they were executed may be shown in an action to recover on the note and to foreclose the mortgage. *McFall v. Murray*, 45 P. 1100, 4 Kan. App. 554.

⁹⁰ *Butts v. Privett*, 14 P. 247, 36 Kan. 711.

Where plaintiff contends that he made an absolute sale of the property, and defendant claims that he accepted the bill of sale as a chattel mortgage, it is competent for plaintiff to show that defendant has sold the property, or a part thereof, as his own. *Eby v. Winters*, 33 P. 471, 51 Kan. 777.

⁹¹ *Balduff v. Griswold*, 60 P. 223, 9 Okl. 438; *Yingling v. Redwine*, 69 P. 810, 12 Okl. 64; *Wagg v. Herbert*, 92 P. 250, 19 Okl. 525, judgment affirmed 30 S. Ct. 218, 215 U. S. 546, 54 L. Ed. 321.

Parol evidence is admissible to show that an instrument reciting the receipt of the transfer of certain lots for a certain price, payable in lumber, and containing an agreement to reconvey to the grantors on payment of their bill to the grantee, and that the parties should sell the lots within 90 days, was intended for a mortgage, and not an absolute sale of the lots, rendering the grantee liable for the price. *Stith v. Peckham*, 46 P. 664, 4 Okl. 254.

Parol evidence is admissible to show that a deed absolute on its face was intended by the parties as a mortgage, that it was given for the security of a debt, and that a bond given by the grantee for a reconveyance, if the debt secured was paid, was intended by the parties as a defeasance, and not an ordinary bond for title. *Welseham v. Hocker*, 54 P. 464, 7 Okl. 250.

⁹² *Wagg v. Herbert*, 92 P. 250, 19 Okl. 525, judgment affirmed 30 S. Ct. 218, 215 U. S. 546, 54 L. Ed. 321.

⁹³ *Swain v. Archer*, 54 Okl. 731, 154 P. 644.

was intended to cover only jointly owned property of the two mortgagors or their separate property, parol evidence is admissible to show the circumstances of its execution, its subject-matter, the relation of the parties, and its object to ascertain the intent of the parties.⁹⁴

§ 1024. Tickets, bills of lading, and receipts

In an action by a purchaser of a ticket, showing the time of its expiration, and signed in ink by the purchaser, to recover for his expulsion from a train after the date of the expiration shown by the ticket, parol evidence of statements by the ticket agent contradictory of the contract contained in the ticket is inadmissible.⁹⁵

A recital in a bill of lading that a shipment covered thereby is made under a particular order for a car is evidence of the facts stated in the recital, but it is not conclusive evidence thereof, and may be rebutted.⁹⁶

A receipt is open to explanation and contradiction;⁹⁷ but a contract which is incorporated therein cannot be explained or contradicted, in the absence of fraud or mistake.⁹⁸

A deposit slip issued by a bank is but prima facie evidence of its receipt of the amount of deposit on the date shown by the slip, and is open to explanation of the conditions surrounding the deposit and circumstances under which it was given.⁹⁹

⁹⁴ *First Nat. Bank of Washington v. Haines*, 76 Okl. 301, 185 P. 441.

⁹⁵ *Rolfs v. Atchison, T. & S. F. Ry. Co.*, 71 P. 526, 66 Kan. 272.

⁹⁶ *Farmers' Grain & Mercantile Co. v. Union Pac. R. Co.*, 103 Kan. 527, 175 P. 599.

⁹⁷ *Kuykendall v. Lambert* (Okl.) 173 P. 657; *Ellicott v. Barnes*, 31 Kan. 170, 1 P. 767.

A receipt for money in full of all demands is always open to contradiction or explanation. The rule that parol evidence is inadmissible to contradict or vary writings does not apply to it. *Clark v. Marbourg*, 6 P. 548, 33 Kan. 471.

Ordinarily, the mere negligence of a person in signing a receipt without reading the same will not conclude such person, nor prevent explanation or denial of what it contains, and especially so if it appears that such person was induced to sign the paper by the misrepresentation or fraud of the other party. *Missouri Pac. Ry. Co. v. Lovelace*, 45 P. 590, 57 Kan. 195.

⁹⁸ *Robertson v. Vandeventer*, 51 Okl. 561, 152 P. 107. Parol evidence held admissible to show that a receipt given by a party who had contracted relative to the drilling of a well in Oklahoma and one in Kentucky related to the Oklahoma contract only. *Id.*

⁹⁹ *Citizens' Bank of Headrick v. Citizens' State Bank of Altus*, 75 Okl. 225, 182 P. 657; *American Nat. Bank of Stigler v. Funk* (Okl.) 172 P. 1078, L. R.

§ 1025. Release

Parol evidence is not admissible to show that a general release, releasing the defendant of all claims that the plaintiff had against him, was not intended to release a particular debt;¹ nor is it admissible to contradict or vary a written release of a portion of the property included in a chattel mortgage where the release is plain and unambiguous.²

§ 1026. Court records

The records of a court import absolute verity, and where jurisdiction over the person is conceded, parol testimony is inadmissible in habeas corpus to prove that what the record shows was done by the court was not in fact done.³

In the absence of ambiguity, oral evidence of the character of the claim is inadmissible to supplement the record of an action wherein a judgment was obtained against a bankrupt pending bankruptcy proceedings.⁴

The records of the district court clerk, showing the issuance of an execution, cannot be impeached by evidence of a declaration by the deputy clerk that no execution had been issued.⁵

A record in a case, showing that lands were duly appraised before being sold by the sheriff, cannot be impeached by parol evidence in a collateral proceeding.⁶

Where a former judgment is pleaded in estoppel, parol evidence.

A. 1918F, 1137; *American Home Life Ins. Co. v. Citizens' State Bank* (Okla.) 168 P. 437, L. R. A. 1918B, 296.

In an action on a note, against one who had agreed to indorse it and had made a special deposit in the plaintiff bank to secure performance of his agreement, the defendant's testimony as to what was said when the deposit was made was not inadmissible as an attempt to vary the terms of the written contract. *First State Bank of Indianola v. Menasco*, 55 Okl. 748, 155 P. 261.

¹ *Curro v. Altieri*, 66 N. Y. S. 499, 32 Misc. Rep. 690.

² *Drumm-Flato Commission Co. v. Barnard*, 72 P. 257, 66 Kan. 568.

³ *In re Macke*, 1 P. 785, 31 Kan. 54.

The Supreme Court will not, on an application, for habeas corpus, permit the entry of a judgment of the district court, on its face regular, to be overthrown by parol evidence that such entry was ordered by one who had ceased to be a judge of that court, and who assumed to act outside of his district. *In re Watson*, Petitioner, 30 Kan. 753, 1 P. 775.

⁴ *Chambers v. Kirk*, 139 P. 986, 41 Okl. 696.

⁵ *Sparks v. Martin*, 150 P. 532, 96 Kan. 282, Ann. Cas. 1918C, 324.

⁶ *Pritchard v. Madren*, 2 P. 691, 31 Kan. 33.

not contradicting the record, is admissible to show the facts upon which it was based.⁷

Alteration of a record may be shown by parol.⁸

Where a party has introduced a judgment of a justice of the peace in evidence the opposite party may introduce the bill of particulars and the note on which the judgment was based to show that the justice was without jurisdiction.⁹

§ 1027. Ordinances

The terms of an unambiguous city ordinance cannot be varied by parol evidence.¹⁰

§ 1028. Memoranda and incomplete contracts

Where an oral agreement is in part reduced to writing and the latter is not a final statement of the entire transaction, parol evidence, not inconsistent with such written contract, is admissible.¹¹

⁷ *Chambers v. Land Credit Trust Co.*, 139 P. 1178, 92 Kan. 30, rehearing denied 142 P. 248, 92 Kan. 1032.

Where the record fails to show the agreement on which the dismissal of a suit, which is claimed as *res judicata*, is based, extrinsic evidence may be resorted to. *Turner v. Fleming*, 130 P. 551, 37 Okl. 75, 45 L. R. A. (N. S.) 265, Ann. Cas. 1915B, 831.

A question as to what rights have been acquired by condemnation proceedings which include the trial of an appeal from the award by commissioners depends upon what was in fact adjudicated, and, though the record may not be contradicted, other evidence consistent with it, including parol evidence, may be received to show what was involved, considered, and established. *Stone v. Missouri Pac. Ry. Co.*, 90 P. 251, 75 Kan. 600.

Where a defendant relies upon a proceeding and judgment of the district court as *res judicata*, and not upon an arbitration, the court properly refused to allow one of the arbitrators to testify that the subject-matter was not considered by such arbitrators. *Repstine v. Nettleton*, 49 P. 617, 6 Kan. App. 919.

⁸ *Sackett v. Rose*, 55 Okl. 398, 154 P. 1177, L. R. A. 1916D, 820.

⁹ *Miller v. Mills*, 122 P. 671, 32 Okl. 388.

¹⁰ The terms of an unambiguous city ordinance granting a franchise to a railroad company to use a city street cannot be varied by evidence of a parol promise by the grantee to pay damages to an adjacent owner. *Marshall v. Wichita & M. V. R. Co.*, 152 P. 634, 96 Kan. 470.

¹¹ *Jesse French Piano & Organ Co. v. Bodovitz* (Okl.) 174 P. 765; *O. K. Transfer & Storage Co. v. Neill*, 59 Okl. 291, 159 P. 272, L. R. A. 1917A, 58; *Smith v. Bond*, 56 Okl. 112, 155 P. 1116; *Rawlings v. Ufer*, 61 Okl. 299, 161 P. 183.

Parol evidence that the parties to an architect's contract to furnish plans for a school building understood that the building should cost not exceeding

A memorandum, made by one of the parties to an oral contract, reciting the terms of the agreement, does not preclude oral evidence offered by the other party to show what the contract was.¹²

\$10,000 held properly admitted, where the contract was incomplete. *Bair v. School Dist. No. 141, Smith County*, 146 P. 347, 94 Kan. 144.

Though parol evidence cannot be received to vary or contradict a complete written contract, it is applicable to a brief memorandum on its face manifestly incomplete to show the complete agreement. *Heskett v. Border Queen Mill & Elevator Co.*, 105 P. 432, 81 Kan. 356.

Where a writing is incomplete, and shows that all the stipulations between the parties are not included in it, parol proof of the omitted parts, not inconsistent with the written portions, may be introduced to supplement that which is written. *Evans v. McElfresh*, 116 P. 612, 85 Kan. 389.

A written memorandum signed by both parties to a sale of land, merely stating where it is located, and when and how the payments shall be made, will not preclude evidence of parol contemporaneous statements of the vendor, relied on by the vendee, of the quality and condition of the land, and improvements thereon. *Schoen v. Sunderland*, 18 P. 913, 39 Kan. 758.

Where an agreement to pasture cattle did not state the age of the cattle, nor whether they were quiet, parol evidence is admissible to show that the owner represented the cattle to be such as could be kept within inclosures. *Erie Cattle Co. v. Guthrie*, 44 P. 984, 56 Kan. 754.

A written contract for the sale of a threshing machine contained a general warranty that it was well made and with proper management capable of doing the work for which it was made and sold. There was nothing in the contract to show the nature of the machine or the purpose for which it was made and sold. Held, that parol evidence was admissible to show that it was made to be used to thresh all kinds of grain. *Nichols & Shepard Co. v. Maxson*, 76 Kan. 607, 92 P. 545.

Where the interest of a purchaser at a sheriff's sale is transferred to another, to whom the sheriff's deed is made, and the deed, otherwise in proper form, does not contain a recital of such transfer, the fact may be shown by extrinsic evidence. *Austin v. Ballard*, 114 P. 1084, 84 Kan. 619.

A subsequent agreement reciting a misunderstanding as to the original contract, and covering matters not embraced by it, held not to preclude either party from showing that certain property wrongfully invoiced as personality and not mentioned in the latter contract, was to be regarded as realty. *L. & M. Mercantile Co. v. Wimer*, 146 P. 1162, 94 Kan. 573.

In an action against a surety upon a recognizance conditioned that "defendant will be and appear before said court * * * and not depart without leave," in the absence of journal entries showing defendant to have been present during the whole trial and sentence, the surety may show this by parol evidence. *Moorehead v. State*, 16 P. 957, 38 Kan. 489.

Directions by depositor accompanying deposit, as to credit to be given, held provable. *Fidelity & Deposit Co. of Maryland v. State Bank of Holton*, 139 P. 370, 91 Kan. 740.

¹² *Carter Oil Co. v. Garr (Ok.)* 174 P. 498.

§ 1029. Minutes

Oral evidence is admissible to show that something happened at a corporation meeting about which the record is silent, or incorrect in detail.¹³

A record of the proceedings of the county commissioners which the county clerk is required to keep is conclusive and cannot be varied by parol evidence in a collateral proceeding.¹⁴

The journals of the Legislature, showing that a bill has passed, cannot be contradicted by the stenographic notes of one of the official reporters to the effect that the bill did not pass, but was indefinitely postponed.¹⁵

§ 1030. Wills

Extrinsic evidence is admissible to explain latent ambiguities in a will and to perfect imperfect descriptions of beneficiaries or subject-matter of gifts, but no evidence is admissible to vary the testator's express intent, which must be decided from the will itself, assisted by such extrinsic evidence, and, where the evidence is to be employed merely as an aid to the court in determining the intent and that intent cannot be found, the gift must lapse.¹⁶

¹³ Parol evidence is admissible to show that a motion was carried at an annual school meeting to sell certain lumber, where the minutes, kept under Rev. Laws 1910, § 7800, fail to mention same and show on their face that they are a mere abstract of what occurred at the meeting. *Gilmer v. School Dist. No. 28, Noble County*, 136 P. 1086, 41 Okl. 12, 50 L. R. A. (N. S.) 99.

Parol evidence is admissible to show that a resolution of the board of directors of a railroad company, entered on the record of their proceedings, did not correctly recite the amount of money found due and ordered to be paid to one of its officers. *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 15 P. 544, 37 Kan. 606.

¹⁴ *Cobb v. Alberti*, 38 Okl. 296, 132 P. 1075.

¹⁵ *McNeal v. Ritterbusch*, 116 P. 778, 29 Okl. 223.

¹⁶ *In re Dominici's Estate*, 90 P. 448, 151 Cal. 181.

Under Civ. Code, §§ 1318, 1340, where the meaning of a will is clear on its face and no latent ambiguity appears, there can be no evidence of extrinsic circumstances to show that the testator desired to do something not expressed. *In re Willson's Estate*, 153 P. 927, 171 Cal. 449.

Where extrinsic evidence is admissible to aid in the construction of doubtful language of a will, the evidence is limited to such purpose, and, under Civ. Code, § 1340, it may not show a different intent or a different object from that disclosed by the will itself. *In re Donnellan's Estate*, 127 P. 166, 164 Cal. 14.

Testatrix provided in her will that "two deeds" should be handed to her husband, and that after his death they should go to another. Held, that parol

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A latent ambiguity may arise either when a will names a person as the object of a gift or a thing as the subject of it, and there are two persons or things that answer the name or description, or

evidence to show what deeds were meant is inadmissible, as explaining a patent ambiguity. In *re Young's Estate*, 55 P. 1011, 123 Cal. 337.

Certain words in a will held to involve no latent ambiguity to be resolved under Civ. Code, § 1340, but to be construed in view of the circumstances under which the will was made, excluding testator's oral declarations pursuant to section 1318. In *re Womersley's Estate*, 127 P. 645, 164 Cal. 85.

Testator gave his residuary estate to his sister J. and to his nephew S. "and his sister, my niece, all residing in" L., Germany. By codicil he recited that his sister J. was dead, and gave her share to "the other two residuary legatees therein named, S., and to his sister, my niece, whose name is K. and whose residence is S., Germany, share and share alike." S. had an only sister, who, at the time of the making of the will and codicil, was a resident of L., and the testator had a niece, the married daughter of another sister, whose name was K., and whose residence was S. Held, that the will presented a latent ambiguity within Civ. Code, § 1340, permitting extrinsic evidence to correct imperfect descriptions in wills, etc., and not a patent ambiguity within section 1318, requiring the court to ascertain the intention of a testator from the words of his will and the circumstances under which it was made. In *re Dominici's Estate*, 90 P. 448, 151 Cal. 181.

Evidence that testatrix, before making her will, in which she devised land in a certain county to her grandchildren, had sold the land, and had not owned any other land so situated up to the time of her death, is inadmissible to show a mistake. In *re Callaghan's Estate*, 51 P. 860, 119 Cal. 571, 39 L. R. A. 689.

Under Civ. Code, § 1318, providing that, in case of uncertainty arising upon the face of a will as to the application of any of its provisions the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations, the question whether a devise by a testatrix of the residue of her estate to her three nephews named, in equal proportions, was intended as a devise to the nephews as a class, so that, upon the decease of one of them without lineal descendants, the estate would descend to the survivors of the class, is an issue of fact, upon which parol evidence of the circumstances attending the making of the devise is admissible. In *re Langdon's Estate*, 62 P. 73, 129 Cal. 451.

The statute is a limitation on the general rule that, in case of a latent ambiguity in a will, the same may be removed by any evidence or declarations of testator, and it will not be extended beyond its actual language, and applies only to the incidental utterances or declarations of intent as distinguished from specific instructions given to an attorney in drawing a will. In *re Dominici's Estate*, 90 P. 448, 151 Cal. 181.

Where there are two or more persons or things measuring up to the description and conditions of a will, or where no person or thing answers the declarations and descriptions, extrinsic evidence is admissible to remove the ambiguity. In *re Donnellan's Estate*, 127 P. 166, 164 Cal. 14.

Bequest to "the Woman's Christian Temperance Union of Los Angeles," which did not exist, in view of other existing corporations of similar name,

when the will contains a misdescription, as where there is no such person or thing in existence, or if in existence is not the one intended, or the thing does not belong to testator.¹⁷

Declarations of the testator, which are not a part of the *res gestæ*, are inadmissible to show her testamentary intention, whether made before or after the will.¹⁸

Where a will recited that testator made it as his last will, showing on its face he signed with testamentary intent, though his signature was below that of the subscribing witnesses, evidence of the valid execution is admissible despite the objection that it was to show testamentary intent.¹⁹

In construing a will, a former will which was revoked cannot be considered.²⁰

§ 1031. Surety and guaranty

Parol evidence is competent to show that one whose name appears on a promissory note as a joint maker signed such note only as a surety.²¹

held ambiguous within Civ. Code, § 1340, and, on extrinsic evidence, bequest to "the Woman's Christian Temperance Union of Southern California." In *re Little's Estate*, 170 Cal. 52, 148 P. 194.

Evidence as to the existence and identity of the person named in a distribution decree, and in a will, entitled to an estate subject to a conditional limitation, is admissible. *Taylor v. McCowen*, 99 P. 351, 154 Cal. 798.

¹⁷ *Taylor v. McCowen*, 99 P. 351, 154 Cal. 798.

¹⁸ In *re Snowball's Estate*, 107 P. 598, 157 Cal. 301.

Evidence of declarations made by testator after the execution of the will is inadmissible on the question as to who were intended as testator's nieces. In *re Holt's Estate*, 79 P. 585, 146 Cal. 77.

In action by servant of testatrix against executrix for compensation, defended on ground that bequest to servant in will was in lieu of compensation, a letter from testatrix to executrix was inadmissible for purpose of explaining bequest, or of qualifying effect thereof, being hearsay. *White v. Deering*, 38 Cal. App. 433, 177 P. 516.

Evidence of what the testator said, just before his death, to his executor, as to what was intended by the will, and who wrote it, the declarations having been made five years after the making of the will, is inadmissible in a proceeding to construe the will. In *re Gilmore's Estate*, 22 P. 655, 81 Cal. 240.

¹⁹ In *re Dutcher's Estate*, 157 P. 242, 172 Cal. 488.

²⁰ In *re Vanderhurst's Estate*, 154 P. 5, 171 Cal. 553.

²¹ *Stovall v. Adair*, 60 P. 282, 9 Okl. 620.

Under Rev. Laws 1910, § 1051, held that plaintiff was entitled to show that, though he appeared to be a principal, he was in fact a surety on a note. *Wills v. Fuller*, 47 Okl. 720, 150 P. 693.

Where a stranger to a note writes his name across the back, parol evidence is admissible to vary his apparent liability as guarantor by showing the agreement and understanding of the parties at the time of the indorsement.²²

In an action on a guaranty of a contract of a consignee, conversations between the consignor and the consignee prior to the guaranty are inadmissible to enlarge the guarantor's liability.²³

Where a stranger, who intended to become a guarantor of a note, placed his name by mistake on the face of the note, the holder may show the facts by oral evidence, for the purpose of holding the surety on his original undertaking.²⁴

Where, in an action by the holder of a negotiable note against one whose name is written on the back below the indorsement of the payee, it is alleged that plaintiff acquired the note by purchase before maturity from the payee, and that such person whose signature appears after that of the payee on the back of the note is in fact a joint maker thereof, parol evidence is admissible to prove the nature and extent of the contract entered into by such apparent indorser.²⁵

§ 1032. Agency

A principal may sue on a written contract made by his agent in his own name, and evidence may be admitted to show that the principal was the real party in the action, notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol evidence.²⁶ Such evidence is admissible to bind the principals or give the benefit of the contract to them,²⁷ or, to

²² Fullerton v. Hill, 29 P. 583, 48 Kan. 558, 18 L. R. A. 33.

²³ Pease Piano Co. v. Matthews, 48 P. 449, 5 Kan. App. 370.

²⁴ Miller v. Kenigsberg, 57 P. 246, 9 Kan. App. 29.

²⁵ Commercial Nat. Bank of Steubenville, Ohio, v. Atkinson, 62 Kan. 775, 64 P. 617.

²⁶ Rankin v. Blaine County Bank, 93 P. 536, 20 Okl. 68, 18 L. R. A. (N. S.) 512.

²⁷ Nutt v. Humphrey, 3 P. 787, 32 Kan. 100.

In an action on a note signed by a corporation with the names of the president and secretary, evidence is admissible to show that the note was the obligation of the company, and not of the president and secretary individually. Western Grocer Co. v. Lackman, 88 P. 527, 75 Kan. 34.

Where the note is executed by the board of trustees of a corporation, extrinsic evidence is admissible between the original parties to show that such trustees executed the note in their official capacity, with the intention of all

show that in a lease executed by an agent a mistake was made as to the principals named.²⁸

In action on note to a trustee, which specifically names the beneficiary if there is no doubt or ambiguity as to his identity, parol evidence to show that another was intended as beneficiary is inadmissible.²⁹

Parol evidence is admissible to show the authority of an agent acting for the principal in the creation of a written instrument.³⁰

the parties to make it the obligation of the corporation. *Shaffer v. Hoen-schild*, 43 P. 979, 2 Kan. App. 518.

In an action on a corporation note by a holder who accepted the same as collateral with full knowledge of all the facts connected with its execution, extrinsic evidence is admissible to show that the directors who wrote their names on the back signed simply as officers of the corporation, and with the intention to bind it only. *Kline v. Bank of Tescott*, 31 P. 688, 50 Kan. 91, 34 Am. St. Rep. 107, 18 L. R. A. 533.

In an action by the payee on a note made by defendants as president and secretary of a certain association, the collateral mortgage, and also parol evidence, are admissible to show that it was the understanding of all the parties that the note should be the obligation of the association. *Benham v. Smith*, 36 P. 997, 53 Kan. 495.

In a suit on note signed by defendants as members of board of directors of a mining company, the admission of oral evidence to show their intention to sign note for the company and not individually, in view of Gen. St. 1915, § 6590, held erroneous. *Lonnon v. Batchman*, 173 P. 415, 103 Kan. 266.

²⁸ *Olds v. Conger*, 32 P. 337, 1 Okl. 232.

²⁹ *Roberts v. Morgan*, 56 Okl. 513, 156 P. 319.

³⁰ In an action to recover of the lender the balance of a proposed loan to plaintiff on his note and mortgage, it was shown that plaintiff signed an application for a loan, which was forwarded to the lender by its agent, with a statement that plaintiff had agreed to the retention of a part of the loan until certain conditions had been complied with, and defendant alleged that there had been no performance of these conditions. Plaintiff denied having made any such agreement. Held, that the question was whether the lender's agent had authority as plaintiff's agent to make such statement, and parol evidence is admissible to show such authority, though the application was in writing. *Kansas Loan & Trust Co. v. Love*, 25 P. 191, 45 Kan. 127.

Between nominal drawer of dishonored sight draft, the drawee for whom it was deposited for collection, and bank honoring depositor's checks in anticipation of collection, parol evidence was competent, in bank's action against depositors, to show relationship of parties. *Lyon County State Bank v. Schaffer*, 102 Kan. 868, 171 P. 1159.

(942)

§ 1033. Consideration

Where it appears from a writing that the statement of consideration therein is contractual, and not merely a matter of recital, the consideration is not open to contradiction by parol evidence.³¹

In an action on a note, parol evidence is admissible to show want or failure of consideration.³² Likewise, evidence that a note

³¹ *Millich v. Armour Packing Co.*, 56 P. 1, 60 Kan. 229.

A note, stating that it is for credit granted to a third person on threshing machinery, cannot be contradicted by parol evidence as to the consideration, in the absence of fraud or mistake. *McNinch v. Northwest Thresher Co.*, 100 P. 524, 23 Okl. 386, 138 Am. St. Rep. 803.

Under *Wilson's Rev. & Ann. St. 1903*, § 781, declaring that the execution of a contract in writing, whether required to be written or not, supersedes all oral negotiations, it cannot be shown that a note, reciting that it was in consideration of the benefits accruing from the construction of a railroad through a city, was upon the additional condition that the depot at such city should be located at a given point. *Southard v. Arkansas Valley & W. Ry. Co.*, 103 P. 750, 24 Okl. 408.

A release of a right to sue for damages, made without fraud, unambiguous, reasonable, and plain, but containing no agreement for future employment, cannot be supplemented by parol proof of such an agreement, though it be asserted that such an agreement was the inducement for the release. *Atchison, T. & S. F. Ry. Co. v. Vanordstrand*, 73 P. 113, 67 Kan. 386; *Millich v. Armour Packing Co.*, 56 P. 1, 60 Kan. 229.

That the deed recited a consideration did not render evidence of the real consideration incompetent. *Perry v. Jones*, 48 Okl. 362, 150 P. 168.

Parol evidence as to true consideration for deed, the situation of the parties, and the circumstances under which instruments to be considered together with the deed were executed, held admissible. *Roseman v. Nienaber*, 100 Kan. 174, 166 P. 491.

Parol agreement of grantees to support grantor is inadmissible to vary deed reciting consideration of \$1,000. *Wilson v. Highley*, 157 P. 411, 98 Kan. 154.

Where the defendant contracted in writing to convey land to the plaintiff for cash, plaintiff could not recover for breach of the contract by proof of an oral agreement to accept part cash, and a mortgage for the balance. *Baker v. Haswell & Taylor*, 128 P. 1086, 36 Okl. 429.

³² *Aultman Threshing & Engine Co. v. Knoll*, 71 Kan. 109, 79 P. 1074.

Between the original parties to a note the consideration may always be inquired into. *Deming Inv. Co. v. Wallace*, 85 P. 139, 73 Kan. 291.

Under the statute a note and the contracts under which it was received are not conclusive as to consideration and the purpose for which the instruments were given. *Bank of Commerce v. Webster* (Okl.) 172 P. 943; *Rev. Laws 1910*, §§ 4066, 4078.

Parol evidence to show partial failure of consideration of a note is admissible to show what took place at the time the note was made. *Jesse French Piano & Organ Co. v. Bodovitz* (Okl.) 174 P. 765.

In action on note, evidence to support partial want of consideration in

was given for accommodation without consideration may be shown without violating the rule that oral evidence is inadmissible to vary or contradict the terms of a written contract.³³

The rule that parol evidence cannot be received to vary the terms of a written contract does not apply to a check given in payment for property and reciting the consideration for which it was given, unless the parties intended that the check should contain the final contract between them as to the sale of the property.³⁴

Where the officers of a corporation, under an agreement to divide the assets, execute deeds of corporate property to themselves as individuals, evidence of the consideration therefor, even though full and complete, and without fraud on the corporation, will not be admissible in an action to quiet title founded on such deeds.³⁵

§ 1034. Delivery

The admission of oral evidence is proper to explain possession and prove that delivery of a written contract was conditional on the happening of some other event,³⁶ acts, words, and circumstances relevant to the delivery of a deed may be shown by parol.³⁷

§ 1035. Mistake

Where mutual mistake in a written contract is alleged, and reformation thereof is asked, oral evidence may be introduced to prove mistake and contract as it should have been.³⁸

that note was greater than balance for which it was given does not contravene rule that terms of unambiguous instrument cannot be varied by parol. *Holland Banking Co. v. Dicks* (Okla.) 170 P. 253.

³³ *First Nat. Bank of Garden City v. Stroup*, 104 Kan. 11, 177 P. 836.

On foreclosure between immediate parties to a note and mortgage, parol evidence is admissible under Gen. St. 1915, § 6543, to show a failure of consideration, or that they were given merely as an accommodation to the payee. *Rice v. Rice*, 165 P. 799, 101 Kan. 20.

³⁴ *Griffith v. Marsh*, 118 P. 879, 85 Kan. 693.

³⁵ *Barnes v. Lynch*, 59 P. 995, 9 Okl. 11, 156.

³⁶ *Williamson v. Scully*, 52 Okl. 531, 152 P. 839.

³⁷ *Johnson v. Craig*, 130 P. 581, 37 Okl. 378.

³⁸ *Minneapolis Steel & Machinery Co. v. Schalansky*, 165 P. 289, 100 Kan. 562; *Proctor v. Fife*, 155 P. 931, 97 Kan. 431.

In a purchaser's action for a deficiency in the amount of land conveyed, evidence of the oral negotiations between the parties was admissible to show mutual mistake as to the quantity of land. *Maffet v. Schaar*, 131 P. 589, 89 Kan. 403.

A. notified B. that a round sum was due on an account which had not been mutually examined, which was, by mistake, much smaller than it should have

Thus parol evidence is admissible to show that a signature to a bond was misplaced by mistake.³⁹

§ 1036. Fraud—Duress

Where an instrument is attacked for fraud, all the circumstances leading up to its execution, as well as the parties' motives and intentions, may be shown by parol.⁴⁰

been, and received B.'s note therefor, giving a receipt in full. Held in an action on the original account, to which B. pleaded an account stated, that A. might show by reply containing a general denial that there had been no settlement, and that the receipt was given under a mistake. *Clark v. Marbourg*, 6 P. 548, 33 Kan. 471.

³⁹ *Craig v. Spencer*, 56 Okl. 259, 156 P. 172.

⁴⁰ *American Bankers' Ins. Co. v. Hopkins* (Okl.) 169 P. 489; *McLean v. Southwestern Casualty Ins. Co. of Oklahoma*, 61 Okl. 79, 159 P. 660; *Shuler v. Hall*, 141 P. 280, 42 Okl. 325; *Colonial Jewelry Co. v. Jones*, 127 P. 405, 36 Okl. 788; *Hart v. Haynes*, 150 P. 530, 96 Kan. 262; *Outcault Advertising Co. v. Smalley*, 101 Kan. 645, 168 P. 677; *Nickle v. Reeder* (Okl.) 166 P. 895.

A party cannot hide behind the contract procured in general scheme of his misconduct by asserting that all misrepresentations, whether false or otherwise, made, previous to a written contract merged therein. *Hooker v. Wilson* (Okl.) 169 P. 1097.

In the absence of misrepresentation or fraud, a party is bound by a written contract, though he was ignorant of its contents; but, where the signature was induced by misrepresentations as to its contents and he was ignorant thereof, he may introduce parol evidence of contemporaneous acts and conversations to show the true nature of the agreement. *T. & H. Smith & Co. v. Thesmann*, 93 P. 977, 20 Okl. 133, 15 Ann. Cas. 1161.

In an action to avoid a written contract of insurance and to recover money paid thereon, on the ground that the party seeking to avoid and recover the payment had no opportunity to read the contract and was induced to execute the same by false and fraudulent representations, the rule that parol evidence will not be received of conversations between the contracting parties prior to the signing of the contract for the purpose of disputing, altering, or changing the terms of the contract does not obtain. *State Life Ins. Co. v. Johnson*, 85 P. 597, 73 Kan. 567.

Where a defense was that defendant did not have fair opportunity to read the contract he signed, oral testimony that plaintiff assured defendant he might countermand order was properly admitted, where jury were instructed that contract was binding unless defendant did not have a fair opportunity to read it. *Griesa v. Thomas*, 161 P. 670, 99 Kan. 335.

In a purchaser's action for a deficiency in the amount of land conveyed, evidence of the oral negotiations between the parties was admissible to show misrepresentations by the vendor as to the quantity of land. *Maffet v. Schaar*, 131 P. 589, 89 Kan. 403.

A bill of sale absolute on its face may be shown, by creditors attacking it as fraudulent, to be other than it purports to be. *McCluskey v. Cubbison*, 57 P. 496, 8 Kan. App. 857.

Where a parol contract for the purchase of goods was made between the

Parol evidence is admissible to show that the consideration of a contract was illegal or that the contract was made in furtherance of objects forbidden by statute, common law, or general policy of the law;⁴¹ that the execution of a note was procured through fraud;⁴² or to show that a purported deed or contract is not in fact that made by the parties—the object being to show that by mistake or fraud a different deed or contract was made than the one inquired about.⁴³

Though the buyer cannot contradict the writing proposing the sale, he may show fraudulent representations which induced its execution.⁴⁴

The genuine signature and acknowledgment to an instrument indicates such a verity that it cannot be resisted or denied by doubtful and unsatisfactory statements and circumstances.⁴⁵

§ 1037. Separate or subsequent oral contract

Parol evidence is inadmissible to contradict or vary the terms of an unambiguous written instrument, by showing an oral agreement relating thereto which was made prior to, or contemporaneous with, the written instrument.⁴⁶

parties, but at the same time an instrument in writing purporting to be the contract, but which, as to prices, was never intended by the parties to be the contract, was signed by the purchaser, and such writing was made to differ, as to prices, from the real contract, because of an illegal combination previously entered into on the part of the seller with other dealers in the same kind of goods to enhance prices, the writing cannot be enforced as to the prices therein mentioned, by the seller, against the other party, and as against the real contract of the parties, although such real contract exists only in parol. *St. Louis Wire Mill Co. v. Consolidated Barb-Wire Co.*, 27 P. 118, 46 Kan. 773.

⁴¹ *Howard v. Farrar*, 114 P. 695, 28 Okl. 490; *Friend v. Miller*, 34 P. 397, 52 Kan. 139, 39 Am. St. Rep. 340.

⁴² *White v. Smith*, 98 P. 766, 79 Kan. 96; *Deming Inv. Co. v. Wallace*, 85 P. 139, 73 Kan. 291.

⁴³ *American Trust Co. v. Chitty*, 129 P. 51, 36 Okl. 479.

⁴⁴ *Fisher Mach. Works Co. v. Singletary*, 104 Kan. 460, 179 P. 328.

Where a life insurance policy is contested for fraud, parol testimony as to statements inducing the contract is not inadmissible as tending to vary terms of written application and medical examinations signed by insured. *American Bankers' Ins. Co. v. Hopkins* (Okl.) 169 P. 489.

⁴⁵ Evidence that a wife "did not want to sign a mortgage on her homestead," that "she was forced to sign the mortgage," etc., is incompetent. *Gabbey v. Forgeus*, 15 P. 866, 38 Kan. 62.

⁴⁶ *First Nat. Bank of Blanchard v. Richburg*, 75 Okl. 1, 181 P. 145; *Neverman v. Bank of Cass County, Plattsmouth, Neb.*, 78 P. 382, 14 Okl. 417;

The terms of a railroad ticket which are neither ambiguous nor doubtful, which has been accepted and used, cannot be varied by parol evidence.⁴⁷

Early v. King, 38 Okl. 206, 135 P. 286; Barricklow v. Boice, 50 Okl. 260, 150 P. 1094; Western Silo Co. v. Stobaugh, 75 Okl. 73, 182 P. 670; Reinheimer v. Mays, 75 Okl. 131, 182 P. 230; Emerson-Brantingham Co. v. Lyons, 172 P. 513, 102 Kan. 733.

Particular agreements.—In the absence of fraud, accident, or mistake, no contemporaneous parol condition or consideration may be ingrafted into a contract to pay a railway bonus. Coyle v. Arkansas Valley & W. Ry. Co., 41 Okl. 648, 139 P. 294.

Where a written order duly signed is given by the buyer at time of sale, and he later, on delivery of the article, gives a note for the price, oral testimony is inadmissible to vary the written order. Hollister v. National Cash Register Co., 55 Okl. 214, 154 P. 1157.

Where assignors and creditors orally discussed conditions which deed of assignment should contain, and it was thereafter executed and acted upon, and creditors received benefits provided therein, an instrument is plain and unambiguous, the court, in absence of fraud or mistake, properly rejected oral testimony as to conditions orally agreed upon prior to its execution and delivery. First Nat. Bank of Blanchard v. Richburg, 75 Okl. 1, 181 P. 145.

Under Wilson's Rev. & Ann. St. 1903, § 781 (Rev. Laws 1910, § 942), providing that the execution of a written contract supersedes all preceding or accompanying oral negotiations, plaintiff could not recover damages for breach of parol covenants made prior to or simultaneously with the execution of the written contract upon which plaintiff relied. Oland v. Malson, 39 Okl. 456, 135 P. 1055.

Where a warranty deed is executed to secure payment of certain services, and thereafter a deed of defeasance is executed and accepted, they constitute a complete written contract, superseding a previous oral contract. Moore v. Hopkins, 114 P. 1066, 84 Kan. 469.

Where the entire agreement for the sale and purchase of a farm consists of letters, and the deed is executed, delivered, and accepted as the result of such correspondence, and without any other contract, such correspondence constitutes a contract contemporaneous with the deed, and by such a con-

⁴⁷ Walker v. Price, 62 P. 1001, 62 Kan. 327, 84 Am. St. Rep. 392.

Parol evidence held admissible—Particular cases.—Parol evidence is admissible to show that a written release given upon settlement for damages by fire, caused by negligence of a railroad company, was modified by a contemporaneous written agreement providing that the claimant should have the amount of an insurance policy on the property destroyed in addition to the sum paid by the railroad company. Farmers' Alliance Ins. Co. v. Hanks, 83 Kan. 96, 110 P. 99.

It is competent to prove a verbal contract by a local agent to deliver a car of freight to a connecting carrier, though the bill of lading, in which the named destination was the connecting point, provided that all prior understandings were merged in the written agreement. Atchison, T. & S. F. Ry. Co. v. McCluskey, 30 Okl. 711, 120 P. 985.

This is a rule of substantive law as well as one of evidence.⁴⁸

A parol contract may be made between the parties contemporaneously with the written agreement if it is separate and independent

tract the grantor may reserve the immature crops. *Surface v. Leffingwell*, 51 P. 73, 6 Kan. App. 319.

Where one having a mortgage on wheat took possession after it was harvested, in an action by the mortgagor to recover the same, testimony that it was agreed that the mortgagee would not disturb the wheat until it was threshed was inadmissible, as an attempt to incorporate in a written instrument a verbal agreement contemporaneous with its execution. *Robleson v. Royce*, 66 P. 646, 63 Kan. 886.

Where a deed reserves a temporary easement in the premises, parol evidence cannot be received to enlarge such reservation into an agreement to dedicate the property to the public use. *City of Kansas City v. Banks*, 61 P. 333, 9 Kan. App. 885.

Where broker's contract providing for commission for finding purchaser was complete and unambiguous, it could not be contradicted or modified by parol evidence of prior oral agreement that no commission was to be paid on sale to particular person. *Buxton v. Colver*, 171 P. 1158, 102 Kan. 871.

Evidence of a parol agreement which was made at the time of the execution of a mortgage is inadmissible to show when the debt should become due and the mortgage be subject to foreclosure. *Edgar v. Golden*, 36 Or. 448, 60 P. 2.

— *Pledge*.—In a suit for conversion of a ring pledged as collateral for a note, where the contract of pledge contained no valid stipulation against plaintiff's right to redeem, it was error to admit evidence of an alleged contemporaneous parol agreement that the ring might be sold by pledgee at private sale in default of payment of the note. *Clinton Nat. Bank v. McKennon*, 110 P. 649, 26 Okl. 835.

— *Lease*.—Parol evidence held inadmissible to show an oral agreement to make repairs, where it tended to modify the written lease, though the oral agreement might have been part of the consideration. *Reed v. Moore*, 54 Okl. 354, 154 P. 348.

— *Rental contract*.—Where a written rental contract has been entered into, oral proof of a prior parol contract, being evidence tending to vary and contradict the terms of the written instrument, is incompetent. *Kirby v. Hardin*, 41 Okl. 609, 134 P. 854.

— *Repairs and improvements*.—In a suit to enforce a landlord's lien under a lease containing no provision requiring plaintiff to repair the fence, where defendant pleaded as a counterclaim that plaintiff wrongfully tore down the fence and turned stock in upon the crop, testimony that at the time of the making of the contract it was agreed in parol by the parties that plaintiff would repair the fence was inadmissible. *Hardin v. Kirby*, 106 P. 837, 25 Okl. 479.

Parol evidence that several days before making of a written lease the lessor orally agreed to make certain repairs and improvements, is inadmissible in an action for rent, where the lease purports to be complete and does not

⁴⁸ *Brenn v. Farmers' Alliance Ins. Co.*, 103 Kan. 517, 175 P. 383.

in its terms, and in no way alters, varies, or contradicts the written stipulations.⁴⁹

If a writing does not purport to set out the entire contract, it is permissible to show by parol evidence other stipulations, not incon-

include any agreement to make repairs. *Reed v. Moore*, 54 Okl. 354, 154 P. 348.

— *Oil and gas leases.*—Where an assignment in writing of certain oil and gas leases appears to contain the final agreement of the parties, all previous representations and negotiations are merged therein, and thereafter, in the absence of fraud, the rights and liabilities of the parties must be determined by the writing. *Moore v. White*, 75 Okl. 171, 182 P. 684.

In action for conversion of partner's interest in oil and gas leases, exclusion of testimony on value of leases obtained by defendant as to stipulations made when leases were executed and not included in the leases, and contradicting their terms, held not error. *Frith v. Thomson*, 103 Kan. 395, 173 P. 915, L. R. A. 1918F, 1123.

— *Contract of sales.*—Where a final contract of sale fully covers the subject-matter of all prior oral negotiations, such negotiations are merged therein. *J. W. Ripy & Son v. Art Wall Paper Mills*, 136 P. 1080, 41 Okl. 20, 51 L. R. A. (N. S.) 33.

Where a written contract of sale of machine describes it without guaranty that it will accomplish the purpose of the purchaser, refusal to admit correspondence relating thereto was proper. *Scott v. Vulcan Iron Works Co.*, 122 P. 186, 31 Okl. 334.

Where a written contract of absolute sale of articles has been entered into, parol evidence of a contemporaneous verbal contract that the articles were to be sold by the vendee for the vendor on commission is inadmissible. *Smith v. Deere*, 29 P. 603, 48 Kan. 416.

Evidence of contemporaneous verbal agreements contradicting the express

⁴⁹ *Schoen v. Sunderland*, 18 P. 913, 39 Kan. 758; *Mackin v. Darrow Music Co.* (Okl.) 169 P. 497.

Where petition relied on oral contract, to which was attached as exhibit written contract alleged to have been entered into to carry out oral contract, oral contract is not an attempt to vary terms of written contract. *Rex Petroleum Co. v. Black Panther Oil & Gas Co.* (Okl.) 166 P. 1083.

Parol evidence of a verbal contract to deliver a car of freight to a connecting carrier did not vary a written contract in bill of lading, that prior understandings were merged in the written agreement, but was an additional agreement as to what disposition should be made of the car when it reached its destination. *Atchison, T. & S. F. Ry. Co. v. McCluskey*, 30 Okl. 711, 120 P. 985.

In an action for the price of the use of advertising articles, held that a defense could not be predicated on the ground of breach of an oral promise made by plaintiff's agent that plaintiff would revise advertising matter to be suggested by defendant, where this was wholly outside the field covered by the written contract. *Outcalt Advertising Co. v. H. G. Waltner Mercantile Co.*, 153 P. 518, 96 Kan. 689.

sistent with those expressed, but not to contradict that part which is in writing.⁵⁰

Where a deed covenants to convey land free of former grants

terms of a written guaranty in a contract of sale is inadmissible. *Hickman v. Richardson*, 142 P. 964, 92 Kan. 716.

Parol evidence of an agreement, consisting of mere oral promises, made previously or concurrently with the execution of a written contract of sale of land, is inadmissible to charge the vendee with the payment of more than the expressed consideration, when the amount to be paid plainly appears from the face of the instrument. *Trice v. Yoeman*, 57 P. 955, 60 Kan. 742.

— *Assumption of mortgage*.—In an action to charge the grantee of mortgaged premises with the assumption of the mortgaged debt, under a clause in the deed to him, it is error to admit evidence of a prior parol agreement, in pursuance of which such deed was executed. *Shattuck v. Rogers*, 38 P. 280, 54 Kan. 266.

The assumption of mortgages by the grantee of a deed may be shown by competent evidence outside the deed. *Hopper v. Calhoun*, 35 P. 816, 52 Kan. 703, 39 Am. St. Rep. 363.

— *Stock subscription*.—The written contract embodied in the subscription for stock of a corporation cannot be varied by parol evidence of prior or contemporaneous transactions or agreements of the parties. The writing speaks for itself, and all prior oral agreements are merged therein. *Topeka Mfg. Co. v. Hale*, 39 Kan. 23, 17 P. 601.

⁵⁰ *Holmes v. Evans*, 118 P. 144, 29 Okl. 373; *McKenna v. J. S. Terry Const. Co.*, 53 Okl. 202, 155 P. 1158.

A written contract, as modified by the memoranda, etc., added thereto, held incomplete and so parol evidence was admissible to show what the original guaranties were; such evidence not being inconsistent with terms of contract. *Western Silo Co. v. Stobaugh*, 75 Okl. 73, 182 P. 670; *Trice v. Yoeman*, 54 P. 288, 8 Kan. App. 537.

Where a letter authorizing the recipient, as the writer's agent, to buy certain property, says nothing about compensation, the writer may show, in an action for compensation, a prior agreement that no charge was to be made, if it does not appear that the letter covers the entire contract. *Clark v. Townsend*, 153 P. 555, 96 Kan. 650, rehearing denied 154 P. 1009, 97 Kan. 161.

Where a written contract for the employment of an agent to sell silos reads, "On silos: 25 and 5 per cent. on fifty—30 per cent. on 75 or more," and the agent sells 42 silos, the contract being incomplete, oral evidence is admissible to show the agreement. *Royer v. Western Silo Co.*, 140 P. 872, 92 Kan. 333.

Where a written contract fails to provide a means by which the price of fixtures and tools is to be determined, proof of an oral contract as to their price is admissible. *McGrath v. Crouse*, 50 P. 969, 6 Kan. App. 507.

Where there was no issue on the question whether a contract did not contain all the stipulations of the parties, parol evidence varying the terms of the contract is inadmissible. *Power & Bro. v. Turner*, 97 P. 950, 37 Mont. 521.

Proposal by plaintiff to sell an ice plant signed by defendants, which is

and incumbrances, the admission of evidence of an oral agreement by the grantee to take the land with any defects in the title is error.⁵¹

Evidence of a parol warranty of personalty is not admissible, if there is a bill of sale or agreement in writing respecting the sale.⁵²

Where a written agreement for the conveyance of land specifies

only a mere skeleton of an agreement not stating all the terms, cannot be regarded as a complete contract and parol evidence is admissible to show the entire agreement. *Fisher Mach. Works Co. v. Singletary*, 104 Kan. 460, 179 P. 328.

⁵¹ *First Nat. Bank of Ryan v. Sappington*, 53 Okl. 708, 157 P. 937; *Mandler v. Starks*, 131 P. 912, 35 Okl. 809, L. R. A. 1916E, 213.

In an action for breach of a covenant against liens for taxes, parol evidence that during the negotiations the grantor stated to the grantee that a tax lien existed on the land, and that the grantee then agreed to pay it, is inadmissible. *Reagle v. Dennis*, 55 P. 469, 8 Kan. App. 151.

⁵² *German Stock Food Co. v. Miller*, 136 P. 426, 39 Okl. 634; *Kansas Refrigerator Co. v. Pert*, 42 P. 943, 3 Kan. App. 364; *Richardson v. Great Western Mfg. Co.*, 43 P. 809, 3 Kan. App. 445, judgment reversed *Great Western Mfg. Co. v. Richardson*, 47 P. 537, 57 Kan. 661; *Ehrsam v. Brown*, 67 P. 867, 64 Kan. 466.

Parol evidence is inadmissible to prove a warranty of the quality of a safe, made at the time a written order for its purchase, which contained no reference to a warranty, was given. *Diebold Safe & Lock Co. v. Huston*, 39 P. 1035, 55 Kan. 104, 28 L. R. A. 53.

A written warranty in a contract of sale excludes any parol warranty. *Farmers' Stock Breeding Ass'n v. Scott*, 36 P. 978, 53 Kan. 534; *Hercules Buggy Co. v. Hinde*, 124 P. 27, 33 Okl. 85.

When the contract of sale recites that no warranty exists regarding the property other than that contained therein, parol evidence is inadmissible to show any other warranty. *Richardson v. Great Western Mfg. Co.*, 43 P. 809, 3 Kan. App. 445, judgment reversed *Great Western Mfg. Co. v. Richardson*, 47 P. 537, 57 Kan. 661.

Where a written sale contract is complete and contains a warranty, the buyer cannot rely on prior or contemporaneous oral representations as constituting a warranty. *Aultman & Taylor Machinery Co. v. Schierkolk*, 149 P. 680, 95 Kan. 737.

Where B. conveyed his stock of goods to a bank to pay a pre-existing debt, with covenants of warranty, in a suit against him and the bank for goods sold prior to the bill of sale, parol evidence that the cashier of the bank had agreed with B. before the sale to pay the debt in controversy is inadmissible. *Farmers' Nat. Bank of Durant v. Ardmore Wholesale Grocery Co.*, 127 P. 1071, 33 Okl. 769.

Where a sale is consummated by a bill of sale, which contains a description of property, receipt for the purchase money, and a warranty of title, parol evidence is inadmissible to prove an additional parol warranty of the soundness of such chattel. *Rodgers v. Perrault*, 21 P. 287, 41 Kan. 385.

Evidence of verbal statements and representations made during the negotiations for the sale of a horse is not admissible to contradict or enlarge a written warranty delivered at the time of sale, unless it is first shown that,

no time for conveyance, the law requires it to be made within a reasonable time, and evidence of a parol contemporaneous agreement to convey at a given date is inadmissible.⁵³

Evidence is admissible to show that a written instrument was delivered conditionally,⁵⁴ or to prove the existence of any separate parol agreement, constituting a condition precedent to the attachment of any obligation under a written agreement.⁵⁵ But a written contract of sale, absolute and complete on its face, cannot be varied by parol evidence of a condition precedent not mentioned therein.⁵⁶

through fraud or mistake, material parts of the warranty were omitted from the writing. *Huston v. Peterson*, 43 P. 101, 2 Kan. App. 315.

In an action for an amount constituting an overpayment for hay bought under a written contract, held, that evidence of the existence of a contemporaneous oral agreement fixing the time when the weight of the hay was to be determined was properly admitted. *Smith v. Hanson*, 144 P. 226, 93 Kan. 284, motion to modify decision denied 150 P. 223, 96 Kan. 83.

⁵³ *Fisher v. Gossett*, 128 P. 293, 36 Okl. 261.

⁵⁴ *Colonial Jewelry Co. v. Brown*, 38 Okl. 44, 131 P. 1077.

Parol evidence is admissible to show that an instrument sued on was never delivered, or was to take effect only on the happening of some future event. *Bartholomew v. Fell*, 139 P. 1016, 92 Kan. 64.

⁵⁵ *Gamble v. Riley*, 39 Okl. 363, 135 P. 390; *Waggoner Bank & Trust Co. v. Doak* (Okl.) 172 P. 61; *Adams v. Thurmond*, 48 Okl. 189, 149 P. 1141; *J. M. Hoard, Jr., Co. v. Grand Rapids Showcase Co.* (Okl.) 173 P. 844.

In an action on a contract to pay for a horse, a provision that "if full amount is not subscribed, this is null and void" held not to preclude the introduction of parol evidence of a condition that plaintiff should procure financially responsible and otherwise satisfactory subscribers. *Rutherford v. Holbert*, 142 P. 1099, 42 Okl. 735, L. R. A. 1915B, 221.

Evidence of a parol agreement that a written contract for the sale and exchange of property should not take effect until the ascertainment of a certain fact held admissible, where it did not contradict the written contract. *Stroupe v. Hewitt*, 133 P. 562, 90 Kan. 200.

Parol evidence is admissible to show that at the time a note was signed it was agreed that it should be returned if a certain person or number of persons did not also sign it. *White v. Smith*, 98 P. 766, 79 Kan. 96.

⁵⁶ *Slatten v. Konrath*, 42 P. 399, 1 Kan. App. 636.

Where a person gave a written order for books, in which all the terms were set forth, and which directed that the books be shipped, parol evidence of a contemporaneous oral agreement with the agent that the order was not to become effective until the purchaser gave specific instructions to ship is inadmissible. *Duffey v. Scientific American Compiling Department*, 30 Okl. 742, 120 P. 1088.

M., the owner of a tract of land, and C., the owner of a horse, exchanged the one for the other, M. executing to C. a warranty deed for the land, and C. executing to M. an absolute bill of sale for the horse, whereby he agreed to deliver the horse to M. at any time. M. afterwards obtained possession of

Parties to a written contract may by a subsequent executed parol agreement annul the whole or any portion of it, and the admission of evidence of such an agreement does not vary the terms of the written instrument.⁵⁷

Proof of an extension of time of payment of a note by the payee may be made by parol evidence.⁵⁸ Evidence of a contemporaneous parol agreement, under the influence of which a note was executed, which agreement is violated as soon as the note is secured, may be shown.⁵⁹

The maker of a note cannot defend an action by showing an oral agreement at the time of its execution that he should not be liable, or liable only in part, as that would violate the rule prohibiting contradiction of the terms of a written instrument by parol evidence.⁶⁰

the horse. Held that C. could not maintain replevin for the horse on parol evidence that the contract was that he should retain possession of the horse until M. should furnish him an abstract of title for the land. *Cunningham v. Martin*, 26 P. 696, 46 Kan. 352.

⁵⁷ *Finola Mfg. Co. v. Paulsen*, 50 Okl. 591, 151 P. 195.

Where, in a trade for land on which there was a lease, the latter was turned over as a part of the consideration under the written contract, a note for the rental, not mentioned in the contract, was a proper subject for a subsequent verbal agreement. *Menrow v. Pool*, 141 P. 1134, 92 Kan. 732.

⁵⁸ *Roe v. Fleming*, 122 P. 496, 32 Okl. 259.

Where, in an action to charge an indorser on a note, the defendant alleges as a defense that the time of payment was extended on consideration of the principal entering into a written contract for the sale of corn, which the plaintiff contends was void, the evidence of the indorser to establish such defense is not confined to the written contract, but it may be supplemented by parol evidence. *Bank of Horton v. Brooks*, 62 P. 675, 10 Kan. App. 576.

⁵⁹ *Jesse French Piano & Organ Co. v. Bodovitz* (Okl.) 174 P. 765.

Where there was evidence that the payee of a note signed by a surety knew surety's signature was obtained on condition that maker would execute a chattel mortgage, evidence of that agreement was admissible. *Goutermont v. Bland*, 162 P. 270, 99 Kan. 431.

In an action upon notes with counterclaim by defendant and cross-petition alleging his contract with plaintiff whereby the notes had been discharged, evidence of a parol agreement varying and adding to written contract between parties was inadmissible. *Farmers' & Bankers' Life Ins. Co. v. Whitney*, 105 Kan. 237, 182 P. 645.

⁶⁰ *German American State Bank v. Watson*, 163 P. 637, 99 Kan. 686.

Allegations in an answer that the parties agreed orally, when the note sued on was made, that the maker should not be bound to pay more than one-half thereof, do not set up a defense pro tanto. *Bailey v. Lankford*, 54 Okl. 692, 154 P. 672.

Where the president of a bank executes a note and has the money deposited

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The rule excluding an oral agreement varying a written contract is not violated by permitting defendant, in an action on a note, to prove as a set-off the amount due from plaintiff on an oral contract made at the time the note was given, and as a part of its consideration.⁶¹

A parol contract, made contemporaneously with or prior to a note, is inadmissible to prove that the note was not to be paid at maturity, but was to be extended.⁶²

A contemporaneous oral agreement with the payee to look to certain mortgage security and to hold the comaker for the balance

to the credit of his bank, and explained to the officers of the bank making the loan that the bank of which he was president was to pay the note, and it was orally agreed between the president of the bank and the officers of the loaning bank that he should not be held personally responsible, such agreement may be proven for the purpose of showing that a maker of the note executed it as an accommodation maker or to be held as collateral security, but not to defeat recovery from him thereon. *Willoughby v. Ball*, 90 P. 1017, 18 Okl. 535.

In a suit by a bank against the maker of a note, parol evidence is inadmissible to prove that the note was executed for the purchase of stock in the bank, but under an agreement that the transaction should be merely colorable, and that the stock, though issued to the purchaser, and retained by the bank as apparent collateral security to the note, should never in reality belong to the maker of the note, nor should he ever be called on to pay the indebtedness represented by it. *Dominion Nat. Bank of Bristol v. Manning*, 60 Kan. 729, 57 P. 949.

Claim of payee and indorser that it was orally agreed that when she sold the notes for 50 cents on the dollar she would not be called on to pay them, varied the indorsement under Gen. St. 1915, § 6593. *Guaranty Inv. Co. v. Gamble*, 171 P. 1152, 102 Kan. 791.

⁶¹ *Owensboro Wagon Co. v. D. A. Wilson & Co.*, 101 P. 4, 79 Kan. 633.

In an action on a note, defendant answered that the note was given as a part of the purchase price of a flock of sheep, and alleged an express warranty of the soundness of the sheep purchased, and set up a counterclaim for damages on account of the breach of the warranty. It appeared that negotiations had been pending for some time between plaintiff and defendant for the purchase of the sheep. The sale was consummated on September 2, 1885, and the notes and a chattel mortgage were executed, but the cash payment of \$1,500 was not made until September 14th, when a bill of sale was given which contained no warranty. Held, that it was error to permit defendant to show by oral evidence the representations and statements made previous to the execution of such bill of sale, the presumption of law being that the written instrument contained the whole contract, and it should govern, unless fraud had been alleged and proved. *Willard v. Ostrander*, 26 P. 1017, 46 Kan. 591.

⁶² *Commercial Nat. Bank v. Hutchinson Box Board & Paper Co.*, 158 P. 44, 98 Kan. 350.

only could not be shown, as such agreement would contradict the plain terms of the note.⁶³

In an action against joint and several makers of a note, one of them cannot show, to escape liability, a contemporaneous parol agreement with the holder's cashier that security taken would be sufficient to pay the note, and that such maker should not be personally bound thereon.⁶⁴ But where a stranger to a note writes his name across the back, parol evidence is admissible to vary his apparent liability as guarantor by showing the agreement and understanding of the parties at the time of the indorsement.⁶⁵

An unconditional written promise to pay a certain sum at a fixed time cannot be defeated by parol evidence of a prior oral agreement that the obligation was to be paid out of the business in which the money for which it was given was to be used.⁶⁶

Where payee indorses note as collateral, and, after its return, transfers it to one who sues him with the maker, evidence as to such indorsement and that by executed oral contract payee's liability was then limited to a warranty against equities between himself and maker is admissible.⁶⁷

⁶³ *Conqueror Trust Co. v. Danforth*, 103 Kan. 860, 177 P. 357.

⁶⁴ *Colbert v. First Nat. Bank of Ardmore*, 38 Okl. 391, 133 P. 206.

⁶⁵ *Fullerton v. Hill*, 29 P. 583, 48 Kan. 558, 18 L. R. A. 33.

⁶⁶ *Van Fossan v. Gibbs*, 139 P. 174, 91 Kan. 866.

In action on note given for obtaining farm loan, where answer showed that defendant signed application to procure a loan at 6½ per cent. interest, it was error to admit his oral evidence of statements as to rate of interest prior to application. *Fontron v. Kruse*, 172 P. 1007, 103 Kan. 32.

In an action on a written contract for payment of money, an oral agreement contrary to terms of the written contract set up by answer was properly disregarded. *Lesem v. Harris*, 102 Kan. 222, 169 P. 959.

Where plaintiff sold interest in failing mercantile business to partner, taking note of purchaser's mother and brother, note was not impeachable by evidence of oral agreement that if purchaser was unable to pay, makers would not be called on. *Stevens v. Inch*, 158 P. 43, 98 Kan. 306.

Where certain notes are turned over to a creditor as collateral to secure an indebtedness, and there is a written contract conditioned that the notes are to be returned upon settlement of the account, it is not error for the court to refuse to allow evidence of an alleged parol agreement that the notes at maturity are to be returned to the debtor for collection, where such evidence was offered for the purpose of avoiding the expense of collection of the notes, since such evidence would in effect vary the terms of the written contract. *Buxton v. Alton-Dawson Mercantile Co.*, 90 P. 19, 18 Okl. 287.

⁶⁷ *Clark v. Sallaska* (Okl.) 174 P. 505, 4 A. L. R. 746.

Oral evidence of an agreement to surrender a note in suit, without payment, in rescission of the contract in pursuance to which it was given, is inadmissible.⁶⁸

Between nominal drawer of dishonored sight draft, the drawee for whom it was deposited for collection, and bank honoring depositor's checks in anticipation of collection, parol evidence is competent, in bank's action against depositors to show condition of the deposit.⁶⁹

On a sale of chattels by an agent, proof of an oral warranty is not excluded by a provision in a note given for the price that "no promise or contract outside of this note will be recognized."⁷⁰

§ 1038. Evidence explanatory of writing

Where parties reduced their contract to writing, all oral negotiations are merged therein, and the rights of the parties must be measured by the terms of the written instrument,⁷¹ if it is not ambiguous and there is no charge of fraud, accident, or mistake.⁷² But parol evidence is admissible to clear away the doubt and uncertainty inhering in the written instrument sued on, though not admissible to vary its terms.⁷³

⁶⁸ *Thisler v. Mackey*, 70 P. 334, 65 Kan. 464.

⁶⁹ *Lyon County State Bank v. Schaffer*, 102 Kan. 868, 171 P. 1150.

⁷⁰ *Gale Sulky Harrow Mfg. Co. v. Stark*, 26 P. 8, 45 Kan. 606, 23 Am. St. Rep. 739.

⁷¹ *Kinnard-Haines Co. v. Dillingham (Okl.)* 175 P. 208.

⁷² *Walsh v. Kansas Fuel Co.*, 102 Kan. 29, 169 P. 219; *Lusk v. White*, 58 Kan. 773, 161 P. 541.

⁷³ *Cohee v. Turner & Wiggins*, 132 P. 1082, 37 Okl. 778.

Where a written contract between plaintiff and defendant for the dissolution of a partnership is ambiguous, parol evidence is admissible to determine intent of parties. *La Fayette v. La Fayette*, 64 Okl. 93, 166 P. 169.

Where words employed in a contract are ambiguous, it is not error to admit parol evidence to show the meaning intended by the parties. *Barricklow v. Boice*, 50 Okl. 260, 150 P. 1094; *Rev. Laws 1910. § 959.*

Evidence of the construction placed on a written contract by the parties thereto is admissible only where the contract is ambiguous. *Autem v. Mayer Coal Co.*, 158 P. 13, 98 Kan. 379; *Calman v. Kreipke*, 139 P. 698, 40 Okl. 516.

Parol evidence is admissible as between the contracting parties to show their intent where the written contract is ambiguous as to the party bound or character in which the parties signed. *First Nat. Bank of Ada v. Womack*, 56 Okl. 359, 156 P. 207.

The real nature of an instrument of writing, which is doubtful or ambiguous in meaning, may be shown by evidence of the inducing causes to the making of it, and the facts and circumstances surrounding the transaction, and in-

However, the mere assertion by a party to a written contract that uncertainties exist in it will not open the door for admission of parol evidence, where the court can find no equivocal language employed in the contract.⁷⁴

volving the parties in their execution of the paper. *Citizens' Bank of Emporia v. Brigham*, 60 P. 754, 61 Kan. 727, reversing judgment in *Brigham v. Jansen*, 58 P. 1117, 9 Kan. App. 889.

Where the language of a mortgage as to the description of a debt to be secured is uncertain and does not describe it with such precision as to identify it by a comparison with the mortgage, its identity may be established by parol. *Boyes v. Masters*, 89 P. 198, 17 Okl. 460.

Ambiguous.—Where the words expressing a condition in a contract are ambiguous, it is not error to admit parol evidence of the meaning intended by the parties. *Gilbert v. Citizens' Nat. Bank of Chickasha*, 61 Okl. 112, 160 P. 635, L. R. A. 1917A, 740.

Where the terms of a building contract were ambiguous, testimony of the circumstances of its execution were admissible to show its intended meaning. *Lantry Contracting Co. v. Atchison, T. & S. F. Ry. Co.*, 172 P. 527, 102 Kan. 799.

Written contract in settlement of claim of school and church under will being ambiguous and uncertain, oral testimony to show agreement that heir was to commence action to have will declared void, to which church and school would interpose no defense, was admissible. *Shellberg v. McMahon*, 157 P. 268, 98 Kan. 46.

Where the terms of a written agreement for drilling oil wells were ambiguous as to the payments to be made to plaintiff, parol evidence as to such payments was admissible. *Julian v. Eagle Oil & Gas Co.*, 109 P. 996, 83 Kan. 127, rehearing denied 111 P. 445, 83 Kan. 440.

A written agreement reciting that plaintiff pays the defendant a certain sum and agrees to pay a further sum when S. and L., by his guardian or otherwise, are placed in possession of their allotments of land in Chickasaw Nation, Ind. T., and that the defendant agrees to represent S. and L., or the guardian of L., in the matter of placing them in possession of their allotments, and in securing lawful leases from the guardian and having them approved by the United States court, is so ambiguous as to authorize the admission of evidence that plaintiff insisted that by the terms of the contract defendant was to secure him a lease on the allotments of S. as well as on the allotment of L., and that defendant so understood the contract and took some steps toward carrying his understanding into effect by entering into a compromise with a certain party with a view to procuring a lease on the allotments for the plaintiff. *Rider v. Morgan*, 31 Okl. 98, 119 P. 958.

Where such an ambiguity exists on the face of a note that the court cannot

⁷⁴ *Atchison, T. & S. F. Ry. Co. v. Truskett*, 72 P. 562, 67 Kan. 26.

Testimony as to grounds on which attorney for proposed purchaser of an oil and gas lease based his disapproval of title to land, submitted under a provision of the contract making his opinion final, is inadmissible; the written contract being unambiguous and so not authorizing introduction of evidence to explain its terms. *First Nat. Bank v. Clay* (Okl.) 177 P. 115.

If a contract is not all in writing, and the written portion is vague, oral testimony is admissible to determine what the contract is.⁷⁵

say what the contract does express, parol evidence is admissible to explain the contract, but not to modify or change it. *Keokuk Falls Imp. Co. v. Kingsland & Douglas Mfg. Co.*, 47 P. 484, 5 Okl. 32.

Where a lot is appropriated to the use of the Presbyterian Church parol testimony is admissible to identify the particular church organization intended. *Com'rs of Wyandotte County v. Presbyterian Church*, 30 Kan. 620, 1 P. 109.

In an action on a note given in settlement of a contract for building a house, a witness for defendant, testifying in explanation of the plans and specifications for the erection of the house under the contract, admitted that he could not tell from them how many gables were contemplated thereby. Held that, the plans and specifications being thus shown to be ambiguous, testimony on the part of plaintiff explanatory of them, and not by way of contradiction of anything in them, was also admissible. *Coates v. Sulau*, 26 P. 720, 46 Kan. 341.

Where there is a latent ambiguity in the description of land conveyed by deed, parol evidence may be received to explain the ambiguity, and testimony as to the condition of the land conveyed, the circumstances under which the conveyance was made, and the practical construction put upon the conveyance by the parties, may be admitted. *Mayberry v. Beck*, 81 P. 191, 71 Kan. 609.

Parol evidence held admissible to show that a loan application containing a notation with respect to the commission was not to take effect as a contract until the ascertainment of a certain fact, where the application was uncertain and ambiguous. *Little v. Liggett*, 140 P. 838, 92 Kan. 385.

On the question whether an ambiguous transaction constitutes a pledge, writing accompanying transaction, oral statements of parties, and collateral circumstances held to be considered. *Carothers Warehouse Bldg. Ass'n v. McConnell*, 121 P. 191, 30 Okl. 394.

Contract, signed by mother and two sons, stipulating that one son owned an interest in land which others agreed to purchase, held open to extrinsic evidence that mother owned land, that contract intended a gift to son, and that agreement to purchase was without consideration. *Moon v. Moon*, 173 P. 9, 102 Kan. 737, 103 Kan. 179.

Where a written contract is ambiguous, so that the intention of the parties cannot be understood, extrinsic evidence of the relation of the parties and the facts surrounding them may be received for the proper interpretation of the instrument. *Richardson v. Chatfield*, 129 P. 728, 36 Okl. 700.

An unsigned memorandum of a proposed contract, though of a different effect from the contract executed, is admissible to show the relation of the parties, where light will thereby be thrown on their understanding of the subsequent transaction. *Clark v. Townsend*, 153 P. 555, 96 Kan. 650, rehearing denied 154 P. 1009, 97 Kan. 161.

Where a bill of lading under which a carload of potatoes was shipped to a

⁷⁵ *Peters v. McVey*, 52 P. 896, 59 Kan. 775.

Though a description of property taxed cannot be supplied by parol, it is competent to explain abbreviations by evidence aliunde the instrument.⁷⁶

Where a term employed in a written contract has a meaning different from the ordinary meaning when used in connection with a

commission house was ambiguous and question was whether defendant was the consignor, oral evidence was admissible to show the real relations of the owner and of the commission house to the shipping transaction. *Atchison, T. & S. F. Ry. Co. v. Boyle Commission Co.*, 104 Kan. 166, 178 P. 614.

In the record of a deed purporting to have been made in 1857 by George H. Case, the acknowledgment was to the effect that the instrument was acknowledged by George H. Crane. The deed was not in the possession nor under the control of the party by whom the record was offered in evidence, and the grantee testified that the grantor, the subscribing witness, and the officers who took the acknowledgment were dead, and that the deed was executed and acknowledged by George H. Case, in the presence of the witness. Held, that the parol evidence was competent, and the record admissible, and that it was *prima facie* evidence of the delivery of the deed. *Hell v. Redden*, 26 P. 2, 45 Kan. 562.

Where a partnership contract is ambiguous as to who was to furnish teams to carry on the partnership business, evidence as to the situation of the parties and other relevant facts as to how they stood when the contract was made is admissible to ascertain the intent of the parties. *Jenkins v. Kirtley*, 79 P. 671, 70 Kan. 801.

Not ambiguous.—Evidence as to how an unambiguous telegram from an inspector requiring that railroad yards be quarantined, should have been construed, held properly excluded. *Broadhead v. Atchison, T. & S. F. Ry. Co.*, 155 P. 2, 97 Kan. 222.

An exception in a deed reserving "the coal and other minerals underlying said land" is not ambiguous, so as to permit the introduction of parol evidence to change or vary its terms. *Barrett v. Kansas & Texas Coal Co.*, 70 Kan. 649, 79 P. 150.

The fact that the word "future" was written in ink across a written order for the purchase of certain books has been held not such a latent ambiguity as would permit the introduction of parol evidence inconsistent with the order. *Duffey v. Scientific American Compiling Department*, 30 Okl. 742, 120 P. 1088.

Parol evidence held inadmissible to show an intent different from that expressed by an unambiguous written subscription to the capital stock of a corporation. *Graham County Mill & Elevator Co. v. Saunders*, 152 P. 622, 96 Kan. 459.

Where a tax deed described the land as a certain 80-acre tract, less 6 acres not described, extraneous evidence was inadmissible to locate the land intended to be conveyed. *Townsend v. Mallory*, 146 P. 318, 94 Kan. 297.

In an action on a school order, signed and guaranteed by defendants, it is proper to strike out an answer setting up that defendants executed the order

⁷⁶ *Douglass v. Byers*, 76 P. 432, 69 Kan. 59.

trade or business, evidence is admissible to show such meaning, and the sense in which it was used by the parties.⁷⁷

Parol evidence is generally admissible to explain the meaning of technical trade or local terms used in a written instrument.⁷⁸

Parol evidence is admissible to identify realty described in a writing and ascertain its location, on the ground, but not to supply a description omitted from the writing.⁷⁹

as school officers, and that it was understood by both parties that they did not intend to become personally responsible. *Merrill v. Young*, 47 P. 187, 5 Kan. App. 761.

Where the writer of a letter offered in evidence was permitted to explain fully that the letter was written concerning other matters than the one in controversy, other independent testimony to sustain the contention of the writer was properly rejected. *Drummond v. Krebs*, 55 P. 478, 8 Kan. App. 180.

⁷⁷ *Seymour v. Armstrong*, 64 P. 612, 62 Kan. 720, affirming judgment 61 P. 675, 10 Kan. App. 10.

The meaning of a telegraphic message from a live stock broker to a shipper, couched in such terms as to be understood by the shipper, but which is unintelligible to persons not engaged in the stock business as shippers, may be explained by the testimony of the broker in an action against the telegraph company for failure to deliver it. *Western Union Tel. Co. v. Collins*, 25 P. 187, 45 Kan. 88, 10 L. R. A. 515.

Where a written contract provides that goods shall be listed at "cost in market," with 5 per cent. added, parol testimony is admissible to show the meaning given to the term by the parties to the contract. *McGrath v. Crouse*, 50 P. 969, 6 Kan. App. 507.

In an action on a note given in part payment for a horse which was warranted to be a safe "breeder and foal getter," the court properly refused to permit defendant to explain the meaning of these words by showing what was said by the parties at the time the warranty was written, since the words are sufficiently clear. *Cross v. Thompson*, 32 P. 357, 50 Kan. 627.

⁷⁸ Where property secured by chattel mortgage was described as "one standard oil drill and rig, and of tools and equipment consisting of boiler, engine, bits, stems," etc., parol proof of meaning of words, and sense in which parties used them such as evidence that oil well casing was not included was admissible. *Eoff v. Lair*, 63 Okl. 135, 163 P. 515.

In an action for the price of the use of articles described as "Outcalt Service De Luxe" cuts, parol evidence was admissible to show the meaning ascribed to the quoted phrase by plaintiff's agents. *Outcalt Advertising Co. v. H. G. Waltner Mercantile Co.*, 153 P. 518, 96 Kan. 689.

Where technical expressions are used in a railroad rule, or the practical application of a rule to a particular state of facts is not clear, evidence of how those governed by the rule understood it is admissible. *Missouri, K. & T. Ry. Co. v. Missouri Pac. Ry. Co.*, 103 Kan. 1, 175 P. 97.

⁷⁹ *Varner-Collins Hardware Co. v. New Milford Security Co.*, 49 Okl. 613, 153 P. 667; *Powers v. Rude*, 79 P. 89, 14 Okl. 381.

Parol evidence is admissible to identify land intended to be conveyed by an

Where a written contract was intended to bind some particular parties, not clearly shown, parol evidence is admissible to establish their identity.⁸⁰

A person whose name does not appear upon a promissory note cannot be charged as an indorser thereof by parol proof that the nominal payee in accepting and indorsing it was acting as his authorized agent, where nothing upon the face of the note suggests the existence of an agency.⁸¹

A deed conveying title to two persons, one of whom is a party to condemnation proceedings for a right of way, is not conclusive against the claim of such party that he owned the sole title, but may be explained by oral evidence.⁸²

ambiguous deed or other instrument affecting real estate. *Riley v. Foster*, 95 Kan. 213, 148 P. 246.

Extrinsic evidence is admissible to render a description in a deed certain. *Powers v. Scharling*, 67 P. 820, 64 Kan. 339.

The identity of a mortgage, dated November 1st, and acknowledged November 20th, with a mortgage described in the deed as for the same amount, and dated on the 1st day of the month, is a question of fact which may be established by evidence aliunde. *Hendricks v. Brooks*, 101 P. 622, 80 Kan. 1, 133 Am. St. Rep. 186.

Where one of the boundaries in the description in a deed is doubtful, parol evidence of the actual physical location of the boundary by the parties while the negotiations for the conveyance were in progress is admissible. *Parks v. Baker*, 105 P. 439, 81 Kan. 351.

Parol evidence is admissible to identify land devised by ascertaining to what tract the description will apply. *Cummins v. Rlordon*, 115 P. 563, 84 Kan. 791.

Where a sufficient description is given in a contract to convey land, parol evidence may be resorted to in order to fit the description to the property; but where it is insufficient, or there is no description, the evidence is inadmissible. *Halsell v. Renfrow*, 78 P. 118, 14 Okl. 674, 2 Ann. Cas. 286, judgment affirmed 26 S. Ct. 610, 202 U. S. 287, 50 L. Ed. 1032, 6 Ann. Cas. 189; *Powers v. Rude*, 79 P. 89, 14 Okl. 381.

In an action to compel specific performance of a contract to convey land, where a sufficient description is given in the contract, parol evidence may be resorted to in order to fit the description to the thing, but where an insufficient description is given, or where there is no description, such evidence is inadmissible; as the court will never receive parol evidence both to describe the land, and then to apply the description. *Ferguson v. Blackwell*, 58 P. 647, 8 Okl. 489.

⁸⁰ *Van Arsdale-Osborne Brokerage Co. v. Foster*, 100 P. 480, 79 Kan. 669.

⁸¹ *New York Life Ins. Co. v. Martindale*, 88 P. 559, 75 Kan. 142, 21 L. R. A. (N. S.) 1045, 121 Am. St. Rep. 362, 12 Ann. Cas. 677.

⁸² *Wuester v. Topeka & N. W. R. Co.*, 118 P. 1054, 85 Kan. 636.

Where anything appears upon the face of a negotiable instrument which suggests a doubt or ambiguity as to the party bound, or the character in which any of the persons who signed the instrument acted, parol testimony is admissible as between the original parties for the purpose of showing the true intent and meaning of the parties.⁸³ But a signer of a note who describes himself therein merely as a director or trustee or agent for a person or corporation cannot, in the absence of anything in the body of the note to show that it is the obligation of his principal, show, by parol, that he signed merely as agent.⁸⁴

⁸³ *Janes v. Citizens' Bank of North Enid*, 60 P. 290, 9 Okl. 546. Parol testimony is admissible to show that one who signed a note, adding "Sec'y Enid Town Co." to his name, signed the note in his official capacity as secretary, and that it was understood between the parties at the time that he was to bind the corporation, and not himself individually. *Id.*

Where a promissory note is signed by individuals with a representative description it is not error to admit parol evidence that the intention of the parties was to obligate themselves personally to its payment. *Wiers v. Treese*, 117 P. 182, 27 Okl. 774. In an action brought on the following note: "Jan. 1st, 1904, after date, the G. Co. promise to pay S. or bearer, forty dollars, at the T. Bank. Value received with interest at 10 per cent. per annum. No. 3, due Jan. 1st, 1904, M. A. Wiers, Pres. of Company; W. A. Moore, Sec."—it was not error to admit evidence that the signers executed it with the intention of personally obligating themselves to pay it, and that it was not intended by the parties to be an obligation of the G. Co. *Id.*

A note made by an association in the name of the association by A., president, B., as secretary, and C. as treasurer in favor of a bank was thereafter renewed by another note of the association signed by A., president, B., secretary, and C., and the bank, after maturity, sued the association and C. as an individual, and he pleaded that it was the intent of all parties that he should sign as treasurer only, but through mistake he omitted after his name the words, "as treasurer." Held that, by way of equitable defense, such mutual mistake might be proven by parol evidence. *Farmers' & Merchants' Nat. Bank v. Hoyt*, 120 P. 264, 29 Okl. 772.

Where a bond is signed, "H. H. Gardner, Cashier," the word "Cashier" is *prima facie* descriptive only, and extrinsic evidence is admissible to show how the word was understood, as determining the character in which he contracted. *Gardner v. Cooper*, 58 P. 230, 9 Kan. App. 587, judgment affirmed on rehearing 60 P. 540, 9 Kan. App. 587.

⁸⁴ *Keokuk Falls Imp. Co. v. Kingsland & Douglas Mfg. Co.*, 47 P. 484, 5 Okl. 32.

Where a number of persons signed a note in their individual names and nothing appears to show that they executed it in a representative capacity, in a suit on the note it was error to admit evidence that they executed it as directors of a corporation. *Weagant v. Camden*, 132 P. 487, 37 Okl. 508.

Where, in an action on a written instrument, there is anything on its face

Parol evidence is competent, as between the original parties to a written instrument, to show whether the signers executed it in a representative or individual capacity, and to show the parties bound.⁸⁵

In invoking an equitable defense, where a written instrument by mistake does not express the intent of the parties, parol evidence is admissible;⁸⁶ but a deed cannot be impeached by the grantor's testimony as to his intention.⁸⁷

Oral testimony may be introduced to show that a written instrument was executed for a purpose wholly different from that alleged in the petition.⁸⁸

Evidence of purposes for which a note was given may be shown without violating rule that oral evidence is inadmissible to vary or contradict terms of a written contract.⁸⁹

§ 1039. Evidence showing performance or discharge

The purpose and effect of evidence of an executed parol agreement to annul a written contract is not to vary the terms of such written contract, but to show that by mutual consent it was re-

which suggests a doubt as to the party bound, or as to the character in which the signers acted, parol evidence is admissible, between the original parties, to show their true intent in executing the instrument. *Cohoe v. Turner & Wiggins*, 132 P. 1082, 37 Okl. 778.

An agent may prove by parol evidence that his principal was the real party in interest in a written contract made in the name of the agent. *Schmucker v. Higgins-Roberts Grain Co.*, 116 P. 184, 28 Okl. 721.

⁸⁵ *W. C. Dean Jewelry Co. v. Storm*, 64 Okl. 234, 166 P. 1046.

A note held so ambiguous as to authorize admission of parol evidence to show that the directors and president of a corporation signed with intention to bind themselves as individuals. *Denman v. Brennaman*, 49 Okl. 566, 149 P. 1105, L. R. A. 1915E, 1047; *Kenner v. Decatur County Rochdale Co-Op. Ass'n*, 123 P. 739, 87 Kan. 293.

⁸⁶ *Farmers' & Merchants' Nat. Bank v. Hoyt*, 120 P. 264, 29 Okl. 772.

⁸⁷ *Miller v. Miller*, 136 P. 953, 91 Kan. 1, L. R. A. 1915A, 671, Ann. Cas. 1917A, 918.

⁸⁸ *Humphrey v. Timken Carriage Co.*, 75 P. 528, 12 Okl. 413.

⁸⁹ *First Nat. Bank of Garden City v. Stroup* (Kan.) 177 P. 836.

In an action against a decedent's estate on a note, parol evidence is admissible to show that the note executed by decedent to plaintiff, her father, and made payable on demand, was in fact executed by the daughter and received by plaintiff as a mere receipt or memorandum of an advancement, and that a mutual understanding was had at the time of its execution and delivery that payment thereof would never be demanded or enforced. *Brook v. Lattimer*, 24 P. 946, 44 Kan. 431, 21 Am. St. Rep. 292, 11 L. R. A. 805.

scinded or annulled;⁹⁰ but a written contract cannot be altered to abrogation by a subsequent unexecuted parol agreement.⁹¹

Testimony showing a waiver of performance of a written contract is admissible,⁹² except where the contract forbids waiver of its provisions, except in writing.⁹³

DIVISION VI.—OPINION EVIDENCE

Subdivision I.—Nonexpert Testimony

§ 1040. Conclusions and opinions in general

Opinion evidence may be received, where it is the best that can be had, or where the circumstances cannot be reproduced or described to the jury;⁹⁴ but where the facts and circumstances can be adequately described to the jury, and their bearing on the issues can be estimated by all men without special knowledge, experience, or training, opinion evidence is inadmissible.⁹⁵

Where one of the parties to a cause is an attorney at law and testifies in his own behalf, he should not be allowed to give opinions and conclusions.⁹⁶

Generally, a witness should not be permitted to state his opinions or conclusions from facts, whether such facts are known personally to him or brought to his notice by testimony of other witnesses, and the exceptions to such rule relate to questions of science, trade, and those of a similar nature.⁹⁷

Opinions of well-informed bankers and business men as to financial reliability of persons of their community may be of some evi-

⁹⁰ Hart v. Frost (Okl.) 175 P. 257.

⁹¹ Malsen v. Cartwright, 144 P. 375, 43 Okl. 737.

⁹² Hull v. Allen, 113 P. 1050, 84 Kan. 207.

⁹³ Home Ins. Co. of New York v. Ballard, 124 P. 316, 32 Okl. 723.

⁹⁴ Missouri & K. Telephone Co. v. Vandevort, 72 P. 771, 67 Kan. 269.

Witnesses not shown to be experts may nevertheless testify to facts, although such facts appear to be opinions or conclusions of facts, if the subject-matter to which their testimony relates cannot be reproduced or described to the jury as it appeared to the witnesses at the time of its occurrence, and such opinions are founded upon facts such as men in general are capable of comprehending and understanding. Atchison, T. & S. F. R. Co. v. Miller, 18 P. 486, 39 Kan. 419.

⁹⁵ Hicks v. Davis, 32 Okl. 195, 120 P. 260.

⁹⁶ Bilby v. Owen (Okl.) 181 P. 724.

⁹⁷ Tefft v. Wilcox, 6 Kan. 46; Miller v. National Council of Knights and Ladies of Security, 103 Kan. 579, 175 P. 397.

In an action for commissions for selling land the purchaser cannot testify

dentiary value to the jury in determining the worth of such persons' notes as assets of a bank.⁶⁸

Testimony by witnesses as to what they thought, at the time of a transaction which is material in the case is improper.⁶⁹

The ordinary presumption is that a witness who uses the expression "I think" means that his observation is indistinct or his recollection uncertain regarding the matter testified to, rather than that he is without personal information on the subject.¹

It is not error to exclude any statement or answer which is merely a supposed conclusion of the witness drawn from a given state of facts.² In other words witnesses must state facts, and not opinions.⁷

who induced him to make the purchase, this being but a mere conclusion. *Jenkins v. Beachy*, 80 P. 947, 71 Kan. 857.

In an action for a broker's compensation, a question asked the purchaser held objectionable as calling for a conclusion as to the procuring cause of the sale. *Schlegel v. Fuller*, 48 Okl. 134, 149 P. 1118.

In an action against an executor to recover money due for nursing and care of deceased, the defense being that decedent made payment to plaintiff in his lifetime, released mortgages on her property, and transferred property to her; where defendant introduces testimony showing that decedent paid a mortgage on plaintiff's property with his personal check, it is error to allow plaintiff to answer a question of her counsel, "Now, whose money actually paid off that loan?" the answer being a mere conclusion. *Moyer v. Knapp*, 59 P. 674, 9 Kan. App. 226.

In an action for breach of contract, it is not error to refuse to allow defendants to ask a witness, who is also a defendant, whether he ever accepted a certain proposition, since the question calls for the mere conclusion of the witness. *Cogshall v. Pittsburgh Roller Milling Co.*, 29 P. 591, 48 Kan. 480.

Notes.—A question whether there was "a sort of an understanding" that a note was to run another six months, or "any understanding as to whether" the note was to be allowed to run, held objectionable as calling for a mere conclusion of the witness. *Carr v. Chapman*, 139 P. 487, 91 Kan. 869.

Affirmative responses of a witness to leading questions as to whether he bought the note in suit for valuable consideration before maturity and without notice of defenses held properly stricken. *Brice v. Hawk*, 154 P. 273, 97 Kan. 82.

⁶⁸ *Bushey v. Coffman*, 173 P. 341, 103 Kan. 209.

⁶⁹ *McKnight v. Strasburger Bldg. Co.*, 150 P. 542, 96 Kan. 118.

¹ *Losey v. Atchison, T. & S. F. Ry. Co.*, 114 P. 198, 84 Kan. 224, 33 L. R. A. (N. S.) 414.

² *Chicago, R. I. & P. Ry. Co. v. Stibbs*, 87 P. 293, 17 Okl. 97.

In an action for the price of gin machinery, where defendant pleads breach

³ *Marshall v. Weir Plow Co.*, 45 P. 621, 4 Kan. App. 615.

Request that witness state fact as to a certain choice or election did not call for conclusions. *Beckman v. Ash*, 103 Kan. 437, 173 P. 920.

Witnesses whose competency has been shown may state the result of their actual knowledge and observation.⁴

Opinions of witnesses are inadmissible on questions which can be decided by the jury on the facts.⁵

It is error to permit a witness who has heard the testimony of another witness upon another trial as to a matter in issue to give his opinion as to the truth of such matter derived from hearing such testimony.⁶

Witnesses should not ordinarily be permitted to testify to their impression from conversations, but should, as far as possible, be required to give the exact language used or its substance.⁷

of warranty, though defendant may show every fact which would support his claim that the machinery did not fulfill the warranty, he must show the same by facts, and not by the statement of mere conclusions. *Bilby v. Thomas Gin Compress Co.*, 124 P. 1093, 33 Okl. 254. In an action for damages from fire caused by a locomotive, a question asked a witness whether anybody could not ride along there and throw a match down, was properly excluded as calling for a conclusion. *St. Louis, I. M. & S. Ry. Co. v. Weldon*, 39 Okl. 369, 135 P. 8. Testimony that a party to the action could not convey title to land, unaccompanied by a statement of the facts upon which the assertion was based, was a mere conclusion. *Jones v. Citizens' State Bank*, 39 Okl. 393, 135 P. 373.

⁴ Where plaintiff, seeking damages for an interruption of the business of his skating rink, showed that he was in personal charge of the business, and knew its details, and what his receipts and expenses were, and had his bank books in court, he was qualified to testify directly as to amounts, and his summaries were not objectionable as conclusions. *Mensing v. Wright*, 119 P. 374, 86 Kan. 98.

⁵ *Kansas Pac. R. Co. v. Peavey*, 29 Kan. 169, 44 Am. Rep. 630; *Maris v. Lawrence Ry. & Light Co.*, 158 P. 6, 98 Kan. 205.

A witness who admits that he does not know the amount of certain checks should not be allowed to give his estimate. *Haines v. Goodlander*, 84 P. 986, 73 Kan. 183.

In an action for the price of gin machinery, where defendant pleaded breach of warranty, testimony of a witness that the machinery was exactly as represented was inadmissible as being a determination of the specific issues then on trial. *Bilby v. Thomas Gin-Compress Co.*, 124 P. 1093, 33 Okl. 254.

In an action to recover commissions for the sale of a farm, the seller defended on the ground that another agent induced the purchase. The purchaser was asked as a witness who as agent induced him to enter into the negotiations. Held, that an objection to the question was properly sustained, as calling for an inference by the witness from his own mental process and as not relating to an existing fact. *Johnson v. Dysert*, 79 P. 652, 70 Kan. 730.

⁶ *Wright v. Wright*, 50 P. 444, 58 Kan. 525.

⁷ *Continental Ins. Co. v. Chance*, 48 Okl. 324, 150 P. 114.

§ 1041. Nonexpert witnesses in general

One may be permitted to testify from his actual knowledge as to the physical condition of an object without qualifying as an expert.⁸

The opinion of a nonexpert witness as to what was seen by another is not admissible as testimony.⁹

Nonexpert witnesses may give opinions of conditions and situations with which they are familiar, but which it is difficult to embody in words or reproduce before the jury.¹⁰

Where the injuries to plaintiff in an action for an assault are such as to require skilled men to determine the cause thereof, the question must be determined by the testimony of experts, and not by that of witnesses having no scientific knowledge.¹¹

§ 1042. Foundation

Some foundation must be laid for the opinion of a witness to value by showing that he has had the means to form an intelligent opinion, derived from an adequate knowledge of the nature and kind of property in controversy and of its value.¹²

§ 1043. Discretion

Admission of opinion evidence is largely within the discretion of the trial court.¹³

§ 1044. Value

The question of the value of real property is not one for expert testimony, and witnesses who are acquainted with the land and

⁸ It was not necessary for the person who placed in position the water tanks in question to qualify as an expert tinner before being permitted to testify from his actual knowledge as to the physical condition of such tanks. *Berryhill v. Strickland*, 132 P. 687, 37 Okl. 496.

Testimony as to ordinary matters connected with the treatment of a patient and observable by any one may be given by nonexpert witnesses. *Yard v. Gibbons*, 149 P. 422, 95 Kan. 802.

⁹ *Handley v. Missouri Pac. Ry. Co.*, 59 P. 271, 61 Kan. 237.

¹⁰ *Electric Plaster Co. v. Blue Rapids City Tp.*, 96 P. 68, 77 Kan. 580.

¹¹ *Willet v. Johnson*, 76 P. 174, 13 Okl. 563.

It was error to admit the evidence of a nonexpert witness as to expectancy of life of plaintiff. *Atchison, T. & S. F. R. Co. v. Snedeger*, 49 P. 103, 5 Kan. App. 700.

¹² *Western Union Telegraph Co. v. Coyle*, 104 P. 367, 24 Okl. 740.

¹³ *Springfield Fire & Marine Ins. Co. v. Griffin*, 64 Okl. 131, 106 P. 431; *Wichita Falls & N. W. Ry. Co. v. McAlary*, 44 Okl. 326, 144 P. 583.

know the market value of similar property in the locality are competent to state their opinion as to its value.¹⁴

Opinions of witnesses as to the value of property should be confined to the property in question, unless on cross-examination, for

¹⁴ *Wichita Falls & N. W. Ry. Co. v. Harvey*, 44 Okl. 321, 144 P. 581; *Wichita Falls & N. W. Ry. Co. v. McAlary*, 44 Okl. 326, 144 P. 583; *St. Louis, I. M. & S. Ry. Co. v. Weldon*, 39 Okl. 369, 135 P. 8; *Wickstrum v. Carter*, 58 P. 1020, 9 Kan. App. 439; *Incorporated Town of Sallisaw v. Priest*, 61 Okl. 9, 159 P. 1093; *St. Louis, K. & A. Ry. Co. v. Chapman*, 16 P. 695, 38 Kan. 307, 5 Am. St. Rep. 744.

In an action against a railway for overflowing land, the admission of testimony as to the amount of damages is error; as the witness should be required to state the facts, and not conclusions, as to the amount of damage. *Kansas City Southern Ry. Co. v. Hurley*, 61 Okl. 241, 160 P. 910.

Where witness for the owner testified that he could give opinion as to value of farm as a whole, but not of its separate tracts, the sustaining of objections to cross-examination as to how he could tell what whole tract was worth was not error. *Craig v. Salina Northern R. Co.*, 172 P. 21, 102 Kan. 838.

In condemnation proceedings against a railroad company, where damages are claimed from the probable overflow to result from interference with natural drainage, and from the insufficiency of ditches constructed by defendant, a witness is incompetent to testify as to such probable overflow, who is not a civil engineer, and has no special skill that would enable him to calculate the capacity of the ditches, the amount of water that would accumulate and the area that would be affected by the overflow. *Chicago, K. & W. R. Co. v. Donelson*, 25 P. 584, 45 Kan. 189.

Railroad right of way.—At the trial of a case for damages for the taking of a right of way for a railroad through farming land, a farmer living in the neighborhood, who had knowledge of the farm for years, knew its location, advantages, character of soil, and its market value compared to other lands surrounding it, is a competent witness, and qualified to testify to the value of the land taken, and to the damages to the whole tract. *Chicago, K. & W. R. Co. v. Cospers*, 22 P. 634, 42 Kan. 561.

A railroad track was put down in an alley in the city of A., on August 1, 1877. Witnesses were introduced to prove the damages to the lots abutting, who stated that they knew the market value of the said property on or about August 1, 1877. Held, that they were competent to testify to the value of said property, both before and immediately after the laying of said track. *Central Branch U. P. R. Co. v. Andrews*, 14 P. 509, 37 Kan. 162, judgment reversed 16 P. 338, 37 Kan. 641; *Kansas City, O. L. & T. Ry. Co. v. Weidenmann*, 94 P. 146, 77 Kan. 300; *Ottawa, O. C. & C. G. R. Co. v. Fisher*, 22 P. 713, 42 Kan. 675; *Wichita & W. R. Co. v. Kuhn*, 17 P. 322, 38 Kan. 675, reversing on rehearing judgment 16 P. 75, 38 Kan. 104; *Chicago, K. & W. R. Co. v. Muller*, 25 P. 210, 45 Kan. 85; *Chicago, K. & W. R. Co. v. Easley*, 26 P. 731, 46 Kan. 337.

A witness testified that he was well acquainted with the farm before, at the time, and after the appropriation of the right of way, and with the value of land in that vicinity, and was then asked, "How much less, in your opinion, was this farm worth after the railroad company had established their

the purpose of testing the knowledge and competency of the witness, inquiry is made as to the value of adjoining property.¹⁵

In an action to recover damages caused by a nuisance, admission of evidence of witnesses in regard to the value of the property before and after the nuisance is error, where they state that they can only guess at the same.¹⁶

Farmers who have planted and cultivated orchards are competent witnesses to prove the value of fruit trees in the orchard of a neighbor that have been destroyed by fire, or to express opinions about the value of fruit trees of a certain kind, age, and condition, although they may not have seen or examined these particular trees.¹⁷

Testimony as to the condition and value of a building that has been destroyed is admissible.¹⁸

track through it?" Held a proper question. *Wichita & W. R. Co. v. Kuhn*, 16 P. 75, 38 Kan. 104, judgment reversed on rehearing 17 P. 322, 38 Kan. 675.

In an action against a railroad company for damages for the appropriation of a right of way through farming land, it is error to permit a witness, who said he did not know the market value of the land, to testify that the land was damaged \$10 per acre by reason of the construction of the road. *Chicago, K. & W. R. Co. v. Stewart*, 31 P. 668, 50 Kan. 33.

In an action for damages for taking a right of way, witnesses, not knowing the market value of the farm through which the road ran, are incompetent to testify to the damages. *Wichita Falls & N. W. Ry. Co. v. Munsell*, 38 Okl. 253, 132 P. 906; *Leroy & W. R. Co. v. Ross*, 20 P. 197, 40 Kan. 598, 2 L. R. A. 217.

¹⁵ *Kansas City & T. Ry. Co. v. Vickroy*, 26 P. 698, 46 Kan. 248.

¹⁶ *Stephens v. Gardner Creamery Co.*, 57 P. 1058, 9 Kan. App. 883.

¹⁷ *Latham v. Brown*, 29 P. 400, 48 Kan. 190; *Chicago, K. & W. R. Co. v. Mouriquand*, 25 P. 567, 45 Kan. 170.

In action for destruction of shade trees, former county clerk and assessor familiar with the property and its then market value, and local real estate agent, stating that he knew value of trees, were competent to testify as to damages. *Hoffer v. Emporia Gas Co.*, 103 Kan. 354, 589, 175 P. 393.

¹⁸ A witness who testified that he knew the value of a barn which he had built shortly before, and whose testimony showed an intimate knowledge of the different parts of the barn in controversy, could give his opinion as to the value of the barn. *Atchison, T. & S. F. R. Co. v. Huitt*, 41 P. 1051, 1 Kan. App. 788.

Where plaintiff had purchased the materials used in constructing and equipping the factory destroyed by fire, held, that he was competent to testify to the value of the plant. *Hollinger v. Missouri, K. & T. Ry. Co.*, 146 P. 1034, 94 Kan. 316, Ann. Cas. 1916D, 802.

Testimony as to the condition and value of buildings destroyed by a fire started by defendant's locomotive, based on an examination of the ruins long

It is not error to admit testimony of the total value of property destroyed by fire where the same witness has testified in detail as to the value of the various items burned.¹⁹

Farmers are qualified to testify as to the value of growing crops at the time of their destruction.²⁰

A stock raiser or dealer is competent to testify to the value of stock.²¹

A witness is not required to be an expert to testify to the reasonable or market value of goods, such as ordinary wearing apparel and household furniture; the value of such articles being within the knowledge of ordinary experience.²²

after the fire by the witnesses, who had not seen them within several weeks before the fire, is incompetent. *Union Pac. Ry. Co. v. Lipprand*, 5 Kan. App. 481, 47 P. 625.

Witnesses who are not architects, builders or contractors may be allowed to state their opinions as to the worth of a building from a general knowledge of it without being able to estimate the value of any of the materials entering into its construction. *Springfield Fire & Marine Ins. Co. v. Payne*, 46 P. 315, 57 Kan. 291.

¹⁹ *St. Louis, I. M. & S. Ry. Co. v. Weldon*, 39 Okl. 360, 135 P. 8.

²⁰ *St. Louis & S. F. R. Co. v. Dale*, 128 P. 137, 36 Okl. 114.

²¹ Where a witness had been a cattle raiser or dealer, and had priced cattle at the time those in question, alleged to have been damaged, were placed on the market, he was competent to testify as to the value or damage to the cattle in question. *St. Louis & S. F. R. Co. v. Bilby*, 130 P. 1089, 35 Okl. 589.

A farmer, 70 years old, who had handled horses nearly all his life, and testified that he knew the market value of the horse in question, held qualified to state the value. *St. Louis & S. F. R. Co. v. Mounts*, 44 Okl. 359, 144 P. 1036.

Where an owner of sheep testifies that he knows the market value of such animals, it is not error to permit him to give his estimate of their value. *Midland Valley R. Co. v. Larson*, 138 P. 173, 41 Okl. 360.

A farmer, living in the neighborhood where certain farm horses are sold, who knows their value, the character of work done by them upon the farm, and has hired horses to do such work for himself, is qualified to testify what the value of the use of such a team is. *Kennett v. Fickel*, 21 P. 93, 41 Kan. 211.

A woman who had lived on a farm 17 years, and who during that time had bought and sold hogs, horses, and cattle, and had actually purchased all of the cattle sued for in replevin, was competent to express an opinion as to the value of such cattle. *Chanuer v. Parker*, 70 P. 368, 65 Kan. 860.

²² *O. K. Transfer & Storage Co. v. Nelll*, 59 Okl. 291, 159 P. 272, L. R. A. 1917A, 58; *Rogers v. O. K. Bus & Baggage Co.*, 46 Okl. 289, 148 P. 837, Ann. Cas. 1917B, 581.

A witness who had charge of goods and knew all about the stock of goods, its cost, value, and what it actually brought on the market, is competent to testify to the value of the property. *Hindman v. Askew Saddlery Co.*, 57

It is not objectionable to permit the plaintiff in an action for services, after testifying that the services were rendered, to testify to their value.²³

In fixing the value of time lost by an adult injured party, the opinions of witnesses as to what he would be capable of earning at vocations in which he had never been employed are inadmissible.²⁴

In an action for personal injuries, the evidence of plaintiff as to the quantum of damages sustained, is inadmissible as a conclusion and an invasion of the province of the jury.²⁵

In an action by a contractor for damages for a breach of contract to dig gas wells, the testimony of witnesses who have had experience in drilling wells on the same farm and other wells in the vicinity, where the strata appears to be the same, and the condition similar, is competent to show the cost of the work contracted for and prevented by the owner.²⁶

Testimony of witnesses as to usable or rental value of a machine to recover which an action is brought is admissible, where based on the experience in renting such machine.²⁷

§ 1045. Paternity, race, and age

Resemblance between a child and its putative father is not a subject of opinion evidence, and hence opinions as to family resemblance between the two are not admissible in proof of paternity.²⁸

On an issue whether one is a negro or a white person, witnesses

P. 1050, 9 Kan. App. 98; *St. Louis & S. F. R. Co. v. Crowell*, 127 P. 1063, 33 Okl. 773.

In an action for loss of household goods and wearing apparel having no market value, the owner, who is familiar with the lost articles, has purchased, and used them, was competent to testify as to their value to him. *St. Louis & S. F. R. Co. v. Dunham*, 129 P. 862, 36 Okl. 724.

On a trial for conversion of goods, a question asked of defendant as to the value of the goods at the time he took possession of them, under a claim as mortgagee, is not incompetent. *Robinson v. Peru Plow & Wheel Co.*, 31 P. 988, 1 Okl. 140.

²³ *Carter v. Christie*, 42 P. 256, 1 Kan. App. 604.

²⁴ *Atchison, T. & S. F. R. Co. v. Chance*, 45 P. 60, 57 Kan. 40.

²⁵ *Chicago, R. I. & P. Ry. Co. v. Teese*, 140 P. 1166, 42 Okl. 188, 52 L. R. A. (N. S.) 167.

²⁶ *Fredonia Gas Co. v. Bailey*, 94 P. 258, 77 Kan. 296.

²⁷ *Scott v. Vulcan Iron Works Co.*, 122 P. 186, 31 Okl. 334.

²⁸ *Shorten v. Judd*, 42 P. 337, 56 Kan. 43, 54 Am. St. Rep. 587.

who have long known the person should be permitted to state that he is a negro or a white person.²⁹

Witnesses acquainted with a person are properly permitted to testify that he did not appear more than a given age at a certain time.³⁰

Any witness who fully states his means of knowledge and the basis of his opinion may give his opinion as to the age of an absent person.³¹

§ 1046. Mental condition

Nonexperts, who testified that they had observed the conduct of a person whose mental condition was in question, and stated the facts, were entitled to give their opinion, based thereon, as to the person's sanity.³²

Neither an expert nor a nonexpert witness may give a mere abstract statement that in his opinion a person was or was not capable of making a particular contract.³³

²⁹ *Cole v. District Board of School Dist. No. 29, McIntosh County*, 123 P. 426, 32 Okl. 692, Ann. Cas. 1914A, 459.

³⁰ *Bell v. Bearman*, 133 P. 188, 37 Okl. 645.

³¹ *State v. Grubb*, 41 P. 951, 55 Kan. 678.

³² *Conwill v. Eldridge*, 130 P. 912, 35 Okl. 537; *Stafford v. Sutcliffe*, 103 Kan. 592, 175 P. 981; *Moward v. Carter*, 80 P. 61, 71 Kan. 85; *Zirkle v. Leonard*, 60 P. 318, 61 Kan. 636; *Order of United Commercial Travelers of America v. Barnes*, 90 P. 293, 75 Kan. 720; *Grimshaw v. Kent*, 73 P. 92, 67 Kan. 463; *Moors v. Sanford*, 41 P. 1064, 2 Kan. App. 243; *Baughman v. Baughman*, 4 P. 1003, 32 Kan. 538; *Fish v. Poorman*, 116 P. 898, 85 Kan. 237.

Nonprofessional witnesses may state the results of their observation and their opinion of the mental condition of another, when accompanied by the facts upon which their opinions are based, or where an opportunity is given to test the basis of their opinions by cross-examination. *Munger v. Myers*, 153 P. 497, 96 Kan. 743.

In suit to cancel deed on ground of grantor's mental incapacity, nonexpert witnesses acquainted with grantor, who stated facts which they observed and on which they passed their opinion, may express an opinion as to grantor's mental capacity. *Campbell v. Dick* (Okl.) 176 P. 520.

A nonexpert may testify to the unsoundness of a grantor's mind, where he gives his means of observing and states the acts and conduct of grantor. *Jenkins v. Jenkins*, 146 P. 414, 94 Kan. 263.

Evidence of nonexpert witnesses held to show sufficient acquaintance and opportunity for observation, to enable them to form a belief as to plaintiff's mental condition and express opinions relative thereto. *Farmers' & Merchants' Bank of Mountain View v. Haile*, 46 Okl. 636, 149 P. 214.

³³ *Brown v. Brown*, 152 P. 646, 96 Kan. 510.

A party is competent to testify to his own mental condition.³⁴

A witness who, about the time of the execution of the deed in question was with the grantor and testified in regard to her acts and statements at that time, as well as on other occasions, is competent to express an opinion as to his mental capacity.³⁵

Where a witness is describing the manner and attitude of persons engaged in a conversation which he does not hear, it is not improper to permit the witness to characterize the action of one of the speakers as gesticulating "like he was mad," or standing with his head down "as if he was crying."³⁶

The scrivener and subscribing witnesses to a will are competent witnesses as to the testator's mental condition.³⁷

§ 1047. Physical appearances, conduct, and condition

An unprofessional witness can testify from his own observation as to what was the physical condition of a person at a given time.³⁸

In an action against a surgeon for malpractice, nonexpert witnesses may testify to external appearances and manifest conditions observable by any one.³⁹

It is not error to permit a nonexpert to express an opinion as to

³⁴ In a proceeding for contempt in violating an injunction restraining the maintenance of a private asylum, evidence of a witness that screams from the cottages which she described made her nervous and disturbed her was admissible; a party being competent to testify to his own mental condition. *State v. Lindsay*, 116 P. 209, 85 Kan. 192.

³⁵ *Kempf v. Koppa*, 85 P. 806, 74 Kan. 153.

³⁶ *White v. White*, 90 P. 1087, 76 Kan. 82.

³⁷ *Durant v. Whitchee*, 156 P. 739, 97 Kan. 603.

³⁸ *City of Topeka v. Griffey*, 51 P. 296, 6 Kan. App. 920.

That a witness is not an expert does not necessarily render him incompetent to testify as to the bodily condition and health of persons. *Ewing v. Wichita R. & Light Co.*, 137 P. 940, 91 Kan. 388.

In an action for damages for personal injuries, it is error to permit plaintiff to testify that, after she had examined certain bruises and injuries on her body, she knew she would be confined to her bed, and accordingly cut short a visit she was making in order to return home, though such error is not necessarily sufficiently harmful to justify a new trial. *City of Hutchinson v. Van Cleve*, 53 P. 888, 7 Kan. App. 676.

In an action on a benefit certificate, the neighbors, who are well acquainted with the deceased could testify that he appeared to be in vigorous health, where the corporal appearances and conduct, as indications of the inward health or lack of it, are relevant. *Miller v. National Council of Knights and Ladies of Security*, 103 Kan. 579, 175 P. 397.

³⁹ *Paulich v. Nipple*, 104 Kan. 801, 180 P. 771; *Sly v. Powell*, 87 Kan. 142, 123 P. 881.

the physical ability of an injured party to work, based on obvious facts, not calling for an opinion arrived at by a process of reasoning.⁴⁰

A party testifying to his pains cannot state his opinion that his injuries are permanent.⁴¹

§ 1048. Financial condition

In an action to recover goods claimed to have been procured by the fraud of the purchaser, letters written by the vendor to parties in the vicinity of the vendee, inquiring about his financial standing, and their letters in answer thereto giving their opinions thereon, are inadmissible to show such condition.⁴²

§ 1049. Medical and surgical practice

Whether a surgical operation was performed with a reasonable degree of skill, knowledge, and care, and whether the patient was thereafter skillfully and properly treated, cannot be established by testimony of those without special learning and skill as to such operations and practice.⁴³

§ 1050. Speed

Persons of intelligence and observation may testify as to speed of a train without qualifying as experts; the lack of knowledge affecting the weight of the evidence rather than competency of the witnesses.⁴⁴

It is not error to permit a witness who is accustomed to seeing trains of cars pass, and who says that he can tell whether they are

⁴⁰ Creek Coal Mining Co. v. Paprotta (Okl.) 175 P. 235.

⁴¹ Shawnee-Tecumseh Traction Co. v. Griggs, 50 Okl. 566, 151 P. 230.

⁴² E. Rothschild & Bros. v. Hays, 59 P. 660, 9 Kan. App. 193.

C., at the request of D., made a written statement to D. as to his opinion of the financial condition of J. Held, that the statement was merely a conclusion of C. as the agent of D., and was therefore incompetent as against J. William B. Grimes Dry Goods Co. v. Jordan, 53 P. 186, 7 Kan. App. 192.

⁴³ Paulich v. Nipple, 104 Kan. 801, 180 P. 771; Sly v. Powell, 87 Kan. 142, 123 P. 881.

⁴⁴ Atchison, T. & S. F. Ry. Co. v. Miles (Okl.) 170 P. 896.

The speed of a train may be shown by an ordinary witness who has given some attention to the running of trains and has a knowledge of time and distance. Atchison, T. & S. F. Ry. Co. v. Holloway, 80 P. 31, 71 Kan. 1.

Witness who testified that he did not observe or know speed of train was not qualified to testify with regard thereto. Chicago, R. I. & P. Ry. Co. v. Barton, 59 Okl. 109, 159 P. 250.

moving fast or slow by the sound, to testify that a train which he heard distinctly, but did not see, was going pretty fast.⁴⁵

Where the rate of speed of an automobile is material, any person of ordinary means of observation who may observe the vehicle may estimate the rate of speed at which it was moving.⁴⁶

§ 1051. Damages

In an action for rent, plaintiff's testimony that it was his opinion that he had been damaged by the maintenance of a gambling establishment in the upper story of the leased building is not legal evidence on which to predicate his counterclaim.⁴⁷

In an action to recover damages to property occasioned by the maintenance of a creamery, the admission of the evidence of witnesses as to whether, in their opinion, the stench arising from the creamery would penetrate as far as plaintiff's house, is error, there being no question of science or skill involved in the fact.⁴⁸

§ 1052. — Amount

Damages cannot be proved by asking a witness how much a thing is, or was, damaged.⁴⁹

A nonexpert witness cannot give his opinion as to the amount of damages suffered by plaintiff,⁵⁰ or what damages plaintiff should recover.⁵¹

Where damages are claimed from a carrier for delay in the transportation of cattle, experienced witnesses may testify to loss of weight and decrease in value.⁵²

⁴⁵ *Missouri Pac. Ry. Co. v. Hildebrand*, 34 P. 738, 52 Kan. 284.

⁴⁶ *Miller v. Jenness*, 114 P. 1052, 84 Kan. 608, 34 L. R. A. (N. S.) 782.

A person injured at a street crossing by an automobile who sees it approaching, and has frequently observed the passage of automobiles and has ridden in them, may testify as to its speed at the time of the collision. *Himmelmwright v. Baker*, 109 P. 178, 82 Kan. 569.

⁴⁷ *Clarke v. Uihlein*, 52 Okl. 48, 152 P. 589.

⁴⁸ *Stephens v. Gardner Creamery Co.*, 57 P. 1058, 9 Kan. App. 883.

⁴⁹ *Sharon Town Co. v. Morris*, 18 P. 230, 39 Kan. 377; *Upcher v. Oberlender*, 31 P. 1080, 50 Kan. 315.

⁵⁰ *Atchison, T. & S. F. R. Co. v. Snedeger*, 49 P. 103, 5 Kan. App. 700.

⁵¹ *Atchison, T. & S. F. R. Co. v. Wilkinson*, 39 P. 1043, 55 Kan. 83.

Where the court permitted plaintiff to testify as to damages sustained to the stock of goods, it was error, as he could only testify as to the facts, and not his conclusions, as to the damages. *Tootle v. Kent*, 73 P. 310, 12 Okl. 674.

⁵² *Dickinson v. Seay* (Okl.) 175 P. 216.

Where damages are claimed from a carrier on account of weight lost by

A pasture and cattle corrals having been injured, but not destroyed, by the right of way, it is improper for a witness to give his estimate of the amount of damages thereto. He should describe how they were injured, and their value immediately before they were injured and immediately after.⁵³

In an action against a city to recover for the depreciation in the value of property by reason of lowering the grade of the street in front of such property, it is not error to permit a witness to testify that the property is worth a certain sum less, or one-third less, on account of the change of grade, where such witness has already testified what the value was before the grade was altered.⁵⁴

Where those accustomed to feeding and handling cattle can estimate with reasonable certainty the injury sustained by cattle by changing the feed given them from shocked corn to straw, cane, and like fodder, such testimony is admissible in measuring the damages against one wrongfully destroying the shocked corn.⁵⁵

In proceedings to condemn a right of way, it is not competent to ask a witness how much less the farm was worth after the railroad had established its track through it, taking into consideration the damage, loss, and inconvenience, present and prospective, which may reasonably be expected to result from permanently maintaining the railroad.⁵⁶

cattle by negligent delay, and the exact weight at the beginning and at the end of the journey cannot be shown, persons experienced in such matters can give their opinion of the loss ordinarily resulting under such circumstances as well as of the loss in similar cases where no delay occurs. *Atchison, T. & S. F. Ry. Co. v. Watson*, 81 P. 499, 71 Kan. 696.

⁵³ *Ottawa, O. C. & C. G. R. Co. v. Adolph*, 21 P. 643, 41 Kan. 600.

⁵⁴ *City of Topeka v. Martineau*, 22 P. 419, 42 Kan. 387, 5 L. R. A. 775.

⁵⁵ *Enlow v. Hawkins*, 81 P. 189, 71 Kan. 633.

⁵⁶ *Chicago, K. & N. Ry. Co. v. Neiman*, 28 P. 22, 45 Kan. 533.

In an appeal from an award made in a proceeding to condemn a right of way for a railroad over a highway which ran through a tract of land, it is error to permit a witness to state, over objection, what, in his opinion, was the increased burden to the fee of the land by reason of the construction of the railroad, and how much the land was depreciated in value per acre by reason of the construction and operation of the railroad. *Chicago, K. & W. R. Co. v. Woodward*, 29 P. 1146, 48 Kan. 599.

§ 1053. Custom and usage

It is competent for any witness, having personal knowledge of the facts, to state what services are generally performed by firemen in a railroad yard.⁵⁷

Where a person has lived several months on a farm, near a railroad crossing of a public highway, and his business requires him to cross the track frequently, and he is able to tell the time the regular trains pass the crossing, he is competent to testify whether a particular train is an irregular or extra one.⁵⁸

In an action against a carrier for damages from delay in the transportation of cattle, witnesses who from past experience are familiar with such transportation may properly testify to the usual time required to make such shipments.⁵⁹

It must be shown that the witness has knowledge of the subject about which he is asked to testify.⁶⁰

§ 1054. Habits and nature

A witness may state the result of his experience as to the habits and nature of animals.⁶¹

§ 1055. Ownership

Ownership of personalty, being ordinarily a simple fact, to which a witness having the requisite knowledge can testify directly, testimony as to who is the owner of property involved in replevin, involving a fact clearly within the knowledge of the witness, and not the expression of an opinion upon facts proved, is admissible;⁶²

⁵⁷ *Missouri Pac. Ry. Co. v. Mackey*, 6 P. 291, 33 Kan. 298.

⁵⁸ *Missouri Pac. Ry. Co. v. Stevens*, 12 P. 25, 35 Kan. 622.

⁵⁹ *Dickinson v. Seay* (Okl.) 175 P. 216.

⁶⁰ In an action against a city for personal injuries to plaintiff, alleged to have been caused by a defective sidewalk, defendant offered to prove by its street commissioner the customary price in the city of putting down a certain kind of sidewalk, and how much a good workman could put down. Held, that the evidence was properly excluded, as no knowledge of the witness on the subject was shown. *City of Ft. Scott v. Canfield*, 26 P. 697, 46 Kan. 322.

⁶¹ An opinion of a witness that the horse "seemed to be frightened" is admissible, under the rule admitting opinions from necessity. *Bartlesville Interurban Ry. Co. v. Quaid*, 51 Okl. 166, 151 P. 891, L. R. A. 1918A, 653.

Admission of testimony of a farmer who had observed the habits of horses that, as a rule, young horses were afraid of openings such as are found in railroad trestle bridges held not error. *Dannenberg v. Missouri Pac. Ry. Co.*, 96 Kan. 708, 153 P. 504.

⁶² *Jantzen v. Emanuel German Baptist Church*, 112 P. 1127, 27 Okl. 473, Ann. Cas. 1912C, 659.

A witness may testify as to who is the owner of personalty where such tes-

but witnesses can not give their opinions on an issue of ownership of personal property.⁶³

In ejectment, a question whether the witness had ever parted with his interest in the land in controversy was properly excluded as calling for a conclusion.⁶⁴

§ 1056. Agency

Evidence that a party is or is not an agent is a mere conclusion, but a witness may state facts concerning transactions between him and the principal, leaving the court and jury to determine the existence of agency.⁶⁵

§ 1057. Handwriting

Where a witness testifies that he is familiar with the signature of a certain person and would know it anywhere, his testimony to a signature purporting to be that of the person is admissible.⁶⁶

A witness who was not present when an instrument was signed, and had no knowledge of the handwriting of the party signing it, is incompetent to prove the signature.⁶⁷

§ 1058. Identification

It is possible that a typewritten letter may have about it such peculiarities as shall enable one who has received several letters written thereon which he knows come from the one whose typewritten signature is attached thereto, to identify such letter.⁶⁸

A witness who knows a certain animal may testify to its identity.⁶⁹

timony involves a fact, and is not a mere expression of opinion. *Ft. Smith & W. R. Co. v. Winston*, 136 P. 1075, 40 Okl. 173.

A party claiming title to personalty may testify as to who is its owner. *First Nat. Bank of Hays City v. Robinson*, 144 P. 1019, 93 Kan. 464, L. R. A. 1915D, 134.

Where the main question at issue is the ownership of a chattel, it is not competent for a witness to testify in general terms that the plaintiff is the owner. *Hite v. Stimmell*, 25 P. 852, 45 Kan. 469.

⁶³ *Brown v. Cloud County Bank*, 42 P. 593, 2 Kan. App. 352.

⁶⁴ *Work v. Work*, 136 P. 236, 90 Kan. 683.

⁶⁵ *Ford Motor Co. v. Livesay*, 61 Okl. 231, 160 P. 901.

⁶⁶ *Arthur v. Arthur*, 17 P. 187, 38 Kan. 691.

⁶⁷ *Arthur v. Arthur*, 38 Kan. 691, 17 P. 187.

⁶⁸ *Huber Mfg. Co. v. Claudel*, 80 P. 960, 71 Kan. 441.

⁶⁹ A witness properly qualified is competent to prove the identity of a hog. *Lawton v. Shepard*, 130 P. 135, 36 Okl. 772.

§ 1059. Dangerous and safe conditions—Negligence

A witness may not give an opinion on the ultimate fact which the jury has to decide.⁷⁰

Where one of the main questions in issue is the negligence of those in charge of a business, the opinions of witnesses as to whether or not such persons had exercised due diligence are inadmissible.⁷¹

⁷⁰ A witness may not give an opinion on the ultimate fact that the jury has to decide, whether the cause of the trouble preventing a contractor drilling a well was insufficiency of the casing, for which the owner was responsible, or matters for which the contractor was responsible. *Augusta Oil, Gas, Mining & Prospecting Co. v. Independence Drilling Co.*, 101 P. 1072, 80 Kan. 261.

The distance that hand cars running on the same track should be kept apart, under certain circumstances, in order to protect the men against danger, is a question for the jury to determine, upon evidence, of all the facts, rather than by the opinion of a witness. *Atchison, T. & S. F. R. Co. v. Chance*, 45 P. 60, 57 Kan. 40.

Sidewalks and street crossings.—It is error to permit a witness to give his opinion that a sidewalk is dangerous; but where, immediately before, he had described it at length, and from such description no other inference could have reasonably been drawn than that it was dangerous, such evidence will be presumed harmless. *City of Topeka v. Sherwood*, 18 P. 933, 39 Kan. 690.

It is error, in an action against a city for personal injuries caused by a defective crossing, to permit witnesses not shown to have particular knowledge with reference to street crossings to give their opinions as to whether the crossing was dangerous. *City of Junction City v. Blades*, 41 P. 677, 1 Kan. App. 85.

The opinion of a witness, who had constructed and repaired sidewalk crossings elsewhere, that the crossing was not in a proper condition, or that certain repairs were required, held improperly admitted, where the matters were

⁷¹ *Inslay v. Shire*, 39 P. 713, 54 Kan. 793, 45 Am. St. Rep. 308.

A bridge where a brakeman lost his life was so described and photographed that the jury could thoroughly understand its character and condition. Railway employes were permitted, over objection, to give their opinions as to such bridge being a safe place to work. Held error, as the jury could not from such opinions have received any assistance in arriving at a proper conclusion. *Duncan v. Atchison, T. & S. F. Ry. Co.*, 119 P. 356, 86 Kan. 112, 51 L. R. A. (N. S.) 565.

Cattle guards.—On an issue whether a railway company was negligent in failing to construct a cattle guard at a highway, it is error to permit witnesses to testify that in their opinion a guard maintained at such place would be dangerous to railway employes. *Chicago, R. I. & P. Ry. Co. v. Clonch*, 43 P. 1140, 2 Kan. App. 728.

Upon the question of whether the cattle guards were proper and sufficient to complete the inclosure, and prevent domestic animals crossing the same, the opinions of witnesses are not admissible. *St. Louis & S. F. Ry. Co. v. Ritz*, 6 P. 533, 33 Kan. 404.

An experienced railroad man, familiar with coal cars and the work of making up freight trains, may give his opinion regarding the proper position or proper steps for an employé of the railway company to take in order to pass from a box to a coal car when the same are in motion.⁷²

Testimony of one who is experienced or is an expert is admissible as to the safe method of oiling machinery,⁷³ or to prove the duty of a miller in operating machinery.⁷⁴

§ 1060. Competency and skill

It has been held error to permit a witness to give his opinion as to one's competency and skill.⁷⁵

Subdivision II.—Expert Testimony

§ 1061. Subject-matter

Opinions of experts are admissible with reference to an ultimate fact in issue, where the subject can be presented to the jury so that

within the comprehension of a jury under the evidence. *Martin v. City of Columbus*, 143 P. 421, 93 Kan. 79.

In an action against a city for personal injuries sustained by plaintiff falling in consequence of an alleged defective area way, trapdoor, and sidewalk upon one of the principal streets of the city, the court permitted plaintiff, over objection, to introduce in evidence the opinion of a large number of witnesses, some of whom were expert carpenters, and others not shown to be experts, or possessed of any peculiar skill, who had seen the area way, trapdoor, the supports thereto, and the sidewalk, and such witnesses were permitted to testify that, in their opinion, "the trapdoor was not properly constructed," that "it was in a bad condition," that "it was not constructed right," that "it seemed to be unsafe," and similar expressions. Held, that the admission of such testimony, calling for the opinion and conclusion of such witnesses, was prejudicial error; that in such cases, where the relation of facts and their probable result can be determined without special skill or study, the facts must be given, and the jury left to draw their own conclusions. *City of Holton v. Hicks*, 58 P. 998, 9 Kan. App. 179.

⁷² *Missouri, K. & T. Ry. Co. v. Merrill*, 60 P. 819, 61 Kan. 871.

⁷³ In an action for injuries to a servant while oiling machinery, testimony of an expert as to the safe method of oiling the machinery is admissible. *Burk v. Hobart Mill & Elevator Co.*, 48 Okl. 470, 150 P. 458.

⁷⁴ In an action under Rev. St. Mo. 1909, § 7828, requiring guarding of machinery, testimony of experienced millers was admissible to prove the ordinary duty of a miller when a corn mill chokes in operation. *Bailloil v. Nelson Grain Co.*, 145 P. 895, 93 Kan. 775.

⁷⁵ On an issue as to the competency and skill of a coemployé of plaintiff, it is error to permit a witness to give an opinion as to his skill and competency. *Cherokee & P. Coal & Mining Co. v. Dickson*, 39 P. 691, 55 Kan. 62.

it is capable of drawing the ultimate inference.⁷⁶ They are admissible whenever the subject of inquiry is such that the jury are unlikely to form a correct judgment upon the matter without such assistance; the value of such evidence being for the jury.⁷⁷

Expert testimony is inadmissible to prove ultimate facts which the jury itself should determine.⁷⁸

Expert testimony should be excluded, where all of the facts are

⁷⁶ *Root v. Cudahy Packing Co.*, 129 P. 147, 88 Kan. 413, rehearing denied 129 P. 1199, 89 Kan. 8.

In action for personal injury in crossing accident, a physician's testimony that from patient's statements her jump out of a wagon would have been sufficient to produce her miscarriage was not objectionable as invading jury's province by stating what did in fact cause the miscarriage. *Ft. Smith & W. Ry. Co. v. Hutchinson* (Okl.) 175 P. 922.

In action for injury to an employé from failure to guard a machine, as required by Factory Act, testimony of expert, who not only gave facts on which he based his opinion, but who fairly demonstrated practicability of safeguarding machine, was not objectionable as being testimony to ultimate facts in issue. *Hockman v. Sifers Candy Co.*, 104 Kan. 94, 178 P. 254.

⁷⁷ *Chicago, R. I. & P. Ry. Co. v. Pruitt* (Okl.) 170 P. 1143.

Testimony of skilled electrician as to diffusion of lights from lamps where accident happened, and of similar lights and the shadows created thereby, is competent on question of sufficient lighting. *Prickett v. Sulzberger & Sons Co.*, 57 Okl. 567, 157 P. 356.

⁷⁸ *Healer v. Inkman*, 146 P. 1172, 94 Kan. 504.

Whether an order given the injured employé to clean gin machinery was a continuing one and required a continued future observance held not a proper subject for expert testimony. *Choctaw Cotton Oil Co. v. Pope*, 47 Okl. 383, 148 P. 170.

In an action on an accident insurance policy defended on the ground of misrepresentations by the insured, insurance experts may not state that facts suppressed or falsified were material and that the policy would not have been issued if the truth had been known, but they can state the usage of insurance companies in respect to charging higher rates or canceling policies when made aware of the particular facts in question. *Continental Casualty Co. v. Owen*, 38 Okl. 107, 131 P. 1084.

It is not error to refuse to permit an expert in handwriting to testify from an examination of the will, and an erasure therein, that a person who wrote with a nervous hand was unable to make such an erasure, though the witness might properly testify that the hand of the person who wrote the will was nervous and unsteady. *Scott v. Thrall*, 95 P. 563, 77 Kan. 688, 17 L. R. A. (N. S.) 184, 127 Am. St. Rep. 449.

The general duties of a fireman on a switch engine in a certain trackyard at a stated time is not a matter which is the subject of expert testimony, and upon which an opinion may be given, but is a question of fact which may be testified to by any witness having personal knowledge thereof. *Missouri Pac. Ry. Co. v. Mackey*, 6 P. 291, 33 Kan. 298.

The opinion of an attorney regarding the title to a tract of land which

susceptible of being placed before the jury, and from them the jury are capable of determining whether one was guilty of negligence.⁷⁹

It has been held that the testimony of experienced persons is admissible as to whether or not a particular device is reasonably safe,⁸⁰ the erection of a dam would back up water so as to affect the operation of a mill situated above the proposed dam,⁸¹ the place where an accident occurred is a dangerous place to work,⁸² it is dangerous to catch a locomotive which is moving at a certain rate of speed,⁸³ a locomotive properly equipped would throw sparks sufficient to ignite property on the right of way,⁸⁴ railway signals

he had examined is not competent to show that the title claimed by one of the parties is imperfect. *Stiles v. Steele*, 15 P. 561, 37 Kan. 552.

A witness was asked whether, after having examined the door of the boiler in question, and the door, after its explosion, he could say from his knowledge and experience in the handling and using of boilers, if a man in the exercise of ordinary and reasonable precaution could have told this boiler was defective in any way, to which an objection was sustained. Held, that the question did not call for expert evidence, save in the slight degree furnished by the experience of witness in handling boilers, and the ruling was proper. *Wise v. Lillie*, 84 Kan. 86, 113 P. 403.

⁷⁹ *Louisville, E. & St. L. C. R. Co. v. Berry*, 35 N. E. 565, 9 Ind. App. 63.

In an action against a sheriff for the wrongful seizure of goods, a witness who testified that he had been a merchant one year, and had been sheriff of the county, and had attached several stocks, was asked if these goods were as well handled and cared for as goods usually are when attached. Held, that the question should have been excluded, as calling for witness' opinion in a matter not competent for expert testimony. *Dow v. Julien*, 4 P. 1000, 32 Kan. 576.

⁸⁰ Whether a particular device for operating a circular saw is reasonably safe is a subject for expert evidence. *King v. King*, 100 P. 503, 79 Kan. 584.

Opinion evidence that a machine is unsafe is admissible, where the machine is so complicated that the grounds of the opinion cannot be fully exhibited to the jury. *Wells v. Swift & Co.*, 133 P. 732, 90 Kan. 168.

⁸¹ Expert testimony is competent to show what effect the erection of a mill-dam will have on the channel of a stream above such dam, and whether such dam backs the water up so as to affect the operation of a mill situated above the dam. *Ball v. Hardesty*, 16 P. 808, 38 Kan. 540.

⁸² In a mine employe's action for injuries from the derailment of a coal car, it is not error to permit experienced miners to state whether the place where the accident occurred was a dangerous place to work. *Great Western Coal & Coke Co. v. Malone*, 136 P. 403, 39 Okl. 693.

Opinions of experts, as to whether it was practicable to guard the machinery involved held admissible, where their knowledge was superior to that of the jury. *Warfield v. Morgan*, 121 P. 489, 86 Kan. 524.

⁸³ Whether there would be any danger to an experienced man in catching a train moving from 6 to 8 miles an hour held a proper subject for expert testimony. *Missouri, O. & G. Ry. Co. v. Miller*, 45 Okl. 173, 145 P. 367.

⁸⁴ A locomotive engineer of long experience who understands the operation

were properly set,⁸⁵ an engineer is competent,⁸⁶ a filling would stop the flow of water,⁸⁷ the treatment of stock contributed to its depreciation,⁸⁸ or the framework of a building was negligently constructed.⁸⁹

The opinion of a witness, showing the proper qualifications to speak as an expert on the effect on persons and buildings of the explosion of a certain amount of dynamite within a certain distance, is proper evidence in an action to enjoin the prosecution of the business in which the dynamite is used.⁹⁰

In an action on a fire insurance policy, where the sole question is whether spontaneous combustion occurred, it is not error to permit an expert to define "fire," "ignition," "ignition point," the relation between "fire" and "flame" and kindred terms of which the meaning is commonly understood by all well-informed persons.⁹¹

of spark arresters in locomotives, may testify as to whether a locomotive equipped with a first-class spark arrester would throw sparks sufficient to ignite property on the right of way. *Kansas City, Ft. S. & M. R. Co. v. B. F. Blaker & Co.*, 75 P. 71, 68 Kan. 244, 64 L. R. A. 81, 1 Ann. Cas. 883.

In an action against a railroad company to recover damages caused by fire, it is competent to show by hypothetical questions propounded to experts that an engine properly equipped and carefully operated will not set a fire. *St. Louis & S. F. R. Co. v. Noland*, 90 P. 273, 75 Kan. 691.

⁸⁵ Opinions of experienced railway men as to "good condition" of signals set so close to track as to endanger trainmen are competent in an action on managing railway's claim for expenses in keeping signals in good condition. *Bush v. Chicago Great Western Ry. Co.*, 103 Kan. 385, 175 P. 160.

⁸⁶ To rebut the presumption of negligence of a railroad company arising from the occurrence of a fire, expert testimony is admissible on the issue of the competency of the engineer of the engine causing the fire. *Saunders v. Atchison, T. & S. F. Ry. Co.*, 119 P. 552, 86 Kan. 56.

⁸⁷ The defendant, after the boring of a well under contract with plaintiff, having insisted upon having the space outside the pump pipe filled with pounded stone and gravel, the testimony of experienced well diggers is admissible to show that such filling would stop the flow of water. *Boston v. Hewitt*, 58 P. 619, 8 Okl. 401.

⁸⁸ In an action for damage to a delayed shipment of cattle, an expert witness' testimony that certain treatment within the issues contributed to the depreciation of the cattle has been held competent. *St. Louis & S. F. R. Co. v. Shepard*, 139 P. 833, 40 Okl. 599.

⁸⁹ Expert testimony is admissible on the issue of the negligent construction of the framework of a building, where such framework was so complicated that the jury could not understand its construction without expert testimony. *Henry v. Morris & Co.*, 140 P. 413, 42 Okl. 13.

⁹⁰ *Remsburg v. Iola Portland Cement Co.*, 84 P. 548, 73 Kan. 66.

⁹¹ *Sun Ins. Office of London v. Western Woolen Mill Co.*, 82 P. 513, 72 Kan.

Testimony of a farmer, who is an expert on the value of a growing crop, is admissible to prove the value thereof.⁹²

A veterinary surgeon who treated certain poisoned horses, and gave the effect of the poison on them, and was acquainted with the general effects of such poison on horses, may testify to the permanency of the injuries,⁹³ and if he is acquainted with the general value of such horses, he may testify to the damages occasioned by such injuries.⁹⁴

Expert testimony has been held inadmissible to show that elevators are unsafe, where evidence could be given of the results of their use,⁹⁵ that telephone poles placed along the right of way might frighten horses,⁹⁶ that land contained in tax books describes the same land as that described in a tax deed,⁹⁷ or to show that a bridge is unsafe, where the character and extent of its defects are comprehensible by the jury.⁹⁸

Where the injury complained of is of such character as to require skilled and professional men to determine the cause thereof, the question is one of science and must necessarily be proved by the testimony of skilled professional persons.⁹⁹

⁹² *Chicago, R. I. & P. Ry. Co. v. Johnson*, 107 P. 662, 25 Okl. 760, 27 L. R. A. (N. S.) 879.

⁹³ *Coyle v. Baum*, 41 P. 389, 3 Okl. 695.

⁹⁴ *Coyle v. Baum*, 41 P. 389, 3 Okl. 695.

⁹⁵ In an action for injuries to a servant by the fall of a friction elevator, the opinions of experts that such elevators were unsafe and improper to be used is inadmissible, the best evidence of reliability being the demonstrated results of their use, which can be shown by evidence. *Root v. Cudahy Packing Co.*, 129 P. 147, 88 Kan. 413, rehearing denied 129 P. 1199, 89 Kan. 8.

⁹⁶ In an action to recover for injuries from alleged negligence in placing telephone poles on the side of a highway in such a manner as to frighten horses, where the location and all the surrounding circumstances can be easily described by witnesses, opinions of experts as to whether the poles were calculated to frighten horses is inadmissible. *Missouri & K. Telephone Co. v. Vandevort*, 72 P. 771, 67 Kan. 269.

⁹⁷ The evidence of an expert attorney and abstractor is inadmissible to show that a reasonably certain description of land contained in various tax books and proceedings connected with its sale for taxes described the same land as that described in the tax deed. *McWilliams v. Great Spirit Springs Co.*, 52 P. 905, 7 Kan. App. 210.

⁹⁸ *Murray v. Board of Com'rs of Woodson County*, 48 P. 554, 58 Kan. 1.

⁹⁹ *Ft. Smith & W. Ry. Co. v. Hutchinson* (Okl.) 175 P. 922; *St. Louis & S. F. R. Co. v. Criner*, 137 P. 705, 41 Okl. 256; *Ft. Smith & W. R. Co. v. Jones*, 63 Okl. 228, 163 P. 1110.

A physician's expression of opinion that plaintiff's appearance could have

The trial court should not permit an expert witness to state whether the present condition of the injured and his ailments are the direct results of the collision in question, and whether or not the collision caused that condition and such ailments.¹

While medical experts may properly state whether in their opinion a person was of unsound mind, it is not competent for them to give an opinion as to whether the person had sufficient mental capacity to make a contract.²

It is competent to prove the law of another state by the testimony of a person learned therein.³

A lawyer familiar with statutes and decisions of another state can testify to whether a chattel mortgage witnessed in a certain way is void under the law of such state.⁴

Expert testimony as to the value of legal service rendered is not necessary, when there is evidence of the services rendered, the character of the litigation, and results obtained sufficient to form a basis for determining the value of such services.⁵

§ 1062. Competency of experts

Before a witness can be examined as an expert the party calling him must show him to be qualified.⁶

been caused by a beating held admissible. *Musick v. Enos*, 148 P. 624, 95 Kan. 397.

In an action under the compensation act, expert testimony of physicians is admissible to show that partial disability exists. *Sillix v. Armour & Co.*, 160 P. 1021, 99 Kan. 103, judgment modified on rehearing 162 P. 278, 99 Kan. 426.

In passenger's action for injury admission of opinions of physicians derived from examination of plaintiff that they believed that she was shamming held not erroneous, though they were to be viewed with caution. *Hopson v. Union Traction Co.*, 101 Kan. 499, 167 P. 1059.

¹ *Chicago, R. I. & P. Ry. Co. v. Sheldon*, 51 P. 808, 6 Kan. App. 347.

² *Coblentz v. Putifer*, 125 P. 30, 87 Kan. 719, 42 L. R. A. (N. S.) 298.

Neither an expert nor a nonexpert witness may give a mere abstract statement that in his opinion a person was or was not capable of making a particular contract. *Brown v. Brown*, 152 P. 646, 96 Kan. 510.

³ *Palmer v. Hudson River State Hospital*, 61 P. 506, 10 Kan. App. 98.

The unwritten or common law of another state may be proved by expert evidence. *Cole v. District Board of School Dist. No. 29, McIntosh County*, 123 P. 426, 32 Okl. 692, Ann. Cas. 1914A, 459; *Atchison, T. & S. F. Ry. Co. v. Lambert*, 123 P. 428, 32 Okl. 665.

⁴ *Woods County Union Bank v. Shore*, 123 P. 880, 87 Kan. 140.

⁵ *McClintock v. Parish (Okl.)* 180 P. 689.

⁶ *Dolan v. Herring-Hall-Marvin Safe Co.*, 94 N. Y. S. 241, 105 App. Div. 366. Before a witness can be permitted to testify to the value of land, he must

The competency of witnesses is for the court, while the value of their opinion evidence is for the jury.⁷

Witnesses who, because of experience, study, and observation know more about a particular subject than persons without experience are competent to testify as experts,⁸ though others may be more expert,⁹ and though they disclaim being experts.¹⁰

first show that he possesses sufficient information to qualify him to so testify. *Whitehead v. Jefferson*, 51 Okl. 42, 151 P. 681.

It is error to permit a witness to testify how much wheat an ordinarily good reaper will ordinarily cut in a day, until it has been shown that the witness is competent to testify in regard to such matter. *Sandwich Mfg. Co. v. Nicholson*, 5 P. 164, 32 Kan. 666.

A witness cannot give his opinion as to the shrinkage of cattle by delay in course of shipment, without first showing that he has had experience as a shipper, or has handled cattle in course of shipment, and observed the effects of transportation upon them. *Atchison, T. & S. F. R. Co. v. Mason*, 46 P. 31, 4 Kan. App. 391.

Where a witness to value is offered as an expert, some foundation must be laid for his opinion, by showing that he has had the means to form an intelligent opinion, derived from an adequate knowledge of the nature and kind of property in controversy and of its value. *Western Union Telegraph Co. v. Coyle*, 104 P. 367, 24 Okl. 740.

⁷ *Fire Ass'n of Philadelphia v. Farmers' Gin Co.*, 39 Okl. 162, 134 P. 443; *Garnett v. Storm*, 64 Okl. 137, 166 P. 401; *Yates v. Garrett*, 92 P. 142, 19 Okl. 449; *Whitehead v. Jefferson*, 51 Okl. 42, 151 P. 681; *Atchison, T. & S. F. Ry. Co. v. Baker*, 130 P. 577, 37 Okl. 48.

Where a witness is offered as an expert but it appears that he possesses little general intelligence, the court may refuse to allow him to give opinion testimony, even though it appear that he has had some experience in the matter in question. *Broquet v. Tripp*, 14 P. 227, 36 Kan. 700.

⁸ *Denver v. Atchison, T. & S. F. R. Co.*, 150 P. 562, 96 Kan. 154, Ann. Cas. 1917A, 1007.

Held competent to testify.—Where there is a uniformity in the rules of practice of different schools a qualified practitioner of any school is competent to testify whether treatment was negligently administered. *Yard v. Gibbons*, 149 P. 422, 95 Kan. 802.

A person who knows the usage among commission merchants may testify thereto, though he is not himself a commission merchant. *Gregg v. Garverick*, 5 P. 751, 33 Kan. 190.

A manager of a cold storage plant of nine years' experience, having had occasion to observe the condition of frozen products, was held qualified to tes-

⁹ *Denver v. Atchison, T. & S. F. R. Co.*, 150 P. 562, 96 Kan. 154, Ann. Cas. 1917A, 1007.

¹⁰ Where a witness shows himself to be an expert in the matter concerning which he gives an opinion, his testimony is properly received as an expert, though he disclaims being such. *Yates v. Garrett*, 92 P. 142, 19 Okl. 449; *Walker v. Scott*, 61 P. 1091, 10 Kan. App. 413.

One who has had several years of experience concerning a particular subject may testify to the amount of damages to property connected therewith.¹¹

tify whether "egg meats," having been once solidly frozen, would thaw in a temperature lower than 32 degrees. *Stewart v. Henningsen Produce Co.*, 129 P. 181, 88 Kan. 521, 50 L. R. A. (N. S.) 111, Ann. Cas. 1914B, 701.

— *Architects and carpenters.*—Architects, carpenters, and builders are competent to testify as experts on the question of the negligent construction of the framework of a building, where their experience and observation are shown to be sufficient. *Henry v. Morris & Co.*, 140 P. 413, 42 Okl. 13.

In an action to recover a balance due on a contract for the construction of a building, an architect who examined the building and detailed the defects therein could testify as to the particulars wherein the job had not been done in a workmanlike manner. *McCune v. Ratcliff*, 129 P. 1167, 88 Kan. 653.

— *Control and operation of railroads.*—Opinions of railway employes as to which side of a freight train it was proper for a brakeman to alight, in order to give signals, are properly received; this being a question calling for special knowledge or experience. *Duncan v. Atchison, T. & S. F. Ry. Co.*, 119 P. 356, 86 Kan. 112, 51 L. R. A. (N. S.) 565.

Though one's experience has been in the matter of bridge timbers, he may testify in an action for injury received in a train wreck, caused, as contended by plaintiff, by defective timbers in a car, as to the manner of inspecting timbers for the purpose of ascertaining their condition. *Missouri Pac. Ry. Co. v. Johnson*, 53 P. 129, 59 Kan. 776.

One who has been a boiler maker for 15 years, is familiar with locomotives, and has been boiler maker and inspector for defendant for 4 or 5 years, his duties being to inspect nettings, ash pans, stacks, and dampers, and to inspect locomotives as to their condition is competent to give an opinion as to one of defendant's engines and the appliances with which it was supplied to prevent the escape of fire. *Atchison, T. & S. F. R. Co. v. Osborn*, 51 P. 286, 58 Kan. 768.

— *Legal services.*—In an action against a railroad company for negligently setting out a fire, one who is shown to be a practicing attorney in the city in which the action was tried may testify as to what is a reasonable attorney's fee to be allowed plaintiff, in answer to a question stating that there was a trial in the justice's court, an appeal and jury trial in the district court,

¹¹ One who has had several years' experience in using and dealing in fire-proof safes is competent to testify to the amount of damage done such a safe by having holes punched in it. *Diebold Safe & Lock Co. v. Holt*, 46 P. 512, 4 Okl. 479.

Wool merchants and manufacturers who have had years of experience are competent to give opinions as to the effect of water on a large mass of wool and the probability of spontaneous combustion in it. *Sun Ins. Office of London v. Western Woolen-Mill Co.*, 82 P. 513, 72 Kan. 41.

In an action to recover for injuries by fire set by a railroad, a witness who has had experience with trees and hedges and has observed the effect of fire upon them, and is shown to be qualified as an expert, may testify as to such effect. *Chicago, R. I. & P. Ry. Co. v. Mosher*, 92 P. 554, 76 Kan. 599.

§ 1063. Examination of experts—Hypothetical questions

It is proper to ask an expert witness what causes, in his opinion, produced certain results, and to ask what causes would produce

and that three attorneys appeared for defendant, though it is not shown that he knows anything about the issues in the particular action, or ever tried such an action. *Missouri Pac. Ry. Co. v. Henning*, 29 P. 597, 48 Kan. 465.

A Kansas case has held that where plaintiff, who was a farmer, had had considerable litigation, it was not error to permit him to testify as to the value of the services of his attorney in defending an attachment case. *Murphree v. Anderson*, 140 P. 880, 92 Kan. 370.

— *Live stock.*—In an action for injuries to domestic animals, statement of plaintiff, as a witness, that he is a farmer, and has been for 20 years, qualifies him to testify as to the value of the animals killed. *Choctaw, O. & G. R. Co. v. Deperade*, 71 P. 629, 12 Okl. 367.

In an action to recover for injuries to live stock shipped over defendant road, testimony of a farmer who had handled cattle for 18 years, buying and selling, and who knew the value of cattle such as those in question and of a stockman who had experience in buying and selling cattle, and both of whom had examined the cattle shipped as to their worth, was competent, the weight and sufficiency of such evidence being for the jury. *St. Louis & S. F. R. Co. v. Young*, 30 Okl. 588, 120 P. 999.

Where a witness is shown to have been a farmer and a livery stable keeper, and to have dealt in horses, and to have some knowledge of value thereof, he may testify with regard to the value of particular horses which he has known and owned. *Reed v. New*, 12 P. 139, 35 Kan. 727.

An expert witness can testify as to the market value of cattle similar to those in controversy, though he has never seen them. *Edwards v. Renstrom*, 65 P. 249, 63 Kan. 883.

In an action involving the value of a thoroughbred bull, a witness testified that he had bought the bull and sold it to its then owner; that he lived 15 miles from her, and knew the price of cattle in her neighborhood; and that he had handled blooded and other stock for 20 years. Held, that he was competent to testify as an expert as to the value of the bull. *Missouri Pac. R. Co. v. Shumaker*, 27 P. 126, 46 Kan. 769.

A dealer in horses, who testified that he knew the value of the colts killed by the defendant railroad company, was competent to give his opinion in regard thereto. *Atchison, T. & S. F. R. Co. v. Bartlett*, 43 P. 284, 2 Kan. App. 167.

— *Physicians and surgeons.*—A physician, who had examined plaintiff's mouth with an X-ray machine, is competent to testify as to the character of dental work. *Hoskinson v. Smyser*, 148 P. 640, 95 Kan. 568.

Whether a surgical operation was performed with a reasonable degree of skill, knowledge, and care, and whether patient was thereafter skillfully and properly treated are questions of science, to be established by testimony of witnesses of special skill and experience. *Paulich v. Nipple*, 104 Kan. 801, 180 P. 771.

— *Value of real property.*—A witness who has dealt in land in the general vicinity, and has examined the land in question, can give his opinion as to its value, though he is not acquainted with the market value of land in the

such results.¹² The question may be based upon any assumption of facts which the testimony tends to prove.¹³

A party in framing hypothetical questions, is entitled to act upon

immediate vicinity. *Hall v. Kansas City, L. & T. Electric R. Co.*, 130 P. 664, 89 Kan. 70.

A witness was not incompetent to testify as to value of realty because unable to state that he knew the market value thereof, in view of his residence in and ownership of land in locality and his general knowledge of values. *Garnett v. Storm*, 64 Okl. 137, 166 P. 401.

Where a witness is offered to prove the damages caused to adjacent lots by laying a railroad track through an alley, and he testifies that he did not know the real value of the lots at the time the track was laid, but had an opinion of their market value, and it is in evidence that he has been in the business of buying and selling real estate for nearly 15 years in the city, he is qualified to give his opinion of their value. *Central Branch U. P. R. Co. v. Andrews*, 14 P. 509, 37 Kan. 162, judgment reversed 16 P. 338, 37 Kan. 641.

Witnesses are not incompetent to testify as to the value of a ginhouse and machinery because they do not know their market value, where they are well acquainted with both, having had several years' experience handling such machinery, and claim to know the cash value of the particular building and machinery. *Fire Ass'n of Philadelphia v. Farmers' Gin Co.*, 39 Okl. 162, 134 P. 443.

Held incompetent to testify.—Where one of the issues to be tried, in an action for personal injuries, is whether the person injured was in the exercise of ordinary care, and there were eyewitnesses as to his conduct at the time of the injury, the opinions of experts as to whether he was generally a careful and skillful man are not competent evidence. *Southern Kansas Ry. Co. v. Robbins*, 23 P. 113, 43 Kan. 145.

An employé of a livery stable cannot testify as an expert that the car was not proper for the safe transportation of the animal, where no further evidence of his experience and training is offered than his own testimony that he is an expert in the matter. *Atchison, T. & S. F. R. Co. v. Sage*, 31 P. 140, 49 Kan. 524.

A witness who is not a physician or surgeon, and who has never read any course in medicine or surgery, or attended any medical school or college, is incompetent to testify to the value of medical or surgical services. *Griffith v. McCandless*, 59 P. 729, 9 Kan. App. 794.

Control and operation of railroads.—A person not connected with the management of a train of cars, nor having such experience as would entitle him to speak as an expert, is not competent to answer, "How long does it take to stop a train?" *Manhattan, A. & B. Ry. Co. v. Stewart*, 2 P. 151, 30 Kan. 226.

Nurses.—A graduate nurse who has never nursed epilepsy is not competent to testify whether certain symptoms indicate epilepsy; it not appearing that nurses as part of their training are taught to diagnose diseases. *Shawnee Gas & Electric Co. v. Hunt*, 122 P. 673, 32 Okl. 368.

Legal services.—A witness not an attorney at law is incompetent to testify

¹² *Shawnee Gas & Electric Co. v. Hunt*, 122 P. 673, 32 Okl. 368.

¹³ *Medill v. Snyder*, 58 P. 962, 61 Kan. 15, 78 Am. St. Rep. 307.

the assumption that in so far as there is any justification in the evidence the facts will be found in accordance with his theory and against the theory of the adverse party.¹⁴ He should not be permitted to ask a hypothetical question containing assumptions which are neither supported by the evidence, nor the legitimate deductions to be drawn from the evidence.¹⁵

to the value of an attorney's legal services. *Kappler v. Storm*, 54 Okl. 493, 153 P. 1142.

Physicians and surgeons.—The opinion of a medical witness as to the mental condition of a person at a certain time, based only upon a physical examination made 18 months afterwards, where such witness is not informed as to the mental condition at the time when the mental capacity was in question, is too uncertain to be admissible. *Missouri Pac. Ry. Co. v. Lovelace*, 45 P. 590, 57 Kan. 195.

Veterinarians.—A person who is not a veterinary surgeon, but who has read extensively, and has heard the testimony of experts in court regarding the diseases of cattle, is not competent as an expert concerning them. *Missouri Pac. Ry. Co. v. Finley*, 16 P. 951, 38 Kan. 550.

A witness, not a veterinarian, was not rendered competent to testify as an expert as to the disease with which certain cattle were afflicted by the fact that he had had some experience in observing the treatment of diseases in stock by veterinarians, and in the handling of stock, and had read accounts of different diseases among animals. *Rouse v. Youard*, 41 P. 426, 1 Kan. App. 270.

¹⁴ *Order of United Commercial Travelers of America v. Barnes*, 90 P. 293, 75 Kan. 720. Hypothetical questions put to expert witnesses should be based upon such facts only as the evidence tends to prove, and if as to any material hypothesis such question is without the support of evidence, it should be excluded. *Id.*

Each party had a right to propound hypothetical questions upon his own theory of what the evidence tended to prove, provided they contained no material exaggeration or perversion of the facts assumed. *Wingfield v. McClinck*, 116 P. 488, 85 Kan. 452, affirming judgment on rehearing 113 P. 394, 85 Kan. 207.

A hypothetical question, summarizing plaintiff's antecedent evidence submitted to expert, held to contain no substantial element of fact not included in plaintiff's evidence as to his injuries. *White v. Atchison, T. & S. F. Ry. Co.*, 104 Kan. 120, 178 P. 255.

A hypothetical question, in an action for malpractice, as to the effect of a puncture from an instrument not sterilized properly, is authorized, though the only evidence as to the instrument being in a septic condition was the fact that defendant did not immerse it in boiling water. *Bower v. Self*, 75 P. 1021, 68 Kan. 825.

¹⁵ *Greeno v. Roark*, 56 P. 329, 8 Kan. App. 390, judgment reversed *Roark v. Greeno*, 59 P. 655, 61 Kan. 299.

In action for killing a boy, alleging automobile driver's negligence in driving too fast, a hypothetical question to plaintiff's expert assuming that car skidded after striking boy, where evidence was that after brake was released

In asking a question of an expert witness, it is necessary to base such question upon a hypothesis of fact, which is expressed in the question or founded in the evidence before the jury.¹⁶

the car rolled until driver stopped it with brake, was such a material assumption not warranted by evidence, as to warrant its rejection. *Eames v. Clark*, 104 Kan. 65, 177 P. 540.

Refusing to permit a witness to answer a hypothetical question which assumes the existence of a material fact not in evidence held not error. *Cherokee & Pittsburg Coal & Mining Co. v. Dickson*, 61 P. 450, 10 Kan. App. 391.

Where the issue was which of several injuries, including the inhalation of gas, caused or contributed to the death of a person, it was error to assume, in a hypothetical question, that such person was found in "a semilunconscious condition," as the result of breathing such gas, when the only testimony upon the subject was that upon entering the room where he was asleep, and arousing him, "he seemed just like a man waking up; seemed a little slow and hard to waken." *Davis v. Travelers' Ins. Co.*, 52 P. 67, 59 Kan. 74.

A physician's testimony based on the fact that plaintiff was a fleshy woman held not objectionable on the ground that there was no evidence that she was fleshy, where she was present at the trial and the jury could see her. *Muskogee Electric Traction Co. v. Bryant*, 56 Okl. 75, 155 P. 879.

¹⁶ *Western Union Tel. Co. v. Morris*, 73 P. 108, 67 Kan. 410.

In motorman's action for personal injury when his car collided with defendant's engine, question as to whether blow on head would be cause of his present condition held not predicated upon hypothesis, unsupported by evidence. *St. Louis & S. F. Ry. Co. v. McFall*, 63 Okl. 124, 163 P. 269.

In an action for personal injuries, a hypothetical question as to the cause of plaintiff's condition, containing more than 500 words, though somewhat complicated and not entirely grammatical, is not improper if intelligible. *Shawnee Gas & Electric Co. v. Hunt*, 122 P. 673, 32 Okl. 368. A hypothetical question is not objectionable as assuming material facts, where there was some evidence of all the material facts assumed. *Id.*

Plaintiff, in an action for damages from the destruction of trees and shrubbery by escaping gas, offered testimony to prove that gas permeating the soil would destroy vegetation. To the introduction of such testimony defendant objected upon the ground that it was not based on facts proven, or facts which the evidence tended to prove. Evidence was introduced by plaintiff which tended to show that the surface of the soil claimed to have been permeated by gas was packed hard by travel over it, and was also frozen during part of the time during which it was alleged that the gas escaped from defendant's pipes; that the soil at a depth of three or four feet was sandy and loose; and that there actually was a leak in the gas pipe near the soil in which the vegetation destroyed was growing. Held, there was sufficient evidence upon which to base the testimony objected to. *Wichita Gas, Electric Light & Power Co. v. Wright*, 59 P. 1085, 9 Kan. App. 730.

In action for death of railroad employé from a shock from an electric light he was carrying, an examination by plaintiff's counsel by reading from several medical and scientific books as to voltage that would produce death and testimony of a medical witness that he agreed with the author of the text are improper, and the excerpts from the text are inadmissible. *Clinton & O. W. Ry. Co. v. Dunlap*, 75 Okl. 64, 181 P. 312.

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That a hypothetical question does not embrace all the facts in the record does not render it erroneous,¹⁷ or that it includes the personal knowledge of the expert witness does not render it fatally defective, where the extent of that knowledge is so proved as to disclose the actual basis of his opinion.¹⁸

A mere statement to an expert witness introductory to a hypothetical question, as to what the examiner intends to state in the question, adding nothing to the facts stated, does not render the question improper.¹⁹ It has been held that expert cannot be called upon to give an opinion upon facts in his mind and undisclosed, or on matters in part within his observation and in part derived from others.²⁰

The form of hypothetical questions, and what may be embraced therein, should be left largely to the discretion of the trial court.²¹

The answer of an expert witness to a hypothetical question must be based on the hypothesis stated, and not on a consideration of what might or might not happen under certain conditions.²²

¹⁷ Chicago, R. I. & G. Ry. Co. v. Bentley, 143 P. 179, 43 Okl. 469.

Where plaintiff, in an action for damages against a dentist for injuries resulting from the use of unsterilized instruments in extracting a tooth, testifies that a hypodermic needle used was not sterilized, and there is evidence that the doctor himself said that the needle had not been sterilized, that it was new and used for the first time, and that the defendant had been seen to use such a needle without sterilizing it, hypothetical questions assuming that the defendant used instruments in a septic condition may be properly asked expert witnesses on part of plaintiff. Roark v. Greeno, 59 P. 655, 61 Kan. 299, reversing judgment in Greeno v. Roark, 56 P. 329, 8 Kan. App. 390.

¹⁸ Currey v. Robinson, 139 P. 1023, 92 Kan. 117.

¹⁹ Shawnee Gas & Electric Co. v. Hunt, 122 P. 673, 32 Okl. 368.

²⁰ Western Union Tel. Co. v. Morris, 73 P. 108, 67 Kan. 410.

Where it appeared that a witness had not heard all of the evidence on which he predicated his opinion as to the value of services of attorneys and that he probably erroneously assumed that their right to compensation under the contract of employment was contingent on success, it was error to permit him to state his opinion. Colley v. Sapp, 44 Okl. 16, 142 P. 989, judgment affirmed on rehearing 44 Okl. 16, 142 P. 1193.

²¹ Order of United Commercial Travelers of America v. Barnes, 90 P. 293, 75 Kan. 720.

²² City of Wichita v. Coggschall, 43 P. 842, 3 Kan. App. 540.

The answer of an expert witness as to the distance to which sparks could be thrown from certain type of locomotive, is not incompetent because it must depend to a degree on atmospheric conditions and the inflammability of the combustible matter referred to, which considerations must have occurred to the jury in weighing the evidence. Saunders v. Atchison, T. & S. F. Ry. Co., 119 P. 552, 86 Kan. 56.

Hypothetical questions, which call for information as to the time required to do certain work and the proper manner of doing same, are proper, where the evidence sought would aid the jury in finding the ultimate facts.²³

An architect, who hears a description of work done by another architect in supervising a building with which the witness is acquainted, may state his opinion as to the value of such supervision.²⁴

A farmer who is an expert on the value of a growing crop may state the facts from which his conclusion as to its value is derived to aid the jury in determining whether his estimate is correct.²⁵

Where a witness is qualified as an expert as to weights of cattle, his testimony giving his judgment as to weights is admissible, though he stated he "guessed" they weighed a certain amount.²⁶

Expert testimony of a physician may be based on hypothetical questions,²⁷ on the facts proved in the case,²⁸ of a physician on personal examination,²⁹ or on his personal examination and knowledge of the injuries received by plaintiff.³⁰

It is error to permit a physician to testify as an expert concerning

²³ *Healer v. Inkman*, 146 P. 1172, 94 Kan. 594.

²⁴ *Mampe v. Kunkel*, 148 P. 741, 95 Kan. 602.

²⁵ *Chicago, R. I. & P. Ry. Co. v. Johnson*, 107 P. 662, 25 Okl. 760, 27 L. R. A. (N. S.) 879.

²⁶ *Midland Valley R. Co. v. Adkins*, 127 P. 867, 36 Okl. 15.

²⁷ *George v. Shannon*, 142 P. 967, 92 Kan. 801, Ann. Cas. 1916B, 338.

In an action by a railroad employé for personal injuries, it appeared that the injury was rupture and varicocele. A physician who had examined the injury, and who had heard plaintiff testify, testified, as an expert, that such injuries were generally the result of violence. On being asked whether, in his opinion, the injury could have been caused in the manner stated by plaintiff, he replied that it must have been done by violence. Held, that the error was not prejudicial, since the testimony of plaintiff was very brief and clear. *Atchison, T. & S. F. R. Co. v. Brassfield*, 32 P. 814, 51 Kan. 167.

In an action against the city for damages by an alleged fall on a dangerous sidewalk, where plaintiff testified as to the manner in which he fell, and that the fall caused a rupture in the region of the groin, it was not error to refuse to permit a physician who never examined plaintiff's injuries, but who had heard plaintiff's testimony, to give his opinion as to the probability of a person being injured as testified to by plaintiff. *City of Ottawa v. Green*, 83 P. 616, 72 Kan. 214.

²⁸ *George v. Shannon*, 142 P. 967, 92 Kan. 801, Ann. Cas. 1916B, 338.

²⁹ *George v. Shannon*, 142 P. 967, 92 Kan. 801, Ann. Cas. 1916B, 338.

³⁰ *Muskogee Electric Traction Co. v. Bryant*, 56 Okl. 75, 155 P. 879.

the condition of a person examined by him, and to base his opinion partly on the history of the case as detailed to him by the patient or by some other person.³¹

A physician testifying as an expert may base his opinion on his observation and examination of the patient, and such opinion will not be inadmissible because based partly on the patient's statement as to his condition and feelings when received as necessary to an examination and proper treatment.³²

Expert medical testimony, based on physical examination of the patient after his action for damages for personal injuries was begun, which apparently was made to enable the physician to testify, is not for that reason alone incompetent, though it may materially affect its credibility.³³

Medical experts, in response to hypothetical questions, are not required to answer with certainty, but may give their opinions as to the cause of certain physical conditions.³⁴

Where a physician testified that he found no evidence of internal injuries on his examination of the plaintiff after his injury,

³¹ Permitting physicians to testify as experts concerning the condition of a person examined by them, and to base their opinion partly on the history of the case, held error. *Smith v. St. L. & S. F. R. Co.*, 148 P. 759, 95 Kan. 451.

A physician, while testifying as an expert, is not permitted to testify to his conclusions of the permanency of an injury to his patient based partially upon the history of the injury detailed to him by the patient or other person, and partially upon his own examination. *Federal Betterment Co. v. Reeves*, 84 P. 560, 73 Kan. 107, 4 L. R. A. (N. S.) 460.

A physician testifying as an expert should not be allowed to express an opinion as to the condition of the patient, formed in part upon the statements of third parties, or on what the family of the patient may have said to him. *Chicago, R. I. & P. Ry. Co. v. Sheldon*, 51 P. 808, 6 Kan. App. 347.

³² *Ft. Smith & W. Ry. Co. v. Hutchinson* (Okla.) 175 P. 922.

³³ *Chicago, R. I. & P. Ry. Co. v. Jackson*, 63 Okl. 32, 162 P. 823.

Physician, who examined patient shortly after accident for purpose of testifying as an expert, could base his opinion on patient's subjective and objective symptoms, relying on history of case, including fact of accident, as circumstance on which he reached conclusion. *St. Louis & S. F. Ry. Co. v. McFall*, 63 Okl. 124, 163 P. 269.

Refusal to permit a physician who examined plaintiff for the first time more than two years after the injury to testify that he thought a fistula in ano, from which he found the plaintiff suffering, was caused by traumatic injury held not error. *Ballard v. Kansas City, M. & O. Ry. Co.*, 148 P. 764, 95 Kan. 343.

³⁴ *Roark v. Greeno*, 59 P. 655, 61 Kan. 299, reversing judgment *Greeno v. Roark*, 56 P. 329, 8 Kan. App. 390.

and on cross-examination was asked if he had not told plaintiff shortly after the injury that he was injured internally, and he denied it, impeaching testimony by the plaintiff is admissible.³⁵

Where an expert witness founds his opinion on standard medical authorities, such authorities may be read to him on cross-examination, and he may be asked whether he agrees with same.³⁶

Where the fees paid to an attorney constitute a demand chargeable to another, the special facts showing the importance of the case in which the fees were charged may be proved, and a hypothetical question as to the value of the services, based thereon, may be asked of a qualified witness.³⁷

Where the evidence is not in material conflict and constitutes a sufficient predicate for an opinion as to the value of the services of attorneys, a witness who has heard all of the evidence may state an opinion based thereon as to such value, without the usual hypothetical question embodying a statement of the premises for the opinion being propounded to him.³⁸

In an action for attorney's fees, an attorney testifying as an expert can be cross-examined upon the subject of his own charges in similar cases.³⁹

§ 1064. Handwriting

The genuineness of a disputed signature may be proved by a comparison thereof with signatures of the same person on other instruments which are admitted or proved to be genuine;⁴⁰ but the genuineness of the writing or signature made the basis of comparison, and sometimes called the standard writing, must be

³⁵ *Monckton v. St. Louis & S. F. R. Co.*, 139 P. 1164, 92 Kan. 158.

³⁶ *Stout v. Bowers*, 154 P. 250, 97 Kan. 33.

³⁷ *Tullock v. Mulvane*, 60 P. 749, 61 Kan. 650, judgment reversed 22 S. Ct. 372, 184 U. S. 497, 46 L. Ed. 657.

³⁸ *Colley v. Sapp*, 44 Okl. 16, 142 P. 989, judgment affirmed on rehearing 44 Okl. 16, 142 P. 1193.

³⁹ *Cooper v. Harvey*, 94 P. 213, 77 Kan. 854.

In an action for attorney's services, the cross-examination of an attorney testifying as an expert, as to his recommendation of what ought to be paid by defendant by way of compromise, was proper to probe the witness and to show how his judgment upon the question at issue was formed, and was not objectionable as evidence, the purpose and effect of which was to show an offer of compromise. *Cooper v. Harvey*, 94 P. 213, 77 Kan. 854.

⁴⁰ *Holmberg v. Johnson*, 25 P. 575, 45 Kan. 197.

proved by direct or positive evidence, and cannot be established by comparison.⁴¹

One engaged in a business which necessitates the frequent comparison of handwritings, and who has been in the habit of making such comparisons, is qualified to testify to the genuineness of a disputed signature by comparison with others admitted to be genuine.⁴²

It is error to permit the witnesses on cross-examination to be asked their opinion as to the genuineness of several purported signatures of the same person, and afterwards to permit testimony showing that some of the purported signatures are false.⁴³

It is error to present to plaintiff's witnesses, who are called as experts, false signatures for the purpose of testing the ability of the witnesses to detect a forgery, and to cross-examine such witnesses as to such false signatures, and then prove by another witness the fact that he wrote them himself.⁴⁴

DIVISION VII.—HEARSAY

§ 1065. In general

Hearsay testimony, when properly objected to, is not admissible.⁴⁵

A request that a witness state a fact as to a certain choice or election does not call for a hearsay opinion.⁴⁶

⁴¹ *Archer v. United States*, 60 P. 268, 9 Okl. 569.

Writings used as a basis for comparison of handwriting on cross-examination must be admitted to be genuine or clearly proved to be so, the same as on direct examination. *Gaunt v. Harkness*, 36 P. 739, 53 Kan. 405, 42 Am. St. Rep. 297.

In an action involving the validity of a chattel mortgage, where a property statement purporting to have been signed by the mortgagors is offered in evidence, and the signature to it is denied, it is error to enter into an inquiry into the genuineness of letters purporting to have been signed by the mortgagors, to be used as a basis of comparison by experts with the signature to the property statement. *Gilmore v. Swisher*, 52 P. 426, 59 Kan. 172.

⁴² *Ort v. Fowler*, 2 P. 580, 31 Kan. 478, 47 Am. Rep. 501.

⁴³ *Underwood v. Quantie*, 116 P. 361, 85 Kan. 111.

⁴⁴ *Gaunt v. Harkness*, 36 P. 739, 53 Kan. 405, 42 Am. St. Rep. 297.

⁴⁵ *Chicago, R. I. & P. Ry. Co. v. Boring-Kilm Produce Co.*, 57 Okl. 495, 157 P. 351; *McKinney v. State* (Okl. Cr. App.) 198 P. 108.

⁴⁶ *Beckman v. Ash*, 103 Kan. 437, 173 P. 920.

On request to witness to state fact as to a certain choice or election, answer that plaintiff's attorney elected to take a money judgment, instead of

Where the single question is whether the property delivered is or is not that or of the value of that contracted for, the good faith of the purchaser cannot be sustained by proof of conversations, which upon any other theory would be inadmissible as mere hearsay. Good faith is presumed, and need not be proved. Only bad faith requires evidence.⁴⁷

In an action to recover purchase money paid, evidence of a conversation between defendant and his alleged agent, in the absence of plaintiff, is not inadmissible as hearsay, where it showed a purchase from such agent, and payment.⁴⁸

§ 1066. Statements of others than parties or witnesses

The statements of third persons, which are not made in the party's presence, are hearsay and inadmissible.⁴⁹

the goods levied on, was not objectionable as hearsay. *Beckman v. Ash*, 103 Kan. 437, 173 P. 920.

⁴⁷ *Weybrich & Co. v. Harris*, 1 P. 271, 31 Kan. 92.

⁴⁸ *Teague v. Adams*, 52 Okl. 107, 152 P. 826.

⁴⁹ *Holman v. Raynesford*, 44 P. 910, 3 Kan. App. 676.

Statements which are hearsay.—In a joint action against an electric light company and a city for wrongful death caused by coming in contact with a live guy wire, it was error to admit in evidence as against the light company a resolution of the city council reciting that the electric company was negligently permitting its wires to be in a dangerous condition. *Shawnee Gas & Electric Co. v. Motesenbocker*, 138 P. 790, 41 Okl. 454.

In an action by a depositor to charge defendant as a partner in an insolvent banking firm, a newspaper article relating to the consolidation of a bank of which defendant had previously been president with another, and stating that defendant was one of the directors of the new bank, was improperly admitted in evidence to show that defendant held himself out as such director; it appearing that the article was written and published without his knowledge, and that the statement was incorrect. *Richardson v. Evans*, 50 P. 85, 5 Okl. 803.

In an action against the obligor and sureties on an attachment bond, evidence of a conversation between plaintiff and a deputy sheriff when the goods were removed by the sheriff, in the absence of the obligor and the sureties, was inadmissible as hearsay. *Bash v. Howald*, 112 P. 1125, 27 Okl. 462.

Where the issue was whether defendant had either expressly or impliedly agreed to the appointment of a certain committee to represent all the lot occupants, he being one whose duties were to appraise such lots, determine who the occupants were, and make certificates thereof, upon which the trustee, holding the legal title to such lots should convey such title to the occupants presenting the certificates and the amounts assessed to their lots, statements made by persons at a mass meeting of the lot occupants where it did not appear that defendant was present or had knowledge of the calling of the meet-

Where the testimony of a witness as to a conversation with a party is otherwise competent, it is not made incompetent by the fact

ing and the purpose thereof, with an express or implied assent thereto, were inadmissible as hearsay. *Moore v. O'Dell*, 111 P. 308, 27 Okl. 194.

In action for burning meadow, it is error to permit section foreman to testify that parties had told him that defendant's engine set out the fire. *St. Louis & S. F. R. Co. v. Murray*, 50 Okl. 64, 150 P. 884.

A witness' testimony as to a statement made by one of defendant's employes four or five hours after the accident held hearsay and inadmissible. *Chicago, R. I. & P. Ry. Co. v. Foltz*, 54 Okl. 556, 154 P. 519.

A conversation had in the absence of the defendant tending to show that he was endeavoring to influence improperly the witness should be excluded. *McGuirk v. Johnson*, 65 P. 654, 63 Kan. 884.

Declarations of a physician, who was not a party to the action, as to an injury or ailment of a patient are not admissible to show the patient's physical condition. *Sly v. Powell*, 87 Kan. 142, 123 P. 881.

In an action by a widow for the death of her husband, caused by the alleged negligent sale by a druggist to him of wood alcohol in place of grain alcohol, which he drank, causing his death, the testimony of witnesses, to whom the stomach of deceased and a sample of the liquid were sent for examination and analysis, as to statements by the person delivering them as to whence they came was hearsay and incompetent. *Campbell v. Brown*, 117 P. 1010, 85 Kan. 527.

A father gave each of two sons a tract of land, on one of which tracts was a mortgage, and to equalize the gifts it was claimed it was agreed each son should pay one-half the mortgage. Before the debt was paid the son whose land was free from the mortgage died, and the other son sued the decedent's administrator to recover half the mortgage debt. Held, that a statement of plaintiff's father, not made in connection with the conveyance of the land, or with any agreement with reference to the mortgage debt, and repeated by a witness, being hearsay evidence, was not admissible. *Miller v. McDowell*, 64 P. 980, 63 Kan. 75.

In a contest of a will directing that stated amounts be deducted from bequests to testatrix's sons on account of debts due her from the sons, held that declarations of a stranger to the will, and to the action, made after death of testatrix, tending to show that he had procured insertion of the claim of indebtedness in the will, were inadmissible as hearsay. *Hopper v. Sellers*, 139 P. 365, 91 Kan. 876.

In an action against a telegraph company for delay in delivering a message, resulting in plaintiff's failure to secure his debt by attachment, the fact of the indebtedness, or of the time it became due, or that the debtor had attachable property, could not be proved by declarations of the debtor made to plaintiff. *Western Union Tel. Co. v. Getto-McClung Boot & Shoe Co.*, 43 P. 849, 3 Kan. App. 561.

Statements which are not hearsay.—Where one defense was that the property was conveyed to plaintiff by her husband in fraud of creditors, it was error to admit evidence of statements by plaintiff's minor son, in her absence, that his father owned the property. *Rauh v. Morris*, 137 P. 1174, 40 Okl. 288.

Testimony as to conversation between deceased servant and master's fore-

that in repeating his own language he is incidentally required to repeat statements which he then made as to what other persons had told him.⁵⁰

An affidavit, the larger part of which is hearsay, is not admissible, where there is no offer to omit the objectionable part.⁵¹

A witness may not testify from hearsay as to the age of another.⁵²

In an action to set aside a compromise of disputed claim as fraudulent the defendant may show statements to him by other persons which tend to show his own good faith.⁵³

On the trial of a contested election, evidence of what others said to the witnesses after election, of what they did at and before the election, is hearsay, and incompetent.⁵⁴

man to effect that servaht and his fellow servants were inexperienced in handling dynamite, and that foreman promised to furnish competent man as soon as possible, was admissible. *Lusk v. Phelps* (Okl.) 175 P. 756.

Evidence that one who has loaned money to a firm had heard that one partner was financially responsible is not hearsay, when offered to establish the fact that he relied on what he heard. *Mills v. Riggle*, 112 P. 617, 83 Kan. 703, Ann. Cas. 1912A, 616.

The admission of the statements of strangers to the action, not made in the presence of the party against whom they were offered, in respect to attempts made to prevent adverse witnesses from testifying in the action against such party, and to improperly influence other witnesses to testify in his favor, is prejudicial error. *Ehrhard v. McKee*, 25 P. 193, 44 Kan. 715.

Where defendant gave plaintiff a verbal order on H., stating that H. was indebted to him, evidence that, on demand of the amount of the order, H. told plaintiff he did not owe defendant anything, is not hearsay. *Kaufman v. Springer*, 17 P. 475, 38 Kan. 730.

Where witnesses testify as to the value of ear corn for seed purposes, it is not error to permit them to testify why shelled corn is of less value, even if in so testifying they state the reasons farmers give for refusing to purchase shelled corn for such purposes. *Missouri Pac. Ry. Co. v. Nevin*, 2 P. 795, 31 Kan. 385.

Refusal to permit defendant purchaser to testify to the destination weights of car loads of coal bought held not error, where his information was secured from his consignee. *Wilkes v. S. V. Clark Coal & Grain Co.*, 148 P. 768, 95 Kan. 493.

⁵⁰ *Fitzpatrick v. Tucker*, 78 P. 828, 70 Kan. 338.

⁵¹ *City of Ft. Scott v. Elliott*, 74 P. 609, 68 Kan. 805.

⁵² *Freeman v. First Nat. Bank of Boynton*, 44 Okl. 146, 143 P. 1165, Ann. Cas. 1918A, 259.

⁵³ *Matthews v. McNeill*, 157 P. 387, 98 Kan. 5.

⁵⁴ *Blue v. Peter*, 20 P. 442, 40 Kan. 701.

The statements of witnesses of what others, not parties to the record, told them subsequent to an election, in regard to voting without right, is incompe-

A certified copy of the enrollment records, offered to prove the age of an Indian allottee at the time he executed a deed, are incompetent as hearsay where living witnesses testify to the allottee's age.⁵⁵

A report on the action of officers of a corporation as to its management and financial condition and expressing opinions as to its future management, by attorneys who are not examined as witnesses, is not admissible.⁵⁶

The value of an animal cannot be enhanced by evidence from a merely private book, issued by persons having animals for sale, purporting to contain his pedigree; such evidence, at best, being mere hearsay.⁵⁷

§ 1067. Evidence based on hearsay

A witness may testify from hearsay as to his own age.⁵⁸

A declaration of intention of testator made subsequent to the execution of his will is inadmissible as hearsay for any purpose.⁵⁹

While title to land cannot be established by reputation, such evidence is admissible to show notoriety of claim of title.⁶⁰

Proof of rumors that certain persons who have been resident electors of a precinct had moved away is hearsay and inadmissible.⁶¹

In state's action to abate a nuisance, evidence as to general reputation for lewdness of persons frequenting place charged to be a house of prostitution, and also evidence of the general reputation of such house as a place of prostitution was admissible.⁶²

In a personal injury suit, evidence that plaintiff's hearing was

tent to establish the charge of illegal voting. *Tarbox v. Sughrue*, 12 P. 935, 36 Kan. 225.

⁵⁵ *Perkins v. Baker*, 137 P. 661, 41 Okl. 288.

In cases involving validity of conveyance of lands allotted to Creek freedman made before Act Cong. May 27, 1908, where living witnesses testify to allottee's age, enrollment records of Commission to Five Civilized Tribes as to his age are hearsay. *Marks v. Foreman* (Okl.) 168 P. 237.

⁵⁶ *Lash v. Ten Eyck*, 59 Okl. 82, 157 P. 924.

⁵⁷ *Maier v. Randolph*, 6 P. 625, 33 Kan. 340.

⁵⁸ *Freeman v. First Nat. Bank of Boynton*, 44 Okl. 146, 143 P. 1165, *Ann. Cas.* 1918A, 259.

⁵⁹ *O'Donnell v. Murphy*, 120 P. 1076, 17 Cal. App. 625.

⁶⁰ *Kruse v. Fredlum*, 152 P. 617, 96 Kan. 456.

⁶¹ *Blue v. Peter*, 20 P. 442, 40 Kan. 701.

⁶² *Balch v. State* (Okl.) 164 P. 776.

not a subject of general discussion in the neighborhood where plaintiff resided is inadmissible.⁶³

A person who accompanied cattle to market may testify, from information received that day from commission men and from reading the market reports, as to the state of the market on the previous day, where he has had experience in shipping and selling cattle.⁶⁴

It is permissible where a question of damage in condemnation proceedings is being tried, to reject evidence of offers to purchase other property in the neighborhood about the time condemnation proceedings were instituted.⁶⁵

The insolvency of a bank issuing worthless paper is provable by hearsay.⁶⁶

DIVISION VIII.—DECLARATIONS

§ 1068. Intent

Declarations are admissible in some cases to show the state of mind of the person making them. Thus, in an action by a wife against her father-in-law for alienation of her husband's affections, declarations of the husband, though not a party, as to his estrangement, are competent to show the effect of the wrongful interference of the defendant and the attempt to induce a separation;⁶⁷ and in an action to set aside instruments, evidence of declarations of the maker bearing on the question of undue influence, is admissible to show her state of mind.⁶⁸

The admission of such evidence constitutes an exception to the hearsay rule. Further illustrating this exception, testimony as to statements made by a deceased servant of his intention to contribute to the support of his parents in future is admissible,⁶⁹ and declarations of either the grantor or grantee as to matters within the

⁶³ Union Pac. Ry. Co. v. Hammerlund, 79 P. 152, 70 Kan. 888.

⁶⁴ Midland Valley R. Co. v. Adkins, 127 P. 867, 38 Okl. 15.

In a shipper's action for damages, a market report was properly admitted in evidence to show loss in price from the delay in transportation. Ray v. Missouri, K. & T. Ry. Co., 133 P. 847, 90 Kan. 244.

⁶⁵ Blincoe v. Choctaw, O. & W. R. Co., 83 P. 903, 16 Okl. 286, 4 L. R. A. (N. S.) 890, 8 Ann. Cas. 689.

⁶⁶ Mathews v. State (Okl. Cr. App.) 198 P. 112.

⁶⁷ Nevins v. Nevins, 75 P. 492, 68 Kan. 410.

⁶⁸ Fairbank v. Fairbank, 139 P. 1011, 92 Kan. 45, rehearing denied 141 P. 297, 92 Kan. 492.

⁶⁹ Lusk v. Phelps (Okl.) 175 P. 756.

scope of the design to defraud creditors of the grantor are admissible against the other.⁷⁰

Where a parent executes a series of deeds to several of his children, seemingly in pursuance of a general plan, evidence of what he said at the time of delivery of one of them, tending to show a purpose to discriminate against a part of his children in the distribution of his property, is competent evidence that all the deeds, including even those of an earlier date, were intended as preferential gifts.⁷¹

§ 1069. Self-serving declarations

Self-serving declarations should be excluded;⁷² also, in an action to recover land alleged to have been conveyed to plaintiff's wife's

⁷⁰ *Chicago Lumber Co. v. Cox*, 147 P. 67, 94 Kan. 563.

⁷¹ *Plowman v. Nicholson*, 106 P. 279, 81 Kan. 210, affirming judgment 105 P. 692, 81 Kan. 210, on rehearing.

⁷² Conversations between defendants and third persons held inadmissible where they constituted self-serving declarations. *Hammett v. State*, 141 P. 419, 42 Okl. 384, Ann. Cas. 1916D, 1148.

In action for price of goods sold but not delivered, on theory that title has passed, seller could not show that after buyer refused to settle he attached goods as buyer's property, as to do so would countenance seller's self-serving conduct. *Mangelsdorf Bros. Co. v. Kolp*, 64 Okl. 33, 165 P. 1141.

Though plaintiff testified to statements by defendants in conversations, refusal to permit her to state what she said to them, when her statements were self-serving and did not tend to explain language of defendants, was not error. *Erickson v. Erickson*, 158 P. 48, 98 Kan. 244.

In an action in which an order of arrest has been obtained, it is not error for the court to refuse to allow the plaintiff to introduce, as evidence to support his case, his own affidavit made to procure the order of arrest. *Johnston v. Johnson*, 24 P. 1098, 44 Kan. 666.

A statement as to the cause of an accident, made after apparent delay, and a purpose to postpone the making of it until witnesses were present, makes the narration a self-serving declaration, inadmissible in evidence. *Atchison, T. & S. F. Ry. Co. v. Logan*, 70 P. 878, 65 Kan. 748.

Where a claim was presented against decedent's estate for a loan alleged to have been made to the decedent, and evidence was introduced that at the time of the alleged loan claimant was financially embarrassed, evidence on claimant's part that at one time she had proposed to pay a large debt to one of her creditors, but that payment was declined, was properly excluded as a self-serving declaration. *Haines v. Goodlander*, 84 P. 986, 73 Kan. 183.

In an action for breach of marriage promise, plaintiff may not give in evidence her declarations to third parties as to the conduct of the defendant in relation to his agreement to marry her. *Cooper v. Bower*, 96 P. 59, 78 Kan. 156, rehearing denied 96 P. 794, 78 Kan. 164.

But where defendant introduces evidence of plaintiff's declarations during the alleged engagement that she would not marry the defendant, plaintiff is

brother through a conspiracy of the wife and brother, where it appeared that plaintiff had made a deed to his wife's brother, and that after he had declined to consummate the purchase plaintiff's wife got the deed and had it recorded, declarations of plaintiff's wife, since deceased, made some years after recording of the deed, that she and her husband owned the land at that time were admissible against the brother, where plaintiff's contention was that he and his wife owned the land and were in possession of it.⁷³

Where declarations of a husband, since deceased, were admitted to prove that an antenuptial contract had been canceled by mutual consent, other declarations of the husband tending to prove the contrary should be received in evidence.⁷⁴

In proceedings to dissolve an attachment, declarations of defendant, made several months before his property was attached, to the effect that he intended to return to the state, and had not abandoned it as his residence, are admissible in his behalf.⁷⁵

§ 1070. Against interest

Declarations against interest ordinarily should be admitted. Declarations made against interest by persons since deceased should be admitted,⁷⁶ although not a part of the *res gestæ*, and though the declarant is not a party, or in privity, with a party to the action.⁷⁷ But where, in an action for damages for death by

properly allowed to give evidence of her declarations during the same period that she was engaged to marry him for the purpose of showing mutuality of the contract. *Id.*

⁷³ *Hunnicut v. Oren*, 84 Kan. 480, 114 P. 1059.

⁷⁴ *Gordon v. Munn*, 125 P. 1, 87 Kan. 624, Ann. Cas. 1914A, 783, rehearing denied 127 P. 764, 88 Kan. 72, Ann. Cas. 1914A, 783.

⁷⁵ *Bigelow v. Bear*, 68 P. 73, 64 Kan. 887.

⁷⁶ In an action against executors for services rendered testator, where the executors set up a contract and performance by deceased, testator's declaration that plaintiff had rendered services and that there was no agreement between them was admissible in plaintiff's behalf. *Wright v. Stage*, 111 P. 467, 83 Kan. 445.

The declarations of an engineer killed in a collision, concerning his conduct and other facts relating to the cause of the injury, made after it was received, are admissible in evidence against his widow. *Walker v. Brantner*, 52 P. 80, 59 Kan. 117, 68 Am. St. Rep. 344.

⁷⁷ Declarations made by a person since deceased against his pecuniary or proprietary interest, concerning facts within his knowledge which are material and relevant to the issue, are admissible in evidence, although not a part of the *res gestæ*, and although the declarant was not a party nor in priv-

wrongful act, the defendant, without notice to plaintiff, and shortly prior to the death of the widow of the deceased, took her deposition, this deposition was not a statement against interest, and as such admissible in evidence, under the exception to the rule of law excluding hearsay evidence.⁷⁸

When an infant becomes a party to an action, the same species of evidence is received against him as though he were an adult; and the mere fact that the court rules that he does not understand the nature of an oath will not authorize the rejection of the declarations of an infant plaintiff against his interest. His declarations are to be cautiously received, but the value and force of the same are necessarily left to the determination of the jury.⁷⁹

§ 1071. Persons in possession

Declarations of persons in possession or control should usually be admitted,⁸⁰ particularly where they constitute verbal parts of an act of occupation,⁸¹ or are in continuation of previous acts and declarations of the same general character,⁸² or explain the possession and the character of the ownership.⁸³

ity with a party to the action. *Mentzer v. Burlingame*, 118 P. 698, 85 Kan. 641.

⁷⁸ *Union Pac. Ry. Co. v. Sternberger*, 54 P. 1101, 8 Kan. App. 131.

⁷⁹ *Atchison, T. & S. F. Ry. Co. v. Potter*, 58 P. 471, 60 Kan. 808, 72 Am. St. Rep. 385.

⁸⁰ In partition between children of decedent depending upon her delivery of deeds, defendants' objections to declarations of decedent indicating nondelivery of deeds was properly overruled. *Randall v. Randall*, 101 Kan. 341, 166 P. 516.

Evidence of statements of defendant, shortly before a memorandum of sale

⁸¹ In an action where there is an issue of adverse possession, the declarations of the occupant importing title in himself, and which give color to his possession, are admissible as verbal parts of his act of occupation. *Liebheit v. Enright*, 94 P. 203, 77 Kan. 321.

⁸² In a suit by a woman's second husband against the beneficiaries of the first husband's will on the ground that she had not elected to take the life estate in the land given her by the will, her acts and declarations showing such an election occurring or made after a homestead right of occupancy of the land had become vested in the second husband are admissible as evidence; they being in continuation of previous acts and declarations of the same general character. *Cook v. Lawson*, 66 P. 1028, 63 Kan. 854.

⁸³ In a suit to establish a parol gift of lands by complainant's father since deceased, his declarations made while in possession and control of the land were admissible, not as assertions of title, but to explain his possession and the character of his ownership. *Butts v. Butts*, 114 P. 1048, 84 Kan. 475.

Acts and declarations of a possessor of personalty concerning the same are admissible to determine the nature of such possession;⁸⁴ but evidence of defendants that they had told their neighbors that they owned the land was inadmissible to show adverse possession.⁸⁵

§ 1072. Age and pedigree

Evidence that a person who is dead at the time of trial stated that she was more than 18 years of age on a certain date has been held admissible.⁸⁶ But an affidavit of the deceased mother of an alleged minor concerning his age, where it was not shown that the affidavit was made in good faith, unbiased by any issue between the parties, and made before commencement of the litigation, is not admissible.⁸⁷

Evidence that a certain person executed a note and mortgage prior to the execution of a deed in controversy in ejectment was held admissible upon the issue of whether she had attained majority at the time she executed the deed.⁸⁸

Declarations relative to pedigree are admissible;⁸⁹ but they are not entitled to the same weight that is to be given to direct and positive evidence.⁹⁰

of land by him was executed, that he owned the land described, and that he owned no other land in the county, was competent to show that he owned and claimed to own no other tract in the county. *Hampe v. Sage*, 125 P. 53, 87 Kan. 536.

Where a deed conveyed land to a husband and wife jointly, and as to the wife was intended as a mortgage to secure money advanced to her toward the purchase price, in a controversy between the heirs of such grantee as to whether the deed was in fact a mortgage, the declarations of the husband, while in possession, explanatory of the same, and the rights claimed in the land, were competent evidence. *Hubbard v. Cheney*, 91 P. 793, 76 Kan. 222, 123 Am. St. Rep. 129.

⁸⁴ *Ragan v. Citizens' State Bank of Foraker*, 38 Okl. 65, 131 P. 1093.

⁸⁵ *Broughan v. Broughan*, 61 P. 874, 10 Kan. App. 575, judgment affirmed 64 P. 608, 62 Kan. 724.

⁸⁶ *Bell v. Bearman*, 133 P. 188, 37 Okl. 645.

⁸⁷ *Perkins v. Baker*, 137 P. 661, 41 Okl. 288.

⁸⁸ *Bell v. Bearman*, 133 P. 188, 37 Okl. 645.

Where the grantor's mother and sister were dead at the time of the trial of an action in ejectment, it was not error to admit in evidence their affidavits as to the grantor's age, made long before the execution of the deed whose validity was disputed.

⁸⁹ *Lauderdale v. O'Neill* (Okl.) 177 P. 113.

⁹⁰ *Lauderdale v. O'Neill* (Okl.) 177 P. 113.

§ 1073. Dying declarations

Dying declarations are not admissible in civil actions, except where part of the *res gestæ*.⁹¹ However, the Supreme Court of Kansas has held otherwise in a decision which other courts will be slow to follow.⁹²

DIVISION IX.—BEST AND SECONDARY EVIDENCE

§ 1074. Necessity of best evidence

The law requires that the best possible evidence be produced, and secondary evidence is admissible only when it clearly appears that primary evidence is unattainable, and then only after a showing of diligence.⁹³

If the best evidence possible cannot be produced, then the next best evidence should be admitted.⁹⁴

⁹¹ Note, 56 L. R. A. 360; 50 L. R. A. (N. S.) 1167.

⁹² Dying declarations are admissible in evidence in civil actions. *Thurston v. Fritz*, 138 P. 625, 91 Kan. 468, 50 L. R. A. (N. S.) 1167, Ann. Cas. 1915D, 212.

⁹³ *Kennedy v. Canadian Pac. Ry. Co.*, 151 P. 252, 87 Wash. 184.

Where some loss was suffered from the seller's failure to deliver machinery in time for harvesting, it must be obtained from the best evidence the nature of the case affords. *Cushman Motor Works Co. v. Kelley (Ok.)* 173 P. 1042.

Under Gen. St. 1889, c. 76, providing for copying into the records of the office of the register of deeds of the county in which the land is situated all patents, and that all records of patents so recorded shall be received in all courts as *prima facie* evidence of the existence of such patents, and conclusive evidence of the existence of such records, in an action of ejectment the record of the patent to the land in controversy is admissible, and preliminary proof, accounting for the original patent, need not be made. *Green v. Holmes*, 58 P. 128, 9 Kan. App. 886.

A schedule of the articles taken on replevin, with the estimated value of each, prepared by plaintiff before the trial, is not competent testimony to establish what articles were wrongfully taken, or the value of the same; but testimony of what articles were taken, and their value, must be orally given by the witness before the court and jury, or in a deposition. *Werner v. Graley*, 38 P. 482, 54 Kan. 383.

The statements of a witness who has no knowledge of one's expectancy of life except such as he may have gained from consulting life tables is inadmissible, the tables themselves being the best evidence. *Erb v. Popritz*, 52 P. 871, 59 Kan. 264, 68 Am. St. Rep. 362.

⁹⁴ *Commercial Union Assur. Co., Limited, of London, England, v. Wolfe*, 137 P. 704, 41 Okl. 342.

Request that witness state fact as to a certain choice or election did not call for evidence not the best. *Beckman v. Ash*, 103 Kan. 437, 173 P. 920.

When the execution of a deed is admitted but its validity attacked on sev-

One may show, by his own testimony, the terms of a parol agreement between himself and another. It cannot be contended that such evidence is not the best evidence.⁹⁵

A witness is competent to testify to his own age and birth, though his parents be living and within the court's jurisdiction.⁹⁶

§ 1075. Matters evidenced by writing

When facts or transactions are described in or evidenced by writing the instrument itself is the best evidence, and oral evidence cannot be introduced, unless proof is first made that the instrument has been lost or destroyed, or cannot with due diligence be produced.⁹⁷

eral grounds, it is not error to admit secondary evidence, though it might not otherwise be admissible. *Williams v. Joins*, 126 P. 1013, 34 Okl. 733.

⁹⁵ *Beyle v. Reid*, 1 P. 264, 31 Kan. 113.

⁹⁶ *Harris v. Hart*, 49 Okl. 143, 151 P. 1038.

The evidence of a father and mother, cognizant of their child's birth, is primary evidence of its date or the age of the child, although there is a written record thereof in the family Bible. *State v. Woods*, 30 P. 520, 49 Kan. 237.

⁹⁷ Where an account against a county board of health is presented to a board of county commissioners for approval, parol evidence is inadmissible to show what the board of health has done with reference to the necessary auditing of the account, in the absence of evidence of the loss of the record required to be kept by such board. *Cooke v. Board of Com'rs of Ouster County*, 73 P. 270, 13 Okl. 11.

Oral proof as to the number of ties bought, though an account of such ties is kept in books in due course of business, is admissible without laying any predicate as to such books. *McCants v. Thompson*, 115 P. 600, 27 Okl. 706.

Admission of oral testimony that a carrier charged a rate in excess of that established by the Interstate Commerce Commission held error, as not the best evidence of the established rate. *Chicago, R. I. & P. Ry. Co. v. Champion Lumber Co.*, 47 Okl. 430, 149 P. 119.

Oral testimony of the removal of restrictions and sale by order and under the rules of the Department of the Interior held incompetent; the department's records being the best evidence under Act Cong. April 26, 1906, § 8, and Comp. Laws Okl. 1909, § 5892. *McKemie v. Albright*, 44 Okl. 405, 144 P. 1027.

Since Rev. Laws 1910, § 6109, prescribes the manner in which a surety may be released from liability on a bail bond by a surrender of the principal, parol evidence to prove a surrender in an action on a forfeited bond is inadmissible. *Edwards v. State*, 136 P. 577, 39 Okl. 605.

Kansas cases.—Marriage may be proven by acknowledgment and declaration of the parties, their conduct and general reputation, without first showing that record evidence of testimony of an eyewitness of the marriage is not available. *Tyner v. Schoonover*, 100 P. 473, 79 Kan. 573.

Any act of a corporation, which must necessarily be performed by its board

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Parol evidence of the contents of a written instrument is inadmissible, where the instrument itself can be produced.⁸⁸

To render such testimony admissible, it must appear by competent testimony that writing has been lost or destroyed or is otherwise unavailable through no fault of party offering such secondary evidence.⁸⁹

Parol evidence as to acts or transactions described in or evidenced

of trustees, and a record thereof kept, cannot be proven by parol evidence, in the absence of any proof of the nonexistence of such record, or that such record, if any exists, is inaccessible to the party offering such proof. *Beeler v. Highland University Co.*, 54 P. 295, 8 Kan. App. 89.

On a question whether defendant or another railway company was the employer of plaintiff, it was error to permit of parol evidence that certain time checks were made out in the name of defendant, when there was no evidence that they had been lost or destroyed, or that search had been made, or notice to produce them served. *Chicago, K. & N. Ry. Co. v. Brown*, 24 P. 497, 44 Kan. 384.

A benefit certificate provided that in case of accident the member should receive such sum as was authorized by the conditions of the ratebook. Held, in an action against the society after an accident, that plaintiff must show the nonexistence of a ratebook before oral testimony is admissible as to the amount of indemnity agreed to be paid when the certificate was issued. *National Benev. Soc. v. Oldham*, 78 P. 163, 70 Kan. 79.

Where city purchased realty occupied by association as tenant of former owner, held, that secretary of association who was member of city council might testify to fact of attornment and tenancy under the city without production of record of city council's proceedings. *City of Dunlap v. Waters*, 161 P. 641, 99 Kan. 257.

In action for termination of contract appointing plaintiff purchasing agent and for breach of supplemental contract making him sole purchasing agent for five years, it was not error to reject oral testimony of written reorganization agreements between defendant company and its predecessor with whom contracts were originally made. *Smith v. Hutchinson Box Board & Paper Co.*, 104 Kan. 732, 180 P. 983.

In an action on a contract whereby plaintiff was to furnish money and defendant conduct a business for plaintiff in his name, plaintiff may show by his own parol testimony how much was paid out for the first purchase of goods. *Beyle v. Reld*, 1 P. 264, 31 Kan. 113.

⁸⁸ *Pilcher v. Atchison, T. & S. F. R. Co.*, 7 P. 613, 34 Kan. 46; *Roberts v. Dixon*, 31 P. 1083, 50 Kan. 436.

⁸⁹ *Adams v. King* (Okl.) 170 P. 912.

It is error to admit proof of the contents of a written instrument by secondary evidence until the loss of the original has been clearly shown, or its absence satisfactorily accounted for. *Richardson v. Fellner*, 60 P. 270, 9 Okl. 513.

The published schedule rates filed with and approved by Interstate Commerce Commission are the best evidence of the tariff in force fixing the legal rates on a shipment between certain points, and statements by carrier's agent

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by corporate records is inadmissible, without any excuse for the absence of the corporate records, and without any attempt to produce a certified copy from the books of the corporation.¹

§ 1076. Public records

Records of a public office can be proven only by the originals or by certified copies thereof.²

§ 1077. — Court records

Parol evidence is not admissible to prove the facts recited in judicial records, or the nature of judicial proceedings.³

Parol evidence is inadmissible to prove the existence of a foreign judgment.⁴

A judgment rendered, but not entered on the journal, as required by law, cannot be shown by secondary evidence.⁵ But parol evi-

are inadmissible to establish correct rate. *St. Louis, I. M. & S. Ry. Co. v. McNabb*, 63 Okl. 87, 162 P. 811.

The statements of a witness that the act of the railroad company in leaving their train standing across the street was a violation of a city ordinance was incompetent. The existence of the ordinance should have been shown by the records of the city. *Missouri Pac. Ry. Co. v. Cooper*, 45 P. 587, 57 Kan. 185.

If a contract of agency is in writing, the written instrument is the best evidence. *Ford Motor Co. v. Livesay*, 61 Okl. 231, 160 P. 901.

¹ Where it is shown, and is uncontradicted, that the plaintiffs, who participated as officers in an illegal agreement, the basis of the action, to divide the assets of a corporation between themselves and with one of the defendants, had themselves removed the books of the corporation out of the jurisdiction of the court, in order to defeat the effect of an order of the court, which was expected, appointing a receiver to take possession of the assets of the corporation, and to prevent that officer, if appointed, from ascertaining from the records what the facts were relating to the company's affairs, and that no reasonable efforts have been made to retain or recover them by the plaintiffs, secondary evidence of what those records contained should be refused and rejected. *Barnes v. Lynch*, 59 P. 995, 9 Okl. 11, 156.

² *MacRae v. Kansas City Piano Co.*, 68 P. 54, 64 Kan. 580.

The state of public records respecting the ownership of a mortgage on land at a particular time cannot be established by the original mortgage. *Farm Land Mortgage & Debenture Co. v. Elsbree*, 40 P. 906, 55 Kan. 562.

Under Rev. Laws 1910, § 5112, and U. S. Comp. St., § 1497, parol evidence is competent to prove existence of a national bank, where its existence is called in question collaterally. *Farmers' Nat. Bank v. Johnston* (Okl.) 176 P. 236, 3 A. L. R. 99.

³ *La Clef v. Campbell*, 45 P. 461, 3 Kan. App. 756.

⁴ *Gamel v. Hynds* (Okl.) 171 P. 920.

⁵ *Cockrell v. Schmitt*, 94 P. 521, 20 Okl. 207, 129 Am. St. Rep. 737.

dence is inadmissible in a collateral action to prove the rendition of a judgment or order of a court of record.⁶

Where an adoption is effected under the statute by order of court, the records of the court constitute the best evidence to establish such adoption.⁷

An official return is the best evidence of the doings of the officer under the mandate of process, and is sufficient proof of facts which the officer is authorized to certify.⁸

§ 1077a. Evidence at former trial or other proceeding

The testimony of a witness, since deceased, given at a preliminary hearing for a felonious assault, may be used against the defendant, in a civil action for damages.⁹

The testimony of a witness at a former trial between the same parties with opportunity for cross-examination, which was preserved by bill of exceptions, is admissible in a second trial in the same cause, where the witness is a nonresident.¹⁰

It is within the sound discretion of the trial court to determine the degree of preliminary proof necessary to admit the testimony of an absent witness given at a former trial in the same case.¹¹

A physician's unverified certificate that a witness could not leave home does not warrant the introduction of testimony at a former trial.¹²

Testimony, as recorded in a case-made, is not admissible, in an action between strangers to the record, without proof by a compe-

⁶ Pulsifer v. Arbuthnot, 53 P. 70, 59 Kan. 380.

⁷ Coombs v. Cook, 129 P. 698, 35 Okl. 326.

⁸ Cox v. State, 61 Okl. 182, 160 P. 895.

In a collateral proceeding, parol evidence, as to the contents of orders or judgments of courts of record lost or not reduced to writing, is inadmissible; the originals or duly authenticated copies thereof being the only competent evidence. In re Bates' Guardianship (Okl.) 174 P. 743.

Oral testimony of a clerk of court as to what his records showed concerning rulings on motions in a former case is inadmissible, as not the best evidence. Borin v. Johnson, 65 P. 640, 63 Kan. 885.

⁹ Ray v. Henderson, 44 Okl. 174, 144 P. 175.

¹⁰ Atchison, T. & S. F. Ry. Co. v. Baker, 130 P. 577, 37 Okl. 48.

¹¹ Phillips v. Mitchell (Okl.) 172 P. 85, writ of error dismissed, 248 U. S. 531, 39 S. Ct. 7, 63 L. Ed. 405.

¹² De Bose v. State (Okl. Cr. App.) 197 P. 176.

tent witness that said testimony was actually given at the trial as therein recorded.¹³

Testimony of witnesses at a former trial, between the same parties involving the same subject-matter, transcribed by the court reporter from his stenographic report, certified and incorporated in the case-made, signed and settled by the trial judge, and filed with the district court clerk, is admissible in evidence as depositions, although the reporter's notes were not filed as required by statute.¹⁴

Before the transcript of the testimony of a witness at a former trial can be admitted at subsequent trial, it must be duly certified by the reporter or agreed by the parties as being the evidence, and can only be used under conditions warranting the use of deposition.¹⁵

Where an official reporter, after her term of office has expired, transcribes the testimony of a witness from her stenographic notes, and verifies the same by affidavits, it is insufficient, in the form presented, to prove what the witness had sworn to on a former trial.¹⁶

An official court stenographer, who has correctly taken the tes-

¹³ Ireton v. Ireton, 52 P. 74, 59 Kan. 92.

¹⁴ Kansas City, M. & O. Ry. Co. v. Roe (Okl.) 180 P. 371.

¹⁵ St. Louis & S. F. R. Co. v. Walker, 61 Okl. 37, 160 P. 79.

Testimony given on a former trial by a witness, who afterwards removed from the state, may be received in evidence; and where it was taken by the official stenographer, who made a transcript of his notes in a case-made, it may be shown by such transcript, where the stenographer testifies that he has examined it and found it to be correct. Smith v. Scully, 71 P. 249, 66 Kan. 139.

Gen. St. Kan. 1909, § 2407, authorizing the stenographer's transcript of evidence to be introduced by any party under like circumstances as a deposition, permits such use only in actions between parties to the litigation in which the testimony was given. Madden v. Stegman, 127 P. 524, 88 Kan. 29.

Gen. St. Kan. 1909, § 2407, permitting the use of the stenographer's transcript in testimony, does not restrict such use to the limitations attaching to a deposition under sections 5931 and 5953 (Code Civ. Proc. Kan. §§ 337, 358). New v. Smith, 145 P. 880, 94 Kan. 6, L. R. A. 1915F, 771, Ann. Cas. 1917B, 362.

Snyder's Comp. Laws 1909, § 5881, requiring that every deposition must be filed at least one day before the trial, does not apply to a stenographer's notes referred to in section 1942, which provides for the filing of stenographer's notes with the clerk of court, and that the same shall be a part of the record, and that any longhand transcript of the notes so filed and certified shall be admissible as evidence with like effect as testimony taken by deposition. Oklahoma Ry. Co. v. Boles, 30 Okl. 764, 120 P. 1104.

¹⁶ Robbins v. Barton, 58 P. 279, 9 Kan. App. 558.

timony of a witness, may read his notes of such testimony as evidence upon a subsequent trial, although he has no independent recollection of such testimony, and can relate the same only by reading his notes thereof.¹⁷

Former testimony of a witness may be proven by any one who heard and recollects it, and the person testifying need not state the very language in which the testimony of a witness was given, but should give the substance thereof.¹⁸

§ 1078. Contents of writing

Parol evidence as to the terms of a contract is improper, where it appears that such contract was represented by a writing.¹⁹

The statute authorizing the introduction of books of account as evidence does not exclude a witness' testimony as to his present knowledge of transactions covered by book entries.²⁰ But copies

¹⁷ *Wright v. Wright*, 50 P. 444, 58 Kan. 525. To reproduce the testimony of a witness deceased or absent from court who has testified on a former trial, it is not error to permit the court stenographer to translate and read his stenographic notes of such evidence in the hearing of the jury, instead of requiring them to be transcribed and certified. *Id.*

Laws Kan. 1905, p. 810, c. 494, § 1, relating to stenographic notes of court reporters, does not restrict the use to be made of a stenographer's notes in a nisi prius trial to a written transcript thereof, but is an extension of such use. *Wilmoth v. Wheaton*, 105 P. 39, 81 Kan. 29.

¹⁸ *Solomon R. Co. v. Jones*, 8 P. 730, 34 Kan. 443.

¹⁹ In action for fraud based on alteration of a contract, copy of contract which defendant's attorney had certified as correct and filed with register of deeds, though differing from original contract attacked by plaintiff, was admissible. *Mullarky v. Manker* (Kan.) 170 P. 31.

Where, in an action by an indorsee of a note, the payee is called as a witness and testifies that his authority to take and negotiate the note is contained in a written contract with his principal, statements as to such authority should be rejected on objection. *Nickleson v. Dial*, 93 P. 606, 77 Kan. 8.

In an action on a note, defendant testified to an agreement that certain accounts to be turned over were to be accepted in payment of the note, and that accounts amounting to a certain sum were turned over, and never tendered back. On cross-examination he admitted that the agreement was in writing. Held, that it was error not to exclude his testimony in chief, on his failure to produce the writing, since the written agreement was the best evidence of the arrangement between the parties. *Kingman v. Hett*, 58 P. 1022, 9 Kan. App. 533.

Subscriptions to the endowment fund of a university in writing may not be proved by parol, since the list itself is the best evidence. *Beeler v. Highland University Co.*, 54 P. 295, 8 Kan. App. 89.

²⁰ *Whitcomb v. Oller*, 137 P. 709, 41 Okl. 331.

of such entries in books of account are not admissible, when the originals themselves are available.²¹

Secondary evidence of the contents of letters is inadmissible, when no foundation has been laid therefor.²²

Where articles bearing inscriptions, labels, etc., can be readily brought into court, the articles themselves are the best evidence.²³

§ 1079. Collateral writings

When title to realty is only collaterally involved, title deeds need not necessarily be produced, but parol evidence is admissible.²⁴

Where a nonresident defendant has been regularly served by publication, proof of such service may be made aliunde, where the judgment is called in question in a collateral proceeding.²⁵

Where plaintiff, seeking damages for an interruption of the business of his skating rink, showed that he was in personal charge of the business, and knew its details, and what his receipts and expenses were, and had his bank books in court, he was qualified to testify directly as to amounts, and his summaries were not objectionable, as secondary.²⁶

²¹ It is error to permit plaintiff to identify an account, including many transactions, extending over several months, and to permit introduction of a copy of account as evidence, when it is shown the witness was plaintiff's bookkeeper, and had made the original entries, and that the books were in the immediate possession of the witness, such attempt being in violation of Rev. Laws 1910, § 5114. *Kasenberg v. Hartshorn*, 30 Okl. 417, 120 P. 956.

²² Where a witness has identified a letter introduced as his writing, it is not proper to ask whether certain statements are contained in it; the letter being the best evidence. *Martin v. Hoffman*, 93 P. 625, 77 Kan. 185.

Where the execution of a contract is in issue, and the plaintiff introduces a letter claimed to have been received from defendant relating to the contract, and defendant denies the writing of such letter and offers a copy of a letter which he testifies he did send to plaintiff, it is error to receive such copy without accounting for the original. *Barton-Parker Mfg. Co. v. Miller Mercantile Co.*, 89 P. 1128, 18 Okl. 137.

²³ A card tacked to a railway tie, bearing the printed words "A. and T. The Company," and the written words "creosote treated ties," is the best evidence of the information the inscription imparts. *Atchison, T. & S. F. Ry. Co. v. Palmore*, 75 P. 509, 68 Kan. 545, 64 L. R. A. 90.

²⁴ *Shanks v. Robertson*, 101 Kan. 463, 168 P. 316, 1 A. L. R. 1140.

Where, in a vendor's action for the price, the plaintiff's ownership was not in issue, it was not error to permit him to give oral testimony that he owned the land when he deeded it to defendant. *Newcomer v. Sheppard*, 51 Okl. 335, 152 P. 66.

²⁵ *Lipscomb v. Citizens' Bank of Galena*, 71 P. 583, 66 Kan. 243.

²⁶ *Mensing v. Wright*, 119 P. 374, 86 Kan. 98.

§ 1080. Copies

Different impressions of a writing produced by using carbon paper, if otherwise competent, are admissible without accounting for nonproduction of others.²⁷

But letter press copies or photographs of documents are admissible as secondary evidence only;²⁸ and copies of copies of letters are not admissible as secondary evidence.²⁹

²⁷Maston v. Glen Lumber Co. (Okl.) 163 P. 128.

When three letters or notices are written simultaneously by the agent of one of the parties and signed by the same individual, containing the same words and addressed to the same person, the principal of said agent, one being retained by the agent and the other by the party signing the same, and the other sent by registered letter to the principal, notice to produce the original papers in order to introduce one of the retained copies in evidence is not necessary, and such copy, when offered to charge the party principal to whom the same was sent by mail, may be considered, not as a copy, but as an original. *Reeves & Co. v. Martin*, 94 P. 1058, 20 Okl. 558.

An impression copy of a shipment contract held admissible, if properly identified, legible, and not shown to have been altered. *Enright v. Atchison, T. & S. F. Ry. Co.*, 152 P. 629, 96 Kan. 546.

Carbon impressions of bills of lading, being the same as the originals, are admissible in evidence. *Wilkes v. S. V. Clark Coal & Grain Co.*, 148 P. 768, 95 Kan. 493.

Carbon copies of official railroad reports made in the usual course of business, held admissible in an action for the death of a switchman. *Giersch v. Atchison, T. & S. F. Ry. Co.*, 158 P. 54, 98 Kan. 452.

²⁸ Where original mortgage was in evidence, and no reason or excuse appears for introduction of photographic copy of original, such copy was properly excluded. *Chase v. Cable Co.* (Okl.) 170 P. 1172.

It is error, under Rev. Laws 1910, § 5114, to permit a witness to read a long list of deposits of a bank and checks, showing the amount of money drawn, which purported copy was not made by the witness, nor certified as being a true copy of the original account, where no excuse is offered for failure to produce the original books, or to show that the same were lost, or that the person making the original entry was dead or absent, or why the books were not subpoenaed or deposition taken. *Kasenberg v. Hartshorn*, 30 Okl. 417, 120 P. 956.

Loss of certain railroad waybills indicating the destination of certain cars in question having been proved, letter press copies thereof were admissible. *Barker v. Kansas City, M. & O. Ry. Co.*, 129 P. 1151, 88 Kan. 767, 43 L. R. A. (N. S.) 1121.

Secondary evidence of the contents of a deed which the grantee failed to produce held admissible, though record of the register of deeds showed a purported copy, where it was contended that the record was inaccurate. *Wetmore State Bank v. Courter*, 155 P. 27, 97 Kan. 178.

Press copies of waybills used by a railroad company, the originals of

²⁹ *Jobes v. Lows*, 66 P. 627, 63 Kan. 886.

Where the original of a writing cannot be produced, a copy thereof made from memory by one knowing its contents is admissible.³⁰

The original books of account should be produced, where copies made by a notary who took the deposition of the bookkeeper have been duly objected to, before the notary and at the trial, as not the best evidence.³¹

§ 1081. Secondary evidence admissible when

The best evidence the nature of the case will admit of is required, if possible to be had, but where not available, secondary evidence is admissible.³²

Where the execution, delivery, and loss of an instrument of con-

which are not shown to be lost or destroyed, or incapable of production, are inadmissible in evidence, in an action between third parties, where the person who issued the waybills and made the copies is not shown to be dead. *Haas v. Chubb*, 74 P. 230, 67 Kan. 787.

What purports to be a copy of the official county paper, containing notice of conveyance of unredeemed lands sold for taxes, found among the files of the county treasurer, though not required by law to be kept there, is sufficient to establish prima facie the contents of the notice. *Morrow v. Inge*, 131 P. 1184, 89 Kan. 481.

³⁰ *Walter v. Calhoun*, 129 P. 1176, 88 Kan. 801.

³¹ *Drumm-Flato Commission Co. v. Edmisson*, 208 U. S. 534, 28 S. Ct. 367, 52 L. Ed. 606, affirming 17 Okl. 344, 87 P. 311.

³² *Farmers' Nat. Bank v. Hartoon*, 60 Okl. 193, 159 P. 844.

Where a party makes a showing at the trial that the primary evidence, such as a letter is lost without his fault, it is not error to permit secondary evidence of its contents. *Adams v. King* (Okl.) 173 P. 206, reversing order on rehearing 170 P. 912.

Where the books of the assured have been lost or stolen through no fault of his, oral proof to establish the property destroyed by fire is admissible. *Commercial Union Assur. Co., Limited, of London, England, v. Wolfe*, 137 P. 704, 41 Okl. 342.

A taxpayer seeking to enjoin the extension of an additional tax for school purposes, pursuant to an election, under Rev. Laws 1910, § 7383, on the ground that 30 per cent. of the voters did not participate in the election, may establish such fact by parol evidence, the law requiring registration not applying to such election. *McCreary v. Lee*, 45 Okl. 201, 145 P. 777.

The contents of a letter may be shown by secondary evidence when it appears that the original is not in the possession or under the control of the offering party, and is so situated that such party could not, by the use of the legal means applicable to such cases, have produced it, the same as when the original is shown to be destroyed. *White v. White*, 90 P. 1087, 76 Kan. 82.

Where a number of chattels were destroyed so that detailed evidence of their value could not be given, testimony of their aggregate value is admissible. *McKnight v. Strasburger Bldg. Co.*, 150 P. 542, 96 Kan. 118.

veyance has been proved, secondary evidence of its existence and contents is admissible.³³

The records of the register of deeds office are competent if the party offering them has not control of the originals.³⁴

Parol evidence is competent, where the record and files are incomplete, to show actual proceedings of county commissioners except as to matters which the statutes specifically require to be recorded.³⁵

Where book entries, vouchers, or accounts are voluminous or complicated, the testimony of a competent witness who has made an examination and summary of them may ordinarily be received.³⁶

Under the statute, the records of a register of deeds or certified copies thereof may be received in evidence to prove a recorded instrument, where the original is not in the possession or control of the party desiring to use same.³⁷

Evidence satisfying the court that an original instrument is not

³³ *Adkins v. Wright*, 131 P. 686, 37 Okl. 771.

Where court proceedings are attacked as void years after they occurred, and where the primary evidence of the proceedings is shown to have been lost or destroyed, secondary evidence may be considered, and every reasonable presumption will be entertained consistent with such evidence to support the validity of the proceedings. *Brunbaugh v. Wilson*, 107 P. 792, 82 Kan. 53.

In 1905, county records were destroyed by fire. In an action in the district court, the only question was whether a certain section road was 60 or 40 feet wide. Held that, the destruction of the road records having been shown, parol evidence that a 60-foot road had been established and traveled since 1886 was admissible. *Bowland v. McDonald Independent Telephone Co.*, 107 P. 797, 82 Kan. 84. motion to retax costs granted 107 P. 1119, 82 Kan. 357.

³⁴ *Sax v. Wilkerson*, 51 P. 299, 6 Kan. App. 203.

³⁵ *Trotter v. Wood*, 52 Okl. 20, 152 P. 600.

³⁶ *Haines v. Goodlander*, 84 P. 986, 73 Kan. 183.

Under the rule dispensing with the production of voluminous documents, a record in the office of a railroad's superintendent, consisting of tables compiled by his office force, was properly admitted in evidence to show an abnormal rush of business in one of the months. *Bourquin v. Missouri Pac. Ry. Co.*, 127 P. 770, 88 Kan. 183.

³⁷ *Dyal v. Norton*, 47 Okl. 794, 150 P. 703.

A copy of a telegram, properly identified, may be introduced in evidence, where the evidence offered has established a conclusive presumption of the destruction of the original. *Western Union Tel. Co. v. Collins*, 53 P. 74, 7 Kan. App. 97.

Secondary evidence of the contents of a letter held admissible where it

in the possession or under the control of the party offering the record, authorizes the admission in evidence of the records of the register of deeds to prove the instrument.⁸⁸

was shown that the letter was lost or could not be obtained. *Bruce v. Mathewson*, 155 P. 787, 97 Kan. 466.

Where letters between a party to the action and a third party are relevant as tending to prove that one party was negotiating a trade which was afterwards consummated, and one of the letters is lost, it is not abuse of discretion to permit a witness to testify to the receipt of the letter and its contents. *Gulliford v. McQuillen*, 89 P. 927, 75 Kan. 454.

Where a person who has suffered loss by the neglect of a telegraph company to deliver a message serves upon the agent of the company a written demand for damages, and gives the agent a copy thereof, but keeps the original, on which the agent accepts service in writing, he may prove the contents thereof by parol where the loss of the original is shown. *Western Union Tel. Co. v. Collins*, 25 P. 187, 45 Kan. 88, 10 L. R. A. 515.

Where written material evidence is admitted to have been in the possession of a party to the action, it is error to admit evidence of its contents until it fairly appears that the writing is lost or destroyed. *Smith, Carey & Co. v. Atchison Live Stock Co.*, 140 P. 108, 92 Kan. 5, reversing judgment on rehearing 133 P. 723, 90 Kan. 258.

⁸⁸ *Dyal v. Norton*, 47 Okl. 794, 150 P. 703.

Admission of records of register of deeds office without first showing that the original deeds were not in the possession or under the control of the party offering the records, held error. *Farmers' Hardware & Implement Co. v. Thacker*, 54 Okl. 425, 153 P. 1144.

Kansas cases.—Where testimony is given to show that defendant has the possession of a written instrument, the subject of the action, and defendant testifies that he does not have and never did have the possession thereof, and that it never existed, oral evidence of the contents of such instrument is admissible. *Bertenshaw v. Laney*, 94 P. 805, 77 Kan. 497.

The presumption that the original of a written instrument is not in the possession of one a stranger to it is sufficient, in the absence of other showing, to admit the record of such instrument, found in the books of the register of deeds' office, to be read in evidence. *Neosho Val. Inv. Co. v. Hannum*, 66 P. 631, 63 Kan. 621.

Under Comp. Laws, c. 80, § 387a, providing that the records kept by the register of deeds may be used in evidence where the original of such records is not in the possession, or under the control, of the party desiring to use the same, the testimony of the husband of a person desiring to introduce the record of a deed that he is her agent, and keeps all her papers, but that such deed is in a distant state, and has never been in his hands, is sufficient to warrant the admission of the record. *Stratton v. Hawks*, 23 P. 501, 43 Kan. 538.

Under Code Civ. Proc. §§ 372, 387a, making the record of deeds duly recorded admissible in evidence when the originals are not in the possession or under the control of the party desiring to use the same, the record is admissible without proof that the originals are not in the possession of the party by whom it is offered when the originals were made to persons claim-

It is proper to admit oral testimony as to the contents of a writing, when it is first shown that it is lost.³⁹

Secondary evidence of the contents of a written contract is inadmissible, though such instrument is in possession of one not

ing adversely to him, and he is not entitled to their custody. *McLean v. Webster*, 26 P. 10, 45 Kan. 644.

Code Civ. Proc. § 369 (Gen. St. 1909, § 5964), authorizing admission of record of instrument, properly recorded, without preliminary proof, furnishes the rule as to such evidence, notwithstanding Gen. St. 1909, § 1678, authorizing admission of secondary evidence on proof of the loss or destruction of the original. *Wendell v. Heim*, 123 P. 869, 87 Kan. 138.

In an action against a telegraph company for failure to deliver a message, it is not error to admit a copy of the message, properly identified, fourteen months after its receipt for transmission by the company, where it is first shown by the manager at the receiving office that the original is not in his office, nor under his control, and that, by the rules of the company, original messages are retained in the office where received for six months, and are then sent to Chicago and destroyed. *Western Union Tel. Co. v. Collins*, 25 P. 187, 45 Kan. 88, 10 L. R. A. 515.

In an action to recover goods which were consigned on the understanding that title was to remain in the consignee until they were paid for, and which the consignee had transferred to defendant, letterpress copies of letters from plaintiff to consignee may be introduced as secondary evidence, when it has been shown that the original letters have been directed and mailed in the usual course of business, and there is preliminary proof, from the party to whom they were addressed, that he had made diligent search for them, and they could not be found. *Powell v. Wallace*, 25 P. 42, 44 Kan. 656.

Where a deed shown to have been deposited in a public office is said to have been lost or destroyed, the testimony of the custodian of such office, or

³⁹ *Redus v. Mattison*, 121 P. 253, 30 Okl. 720.

To admit secondary evidence, it must appear that the original has been lost or destroyed, and a mere showing that it was mislaid through defendant's negligence will not warrant admission of a copy. *Missouri, O. & G. Ry. Co. v. West*, 50 Okl. 521, 151 P. 212.

Parol evidence of the contents of a written option and assignment was improperly admitted, where no steps to require their production by subpoena duces tecum, under Comp. Laws 1909, § 5844, were taken, nor any steps taken to obtain an inspection and production under section 5888; there being no evidence that they were lost or destroyed. *Landon v. Morehead*, 126 P. 1027, 34 Okl. 701.

On the issue of the admission of parol testimony as to the contents of a letter which witness had received, evidence held sufficient to prove that the letter was lost. *Adams v. King* (Okl.) 173 P. 206, reversing order on rehearing, 170 P. 912.

Oral evidence is incompetent to prove the allotment records of the Commissioners to the Five Civilized Tribes, in the absence of a showing that such records have been lost or destroyed. *Gilbert v. Brown*, 44 Okl. 194, 144 P. 359.

a party to the suit and who lives in another state, without first showing that such instrument was lost or beyond the control of the party wishing to prove the terms thereof.⁴⁰

It is a condition precedent to the introduction of a copy of a letter in evidence that a proper predicate be shown for the admission of such secondary evidence.⁴¹

some person who has himself searched in such office, must be produced, showing that after search he was unable to find the instrument, before secondary evidence of its contents is admissible. *Lee v. Birmingham*, 1 P. 73, 30 Kan. 312.

Where a card is tacked to a railway tie, bearing the printed words, "A. & T. Tie Company," and the written words, "creosote treated ties," slight evidence of the loss of the card is sufficient to authorize parol proof of its contents, as it was not likely to be preserved. *Atchison, T. & S. F. Ry. Co. v. Palmore*, 75 P. 509, 68 Kan. 545, 64 L. R. A. 80.

Secondary evidence of a deed alleged to be lost is inadmissible without a showing of reasonable diligence in a search for the original. *Rullman v. Barr*, 39 P. 179, 54 Kan. 643.

When a suit is brought to recover on a promissory note, and it is alleged that the note is lost, and cannot be procured at the trial, proof that the note was delivered to an agent for the payee, and that the agent transmitted the note to the payee by mail, and that it was assigned to the plaintiff by the payee while yet in the hands of the agent, and that the plaintiff has never received the note, without in any manner attempting to prove by the payee that he never received the note, or that he had no knowledge of its whereabouts, is not sufficient proof of the loss of the note to entitle the plaintiff to prove its contents or tenor by secondary evidence. *Richardson v. Feller*, 60 P. 270, 9 Okl. 513.

⁴⁰ *Pringey v. Guss*, 86 P. 292, 16 Okl. 82, 8 Ann. Cas. 412.

Before secondary evidence of the contents of an invoice of a stock of goods can be received, the party offering it must, at least, account for the absence of the original. *Coder v. Stotts*, 32 P. 1102, 51 Kan. 382.

To introduce parol evidence of the contents of a written contract the party offering such evidence must show that original contract was lost or destroyed or beyond his control. *McCoy v. Wosika*, 75 Okl. 3, 180 P. 967.

Oral testimony is admissible to show the terms of a written contract which the evidence already admitted shows has been lost and cannot be produced. *City of Checotah v. Chapman Valve Co.*, 52 Okl. 481, 153 P. 133.

In an action on a note, where it is shown that it is lost and cannot be found, it is not error to admit oral evidence of its contents. *Randolph v. Hudson*, 74 P. 946, 12 Okl. 516.

Where the records of an adoption by the court have been destroyed, parol evidence of their contents and evidence of acts and declarations of the adopting parent are admissible to establish adoption. *Coombs v. Cook*, 129 P. 698, 35 Okl. 326.

⁴¹ *National Surety Co. v. Oklahoma Nat. Life Ins. Co.* (Okl.) 165 P. 161.

Before parol evidence is admissible as to contents of lost document, it is

§ 1082. — Notice

Secondary evidence of a document not in possession of the party offering such evidence is not admissible, without notice to the adverse party to produce the document.⁴²

The rule requiring a party to show that he has used all the means in his power to obtain the original does not apply, where it is in the custody of the adverse party, who admits that the same is lost.⁴³ But a notice to produce an instrument, the existence of which is denied, would be vain and ineffectual, and is therefore unnecessary.⁴⁴

necessary to prove that document was actually executed and delivered by person or persons sought to be bound. *Hallam v. Bailey* (Okla.) 166 P. 874.

In factor's action for advances receipted, freight bills were secondary evidence, and not admissible without preliminary testimony identifying them or showing their admissibility. *Moody v. Thompson* (Okla.) 166 P. 96.

Where a written contract is material, the writing itself is the best evidence and where not produced, its absence must be accounted for before secondary evidence of its contents can be received. *Farmers' Nat. Bank v. Hartoon*, 60 Okla. 193, 159 P. 844.

An order, made by the court or judge on an unverified notice or demand for inspection of a document, without proof of its existence, possession, and control by the adverse party or of further effort to procure the same, or proof of its loss or destruction, is insufficient to authorize secondary evidence. *Landon v. Morehead*, 126 P. 1027, 34 Okla. 701.

Before secondary evidence is admissible to show the pendency of a prior action, it must appear that the record evidence is unavailable, unless such secondary evidence be used to explain missing details. *Patterson v. Choate*, 50 Okla. 761, 151 P. 620.

⁴² *Roberts v. Dixon*, 31 P. 1083, 50 Kan. 436.

⁴³ *Cochran v. Bank of Tuttle*, 31 Okla. 171, 120 P. 652.

Where a petition alleged a contract, consisting of letters and telegrams, and that one of the writings is a telegram sent by plaintiff and now in the possession of defendant, who cannot state its contents definitely, the petition was sufficient notice to defendant to permit secondary evidence as to its contents, in its absence. *Atchison, T. & S. F. Ry. Co. v. Kinkaid*, 30 Okla. 699, 120 P. 963.

Where written agreements were in the hands of the nonresident president of defendant corporation, and a notice to produce them was given, and, not having been complied with, an order to produce them was made by the trial court which was not obeyed, copies of such agreements were properly received in evidence. *Cooley v. Gilliam*, 102 P. 1091, 80 Kan. 278.

Evidence of the contents of letters was properly excluded, where no steps

⁴⁴ *Bertenshaw v. Laney*, 94 P. 805, 77 Kan. 497.

A subpoena on defendant to bring letters into court which were not in his possession is not a ground for introducing secondary evidence. *Jobes v. Lows*, 66 P. 627, 63 Kan. 886.

DIVISION X.—DEMONSTRATIVE EVIDENCE

§ 1083. Exhibition of person

Where the question of physical injury, its extent or permanency, is in issue, ordinarily it is not error to permit plaintiff to exhibit the injured part of the body to the jury,⁴⁵ but he cannot be compelled to do so.⁴⁶

§ 1084. Exhibition of articles

Articles which are the subject of, or are connected with, the controversy, may be admitted in evidence, when shown to be in the same condition as at the time the controversy arose.⁴⁷

were taken to obtain an inspection or production of the letters. *Hull v. Allen*, 113 P. 1050, 84 Kan. 207.

Where original demand for return of usury is in hands of defendant, notice to produce it is not necessary to allow copy to be given in evidence where form of action and allegations of pleading gave notice that production at trial would be necessary. *Security State Bank v. Lane*, 64 Okl. 11, 166 P. 160.

⁴⁵ *Continental Casualty Co. v. Wynne*, 129 P. 16, 36 Okl. 325.

In an action for damages for rape, a child 2½ years of age alleged to be the fruit of the illicit intercourse may be exhibited to the jury to establish the facts of birth and of prior unlawful intercourse. *Watson v. Taylor*, 131 P. 922, 35 Okl. 768.

In an action to recover for the breaking of plaintiff's leg, it is not error to allow both the injured and the uninjured legs to be shown to the jury. *City of Topeka v. Bradshaw*, 48 P. 751, 5 Kan. App. 879.

⁴⁶ Where a person unreasonably refuses to show his injuries on request, that fact may be considered by the jury as bearing on his good faith. *City of Kingfisher v. Altizer*, 74 P. 107, 13 Okl. 121. The court cannot order plaintiff, in an action for personal injuries, to submit to a surgical examination either before or during trial. *Id.* Though one may expose his body with the permission of the court, if he chooses, he cannot be compelled to do so. *Id.*

Where plaintiff exhibits part of his body to jury and to physicians called by him to testify as to extent of injuries, and offers to submit to examination by any physicians named by court, other than defendant's physicians, refusal to require him to submit to examination by defendant's physicians was not error. *Oklahoma Ry. Co. v. Thomas*, 63 Okl. 219, 164 P. 120, L. R. A. 1917E, 405.

In the absence of a statutory or constitutional provision so authorizing, the courts cannot order a plaintiff in a damage case to submit to an examination by a physician. *Atchison, T. & S. F. Ry. Co. v. Melson*, 40 Okl. 1, 134 P. 388, Ann. Cas. 1915D, 760.

⁴⁷ In an action by a servant for injuries received from a fall from an electric light pole about 30 feet in height alleged to have been caused by the rotten condition of the pole near the top, where the pole, after having been used for a short time after the accident, was removed and shortly there-

The question of the introduction of models, casts, etc., rests largely in the discretion of the court.⁴⁸

§ 1085. Experiments and tests

Evidence of experiments, offered as an illustration of a fact in issue, made under the same conditions as the facts sought to be illustrated, is admissible.⁴⁹ They may be admissible, though made out of court.⁵⁰

§ 1086. Handwriting

The genuineness of a writing or signature, which is made the basis of comparison with one in controversy, must be proved by direct or positive evidence and cannot be established by comparison.⁵¹

after placed in a building, and there was evidence that the top portion of the pole at the time of trial appeared to be in practically the same condition as at the accident, except that it was some drier, and there was no controversy as to the condition of the remaining portion of the pole, the upper portion including the part from which plaintiff fell, was admissible in evidence after it had been identified. *Choctaw Electric Co. v. Clark*, 114 P. 730, 28 Okl. 399.

⁴⁸ In action for injuries received by plaintiff coming in contact with defendant's high-tension wires, held that it was not an abuse of discretion for court to refuse to admit a model of defendant's system of wires and poles. *Logan v. Empire District Electric Co.*, 161 P. 659, 99 Kan. 381, L. R. A. 1917E, 258.

⁴⁹ *Wingfield v. McClintock*, 113 P. 394, 85 Kan. 207, judgment affirmed on rehearing 116 P. 488, 85 Kan. 452.

Where it is claimed that an intervening bluff along which a railway was built prevented a traveler approaching the crossing from hearing the ordinary signals, it is competent to show, by a witness who has made a test at the place of the injury, and under substantially similar circumstances, how far the signals can be heard, and the effect of the intervening bluff in obscuring the vision, and deadening the sounds made by a passing train. *Missouri Pac. Ry. Co. v. Moffatt*, 44 P. 607, 56 Kan. 667.

In an action for the death of a person at a railroad crossing, it is competent to show by a witness, who has made a test at the same place and under substantially similar circumstances, that the noise of trains is deadened by a cut through which the track passes and by the surroundings to a person on the highway. *Johnson v. Chicago, R. I. & P. R. Co.*, 103 P. 90, 80 Kan. 456. In an action for death at a crossing, it is competent to show by a witness, who has made a test at the same place and under substantially similar circumstances, that the smoke and steam from engines in a cut could not be seen at the crossing. *Id.*

⁵⁰ *Irby v. State* (Okl. Cr. App.) 197 P. 526.

⁵¹ *Miller v. Thompson*, 50 Okl. 643, 151 P. 192.

In an action involving the genuineness of a chattel mortgage, an error in

DIVISION XI.—ADMISSIONS .

§ 1087. Judicial admissions

An attorney's oral admission of a fact during trial binds his client,⁵² and may be proved on a subsequent trial.⁵³

In a civil action for assault, record of a plea of guilty by defendant to a criminal charge for the same assault is admissible as an admission.⁵⁴

A pleading filed in one case by a party is competent evidence against such party on the trial of another case as a statement or admission.⁵⁵

Pleadings may be admissible in a subsequent action between the

permitting the alleged mortgagor, over defendant's objection, to write his name in the presence of the jury for their inspection and comparison with the signature to the mortgage, becomes harmless where defendant, on cross-examination, adopts the same method of proof by asking the witness to write his name while standing, and introduces such signature in evidence. *Allen v. Gardner*, 27 P. 982, 47 Kan. 337.

⁵² A statement of counsel for plaintiff before the jury and in the presence of the court as to the authority of the local agent of the plaintiff is binding upon the plaintiff. *Etna Building & Loan Ass'n v. McCarty*, 78 Okl. 187, 189 P. 357. An admission by an attorney in opening statement to the jury is binding, but equivocal admission is not binding. *Grimmett v. Grimmett*, 80 Okl. 176, 195 P. 133.

⁵³ *In re Hoover's Estate*, 104 Kan. 635, 180 P. 275.

⁵⁴ *Musick v. Enos*, 148 P. 624, 95 Kan. 397.

⁵⁵ *Solomon R. Co. v. Jones*, 2 P. 657, 30 Kan. 601.

Where plaintiff sues on a contract, and defendant admits its execution, and the cause is dismissed without prejudice, in the second action plaintiff may introduce in evidence the admissions in defendant's former pleading, which defendant will not be permitted to contradict. *Myers v. First Presbyterian Church of Perry*, 69 P. 874, 11 Okl. 544.

Where plaintiff filed a petition in an action, to which defendant files an answer and cross-petition, but is afterwards dismissed, the pleading may be used by plaintiff as evidence, if it contains admissions material to plaintiff. *Arkansas City v. Payne*, 102 P. 781, 80 Kan. 353, 18 Ann. Cas. 82.

A petition filed in a previous action by defendant is admissible in evidence in a later action against defendant if it contains statements material to the issue in the nature of admissions or allegations tending to contradict his testimony. *Every v. Rains*, 115 P. 114, 84 Kan. 560.

In the trial of a case for work and labor, it appeared that plaintiff had brought a prior action charging another person for the same services. No judgment was rendered. Held, that the bill of particulars in the former suit, being a quasi admission, was competent as evidence. *Chicago, R. I. & P. Ry. Co. v. Mashore*, 96 P. 630, 21 Okl. 275, 17 Ann. Cas. 277.

pleader and one not a party to the former action as admissions against interest of pleader.⁵⁶

Allegations in petition, which have been superseded by amended petition complete within itself and not referring to original petition, may be introduced in evidence as admissions against interest subject to plaintiff's denial or explanation.⁵⁷

It is not necessary to prove facts admitted in a pleading of the opposite party.⁵⁸

Stipulations by counsel bind the party as a judicial admission, though made before issue joined, and are competent evidence against him even on a second trial.⁵⁹

⁵⁶ *Kington v. Ewart*, 164 P. 141, 100 Kan. 49.

A lien statement under oath and a cross-petition filed in one case by a party is competent evidence against him at the trial of another case as admissions. *Limerick v. Lee*, 87 P. 859, 17 Okl. 165.

⁵⁷ *Letcher v. Maloney* (Okl.) 172 P. 972.

Where a complete amended petition is filed, the allegations of the original pleading, though no longer absolutely binding on the party pleading, may constitute evidence against him. *Reemsnyder v. Reemsnyder*, 89 P. 1014, 75 Kan. 565.

The exclusion of an original petition offered in evidence by defendant containing statements at variance with an amended petition on which the cause was tried was reversible error. *Meek v. Deal*, 124 P. 160, 87 Kan. 319.

Where an amended petition and exhibits attached thereto materially differ from the allegations contained in the original petition, it is not error to permit defendant to offer the original petition in evidence as the admissions of the plaintiff. *Juneau v. Stunkle*, 20 P. 473, 40 Kan. 756.

While an abandoned pleading does not serve to define the issues, it is in the nature of an admission, and should be received in evidence for what it is worth. *Watt v. Missouri, K. & T. Ry. Co.*, 108 P. 811, 82 Kan. 458.

Where plaintiff filed his bill of particulars on April 16th, alleging that defendant was indebted to him in the sum of \$75, and on May 19th amended the bill of particulars and asked \$200, both pleadings being verified, and at the trial defendant offered the original bill of particulars as evidence, and it was admitted and read to the jury, it was error to instruct that the pleadings in the case form no part of the evidence, as defendant was entitled to have the jury consider the original bill of particulars in connection with the other evidence, as tending to show an admission of plaintiff that on April 16th he claimed only \$75 and on May 19th, without having performed any other services, he claimed \$200. *Leavitt v. Deichmann*, 30 Okl. 423, 120 P. 983.

⁵⁸ Where defendant admits in his pleadings that the lands in controversy were allotted to persons named, and that he claims title through them, it is not necessary for plaintiff to prove such facts. *Fish v. Sims*, 141 P. 980, 42 Okl. 535.

⁵⁹ *Loman v. Paullin*, 51 Okl. 294, 152 P. 73.

Solemn or judicial admissions, made for the express purpose of dispens-

Affidavits, depositions, etc., containing admissions of a party, are admissible in evidence against him.⁶⁰

§ 1088. Offers of compromise

Evidence of an unaccepted proposal of a compromise of a claim is inadmissible in evidence in an action on the claim.⁶¹

Admissions for the purpose of a compromise, if not accepted, cannot be proved against the party making them, but are admissible when not made in confidence of a compromise.⁶²

ing with the proof of some fact at the trial, in the form of express stipulations, on being filed and becoming part of the record are generally conclusive of all the facts involved, and may be given in evidence on any subsequent trial in the same cause. *Consolidated Steel & Wire Co. v. Burnham*, 58 P. 654, 8 Okl. 514.

⁶⁰ The affidavit by plaintiff in replevin is competent evidence against him as to the value of the property, and he will not be heard to object to its competency nor to deny its truthfulness. *Stiller v. Atchison, T. & S. F. Ry. Co.*, 124 P. 595, 34 Okl. 45.

It is not error to admit in evidence statements of a witness set out in a motion for continuance, where, to prevent a continuance, the opposite party admits that the witness if present would testify as stated. *Grimes v. Wilson*, 30 Okl. 322, 120 P. 294.

On motion for judgment on stipulation, where defense is that it was not signed by defendants, but by an attorney not authorized, application for continuance of action sworn to by defendants' attorney referring to stipulation as ground for continuance is admissible. *Berry v. Dewey*, 102 Kan. 392, 170 P. 1000.

⁶¹ *Chicago, R. I. & P. Ry. Co. v. Forsythe & Templar*, 56 Okl. 26, 155 P. 851.

⁶² *City of Anadarko v. Argo*, 128 P. 500, 35 Okl. 115.

Letters written by the defendant to the plaintiff, asking him to delay suit and proposing to trade him or lease him certain property, and with statements therein tending to show an admission of liability, are not incompetent as being an offer to compromise. *Freeman v. Eldridge*, 110 P. 1057, 26 Okl. 601.

In an action against a carrier for coal delivered to it for shipment, but appropriated by it, evidence was properly admitted, over objection that it merely tended to show an offer to compromise, that, a bill having been presented for the coal, the carrier's fuel agent called and said that he had come to have a talk about the coal bill that the carrier owed, since it tended to show the use of the coal by the carrier and its liability therefor. *St. Louis & S. F. R. Co. v. Stone*, 97 P. 471, 78 Kan. 505, rehearing denied 104 P. 1067, 78 Kan. 510.

§ 1089. Written statements

Statements in writing are admissible against the party making them,⁶³ but written statements of third parties are not admissible.⁶⁴

§ 1090. Conduct

A party's conduct indicating a belief in the weakness of his case,⁶⁵ or a consciousness of liability and a purpose to evade satisfaction thereof,⁶⁶ or conduct bearing on some point at issue, may be shown against him as an admission, subject to explanations he may offer.⁶⁷

⁶³ It is not error to admit in evidence a statement, signed by the parties, in settlement of the items of their account, where the amount claimed to be due by one of them is subsequently disputed by the other. *Miller v. Campbell Commission Co.*, 74 P. 507, 13 Okl. 75.

On cross-examination of plaintiff, in action for injuries sustained in a coal mine, where he identifies written statements showing that he had worked in the mine several weeks after the accident, they were erroneously excluded, though the witness had testified under direct examination that the reports were for work done for him by another person. *Home-Riverside Coal Min. Co. v. Fores*, 67 P. 445, 64 Kan. 39.

⁶⁴ The plaintiff, to prove his ownership of a tract of land, introduced in evidence a deed thereto which purported to convey title to himself and another who was not a party in the action. Thereafter the plaintiff offered in evidence a written statement executed by the other grantee by the terms of which such other disclaimed any interest in the land from the date of the deed. Held, that the admission of such disclaimer over the objection of the defendant was material error. *Wuester v. Topeka & N. W. R. Co.*, 118 P. 1054, 85 Kan. 636.

Assessor's lists are not admissible as admissions against interest as to value, where the issue as to value is raised in a civil action between the owner and parties other than the state. *Bartlesville Interurban Ry. Co. v. Quaid*, 51 Okl. 166, 151 P. 891, L. R. A. 1918A, 653.

⁶⁵ *Neece v. Neece*, 51 S. E. 739, 104 Va. 343.

⁶⁶ In action for personal injury from being struck by defendant's automobile, evidence that, shortly after the accident, deeds from defendant to his children were placed on record, was admissible to show consciousness of liability and a purpose to evade satisfaction thereof. *Cusick v. Miller*, 171 P. 599, 102 Kan. 663, L. R. A. 1918D, 1086.

⁶⁷ Where a sheriff attaches goods, and appoints appraisers to appraise them, the appraised value of the goods is prima facie evidence of their real value as against the sheriff. *Carson v. Golden*, 14 P. 166, 36 Kan. 705.

Where surety on note made partial payment upon holder's contract that any judgment against maker should be assigned to him to amount of such payment, the holder, by entering satisfaction of judgment against maker, admitted its payment, and in effect admitted his obligation to pay the assignee. *Magee v. Snyder*, 103 Kan. 558, 175 P. 597.

In condemnation proceedings pursuant to Comp. Laws 1909, §§ 948-956, and

§ 1091. Acquiescence or silence

A definite statement of fact, made in the presence or hearing of a party and understood by him, and when of such a nature as to affect his rights and call for a reply, is admissible in evidence as tending to show an admission of the truth of the facts stated, where he fails to reply thereto; but where it is not made under the circumstances, and is not of a nature calling for a reply, it is mere hearsay and inadmissible.⁶⁸ This is not true, however, of admissions made at judicial proceedings,⁶⁹ nor of offers of compromise.⁷⁰

§ 1092. Admissions by parties or others interested

Any material statement made by a party against his interest is admissible in evidence.⁷¹

The declarations of a codefendant, when competent for any purpose, are properly admitted in evidence.⁷²

Declarations against interest, made by a wife to an officer seizing property under execution against the husband, were admissible in replevin by the wife against the officer for the property.⁷³

The admission of an assignor for the benefit of creditors, made

sections 1370-1374. exclusion of testimony of negotiations to purchase for a given sum by petitioning municipality and a veto by the mayor of an order for the purchase on grounds other than the amount asked held not error. *Lawton Rapid Transit Ry. Co. v. City of Lawton*, 122 P. 212, 31 Okl. 458.

⁶⁸ *Brown v. Brown*, 62 Kan. 666, 64 P. 599; *Jones on Evidence*, § 289; 22 C. J. 317. This rule has been held to apply where a party fails to reply to statements contained in a letter. *Fenno v. Weston*, 31 Vt. 345.

⁶⁹ *State v. Mullins*, 101 Mo. 514, 14 S. W. 625; *People v. Willett*, 92 N. Y. 29.

⁷⁰ *Higgins v. Shepard*, 182 Mass. 364, 65 N. E. 805; *Pelton v. Schmidt*, 104 Mich. 345, 62 N. W. 552, 53 Am. St. Rep. 462.

⁷¹ *Aldred v. Ray*, 54 Okl. 154, 153 P. 664, 7 A. L. R. 1.

Evidence that prior to action on open account defendant admitted that he owed amount sued for was admissible to support plaintiff's cause of action. *Lonsdale v. Schlegel* (Okl.) 171 P. 330. Prior statements of a party in interest are ordinarily admissible against him. *Whitehead v. Jefferson*, 51 Okl. 42, 151 P. 681.

In an action by a wife for the alienation of the affections of her husband, statements of defendant made after the parties have separated are competent evidence when they amount to an admission of responsibility for the acts alleged in the petition. *White v. White*, 90 P. 1087, 76 Kan. 82.

⁷² *Boynton v. Hardin*, 58 P. 1007, 9 Kan. App. 166.

Where several defendants are charged with conspiring with a common purpose, testimony as to conversation and acts of one as to his relations with another is admissible as against all. *American Trust Co. v. Chitty*, 129 P. 51, 36 Okl. 479.

⁷³ *Pope v. Bowzer*, 41 P. 1048, 1 Kan. App. 727.

after the assignment, is competent evidence on the hearing of a motion to dissolve an attachment, made by the assignee in an action where the assignor is defendant, as against the assignor.⁷⁴

In an action against one who asserts that he is only a nominal party, and that another is the real party in interest in said action, the former cannot be heard to complain if on the trial the court permits the admissions of such real party in interest relating to the subject in controversy to be given in evidence.⁷⁵

Statements and admissions of a decedent during his life, to a stranger, are admissible in an action against his administrator.⁷⁶

§ 1093. Admissions of former owners or privies

Declarations against interest made by the vendor of property while title was vested in him are admissible in evidence against his vendee;⁷⁷ but declarations by a vendor several months after he had sold and parted with the possession of the property are not admissible to impeach the title of the vendee.⁷⁸

⁷⁴ *Wichita Wholesale Grocery Co. v. Records*, 19 P. 346, 40 Kan. 119; *Cahn v. Same*, 19 P. 349, 40 Kan. 123.

⁷⁵ *Brown v. Brown*, 64 P. 599, 62 Kan. 666.

In an action under Civ. Code Kan. § 422, providing for the recovery of damages for wrongfully causing a death, brought in behalf of the next of kin of the deceased, an admission by them that he had never contributed to their support or been of any pecuniary assistance to them is competent evidence against the administrator, their nominal representative in the suit. *Atchison, T. & S. F. Ry. Co. v. Ryan*, 64 P. 603, 62 Kan. 682.

⁷⁶ *Miller v. McDowell*, 77 P. 101, 69 Kan. 453.

On the trial of a claim for services rendered a decedent under a promise to compensate the claimant by will, evidence of decedent's statement to others as to what she proposed to do for the claimant in her will is admissible. *Bonebrake v. Tauer*, 72 P. 521, 67 Kan. 827.

⁷⁷ *Kitchell v. Hodgen*, 97 P. 369, 78 Kan. 551.

Statements by deceased, after execution of a deed by his wife to his brother, that it was deeded to his brothers to defraud his wife, held admissible. *Watts v. Myers*, 145 P. 827, 98 Kan. 824.

Where, in an action to set aside a conveyance from husband to wife, there is a *prima facie* showing of a mutual design to hinder, delay, and defraud a creditor, acts and declarations of each relating to the transaction may be shown in evidence. *Chapman v. Farrell*, 153 P. 511, 96 Kan. 659.

⁷⁸ *Smith v. Wilson*, 48 P. 436, 5 Kan. App. 379.

Admissions by holder of legal title that he had sold to another and had received pay therefor are competent against all persons claiming title under or through him. *Globe & Rutgers Fire Ins. Co. v. Creekmore (Okla.)* 171 P. 874.

Where a mother executed a deed to her daughter, reserving a life estate

Declarations by the seller immediately before or after the sale are admissible against the buyer, to show an intent on the seller's part to defraud creditors;⁷⁹ but after a party has parted with the title and possession of personal property, his declarations concern-

in herself, and recording the same, but retained possession of the deed, on a trial to determine title after the death of the mother, statements by the mother after the recording of the deed may not be proven in derogation of the title of the child or its grantee. *Pentico v. Hays*, 88 P. 738, 75 Kan. 76, 9 L. R. A. (N. S.) 224.

In an action between S. and B., S. claimed that B. fraudulently procured the title to a certain piece of land while acting as his agent. In order to prove the fraud of B., S. offered the testimony of witnesses to prove the oral and written statements of the original owner of the land made after the conveyance of the land to B., but not made in his presence or hearing. Held, that the court committed no error in rejecting the evidence. *Stickel v. Bender*, 15 P. 580, 37 Kan. 457.

In an action between C. and E., E. claimed that C. fraudulently purchased and procured the title to a certain piece of land which E. claimed he had the right to purchase; and, in order to prove the fraud of C., E. introduced the testimony of various witnesses to prove the statements of the owner of the land, made in the presence and hearing of such witnesses, but not in the presence or hearing of C., and made after the sale and conveyance of the land to C., and after the owner had parted with his title; and this testimony was introduced with the permission of the court, but over the objections and the exceptions of C. Held error. *Crust v. Evans*, 15 P. 214, 37 Kan. 263.

Where grantors in a deed were in possession of land at the time of its conveyance, and continued to occupy the same for more than 15 years thereafter, in an ejectment brought against them by the grantee, testimony that defendants had made declarations that they were not leasing the land, but owned the same; that one of them had insured a house situated on the property in his own name, and had also mortgaged the land,—was properly rejected in the absence of a showing that the acts and declarations of the occupants had been brought to the knowledge of the plaintiff. *Broughan v. Broughan*, 64 P. 608, 62 Kan. 724, affirming judgment 61 P. 874, 10 Kan. App. 575.

⁷⁹ *Hood v. Gibson*, 56 P. 148, 8 Kan. App. 588.

Where, in replevin, one defense was that the property was fraudulently conveyed to plaintiff by her husband, testimony as to statements by the husband, in the absence of plaintiff, when he executed the bill of sale, to show his purpose to defraud was properly admitted. *Rauh v. Morris*, 137 P. 1174, 40 Okl. 288.

On an issue of the fraudulency of a mortgage, acts and declarations of the mortgagor made contemporaneously with or prior to the execution of the mortgage may be shown, though made in the absence of the mortgagee, since it need not be shown, to charge the mortgagee with the fraud, that he had knowledge of each particular fraudulent act of the mortgagor. *Sherman County Bank v. McDonald*, 46 P. 703, 57 Kan. 358.

Declarations of one party to a transfer of personalty alleged to be fraud-

ing the ownership or title to the property cannot be introduced by a third person to defeat the title of his vendee.⁸⁰

On the issue whether a deed to a son was a gift or an advancement, subsequent statements of the grantor are admissible, if they tend to show his purpose.⁸¹

Declarations of an assignor against his interest, in support of his assignment, are competent evidence against those claiming under him; but declarations by him, tending to overthrow the assignment or to give it a different meaning from that which appears on its face, are not competent as against the assignee.⁸²

The declarations of a holder of a note while he held the note, and before the transfer thereof, are admissible in evidence to prove the failure of the consideration of the note as against one who does not hold the paper as an innocent purchaser or bona fide holder.⁸³

ulent are admissible against his vendee, although the person making them is not a party to the suit, where made about the time of the transfer, where there is not open and visible change of possession. *Turner v. Tootle*, 58 P. 562, 9 Kan. App. 765.

⁸⁰ *Woods v. Faurot*, 77 P. 346, 14 Okl. 171.

In replevin, where defendant bases his title and right of possession on the foreclosure of a chattel mortgage, declarations of the mortgagor after the execution of the mortgage are not admissible to impeach the mortgage or show that it was without consideration or that he had no right to mortgage the same, and its admission is reversible error. *First Nat. Bank of Enid v. Yoeman*, 90 P. 412, 17 Okl. 613.

Statements of the vendor of goods, made after the sale, and out of the presence of the purchaser, are not admissible in evidence to defeat the latter's title. *Scheble v. Jordan*, 1 P. 121, 30 Kan. 353.

The owner of cattle jointly possessed with another pledged them orally to the latter, and afterwards gave a chattel mortgage to a third person. Held, that evidence of communications by the owner to the pledgee was inadmissible to defeat the mortgagee's rights, unless shown to have been communicated to him before he took the mortgage. *Ward v. Johnson*, 72 P. 242, 66 Kan. 813.

⁸¹ *Martin v. Shumway*, 132 P. 993, 89 Kan. 892.

⁸² *Oliver v. McDowell*, 100 Ill. App. 45.

Where the assignee of a defendant in a civil action files and presents a motion to discharge an attachment on the property claimed by him under an assignment from the defendant, and the defendant is not a party to the motion, the statements and declarations of the defendant subsequent to the assignment are not competent evidence against the assignee. *Wichita Wholesale Grocery Co. v. Records*, 19 P. 851, 40 Kan. 215.

In an action against a railroad company for damages caused to abutting property by the laying of its track, admissions as to the value of such prop-

⁸³ *Frick v. Reynolds*, 52 P. 391, 6 Okl. 638.

§ 1094. Admissions by agents

The declarations of an agent within the scope of his authority, and while in the exercise of it, bind his principal,⁸⁴ and when made so as to constitute a part of the *res gestæ* are admissible against the sureties on the principal's bond, given for faithful performance of his duties.⁸⁵

Admissions or declarations of an agent are admissible against his principal, only when made in the discharge of agent's duties and so closely connected with the main transaction in issue as to be a part of the *res gestæ* and relating to fact within the issues.⁸⁶

Before the declarations of an agent can bind the principal, it must be shown that such declarations were made in and about a matter over which the agent had authority from the principal to act, and that he was acting under and by virtue of his authority as such agent.⁸⁷

Declarations of an agent not relating to matters as to which he is

erty, made by plaintiff's intestate about the time of its appropriation, are admissible in defendant's favor. *Central Branch U. P. R. Co. v. Andrews*, 14 P. 509, 37 Kan. 162, judgment reversed 16 P. 338, 37 Kan. 641.

⁸⁴ *Bank of Commerce of Chanute v. Sams*, 152 P. 28, 96 Kan. 437; *Coon v. Boston Ins. Co.*, 79 Okl. 296, 192 P. 1092.

⁸⁵ *Coon v. Boston Ins. Co.*, 79 Okl. 296, 192 P. 1092.

⁸⁶ *Chicago, R. I. & P. Ry. Co. v. Jackson*, 63 Okl. 32, 162 P. 823.

An agent's admissions, are only evidence against his principal when they constitute a part of the *res gestæ*. *Atchison, T. & S. F. R. Co. v. Wilkinson*, 39 P. 1043, 55 Kan. 83.

⁸⁷ *Chellis v. Coble*, 15 P. 505, 37 Kan. 558.

Admissions of an agent, to be admissible against the principal, must be made as agent and while he is acting for the principal within his authority. *Chickasha Cotton Oil Co. v. Lamb & Tyner*, 114 P. 333, 28 Okl. 275.

The declarations of an agent as to matters outside of his agency are not admissible against the principal. *Kilpatrick-Koch Dry-Goods Co. v. Kahn*, 36 P. 327, 53 Kan. 274; *Missouri Pac. Ry. Co. v. Johnson*, 40 P. 641, 55 Kan. 344.

Statements by a servant in the absence of the master are inadmissible in evidence to show that a tort committed by the former was done while in the master's employ and engaged in the transaction of the business. *Clark v. Folcroft*, 73 P. 86, 67 Kan. 446.

The statement of the holder of promissory notes to one of the joint makers, "The notes are paid, so far as you are concerned," is not material evidence for such joint maker, in an action for contribution by another joint maker, who gave a new note for the indebtedness, which he afterwards paid. *Mentzer v. Burlingame*, 118 P. 698, 85 Kan. 641.

authorized to give information, and which relate only to a past transaction, are hearsay.⁸⁸

Where two persons speaking different languages employ an interpreter to translate their conversations relative to a business transaction, admissions or statements made by one to the other through the interpreter, are not hearsay, and the party to whom they are made may testify to them.⁸⁹

The declarations of an agent are not admissible against his principal when they relate to a past transaction.⁹⁰ After the authority of an agent has been revoked, and actual notice of revocation has been given to a party dealing with him, the admissions of such agent thereafter made are not binding on his principal.⁹¹

⁸⁸ J. I. Case Plow Works v. Pulsifer, 98 P. 787, 79 Kan. 176.

⁸⁹ Terrapin v. Barker, 109 P. 931, 26 Okl. 93.

⁹⁰ Acme Harvester Co. v. Madden, 46 P. 319, 4 Kan. App. 598.

In an action against principals for damages caused by the alleged negligence of their agent, declarations of the agent made two hours after the accident are mere hearsay, and not admissible to show negligence. Dodge v. Childs, 16 P. 815, 38 Kan. 526.

A barn was destroyed by fire originating on a neighboring ranch, whose manager, with others, discovering the danger, endeavored to save the building. In an action by the barn owner against the ranch owner, evidence that the manager said at the time that he had set out the fire was not competent evidence of such fact; it being a mere narration of a past transaction not relating to any act in which he was engaged at the time, and not being such a spontaneous exclamation that it would be presumed to be true without being sworn to. Johnson v. McLain Inv. Co., 100 P. 52, 79 Kan. 423, 131 Am. St. Rep. 302.

Declarations of the engineer, made two or three hours after the accident at which a watchman was killed, tending to show himself to have been the negligent cause of the accident, when not offered in impeachment of his testimony, are inadmissible. Walker v. O'Connell, 52 P. 894, 59 Kan. 306.

Under the Workmen's Compensation Act, written report as to injury of employé made by another employé regarding the accident, but which shows that the statements are those of the injured employé, is inadmissible as admissions of employer to prove that the accident occurred, or the nature thereof. Lindsay v. Halstead Milling & Elevator Co. (Okl.) 179 P. 360.

⁹¹ Lewis v. Metcalf, 36 P. 346, 53 Kan. 219.

Where an agent makes a contract for his principal, and afterwards, in an attempted settlement between the parties, makes statements with reference to the terms of the contract, such statements may be shown in evidence by the adverse party, where parol evidence would be competent. St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co., 27 P. 118, 46 Kan. 773.

Evidence of a remark of the foreman of the wrecking crew of which plaintiff was a member when injured, that he expected the accident, held admissible, where it tended to show defendant's knowledge of the defect in the ma-

§ 1095. Admissions by corporate and municipal officers

Declarations and admissions of agent of corporation are competent against corporation where they relate to matters under charge of the agent and in respect to which he is authorized to give information, or where they are made while the agent is acting within the scope of his authority as to transactions depending at the time.⁹² But a conversation between two employes concerning a

chline which caused the injury. *Missouri, O. & G. Ry. Co. v. Davis*, 54 Okl. 672, 154 P. 503.

In servant's action for injury, declarations of the master's superintendent made within the scope of his authority in transacting master's business as to relationship of the parties were admissible. *Wolverine Oil Co. v. Kingsbury* (Okl.) 168 P. 1021.

⁹² *J. I. Case Plow Works v. Pulsifer*, 98 P. 787, 79 Kan. 176.

In an action against an incorporated lodge, oral statements of members of its regularly appointed committees and of its officers acting within their authority, are admissible to bind the lodge. *Park View Hospital Co. v. Randolph Lodge*, No. 216, I. O. O. F., 162 P. 302, 90 Kan. 488.

Cashier's statement, in response to inquiries by bank examiner relating to matters under his charge and as to which he was required to give information to examiner, may be given in evidence against bank. *Oklahoma State Bank of Caddo v. Airington* (Okl.) 172 P. 462.

Declarations of a bank cashier, to the effect that the bank held the notes sued on for collection, held binding on the bank. *Bank of Commerce of Chanute v. Sams*, 152 P. 28, 96 Kan. 437. That the cashier was dead when the bank asserted ownership of the note held not to render incompetent testimony as to declarations of the cashier that the bank held the note for collection. *Id.*

An admission by a foreman in charge of a department that he knew of the defect in a certain appliance is admissible to show knowledge of the corporation. *Cudahy Packing Co. v. Hays*, 85 P. 811, 74 Kan. 124.

Under Code Civ. Proc. § 384 (Gen. St. 1909, § 5979), reports, telegrams, and memoranda relating to a shipment of cattle, made by trainmen at the time in the line of their duty were competent evidence in a shipper's action for damages to a shipment of cattle. *Cockrill v. Missouri, K. & T. Ry. Co.*, 136 P. 322, 90 Kan. 650.

In an action against a railroad for damages for personal injuries from a defective coupling, reports of its car inspectors as to the condition of the coupling cannot be received in evidence as admissions by defendant of the facts stated in the reports, unless such reports have been adopted in an authoritative way by some official having power to bind the corporation by admissions. *Atchison, T. & S. F. Ry. Co. v. Burks*, 96 P. 950, 78 Kan. 515, 18 L. R. A. (N. S.) 231.

In an action against a railroad company for injuries to cattle caused by delay in their transportation, declarations of the trainmen as to matters in the line of their respective duties, and relating to the cause of delay, made at the time and while they were charged with the duty of propelling the

past transaction is incompetent evidence to prove such transaction.⁹³

Admissions of a public officer cannot be given in evidence to bind a municipality of which he is the agent, unless a part of the *res gestæ*.⁹⁴

§ 1096. Husband and wife

Act and statements of the husband or wife, in the absence of the other cannot bind the one absent, unless done or made as agent while transacting business, and unless connected therewith as part of the *res gestæ*.⁹⁵

train, are admissible against the company. *Atchison, T. & S. F. R. Co. v. Consolidated Cattle Co.*, 52 P. 71, 59 Kan. 111.

Where the chief civil engineer, having charge of the construction and repairs of a railroad, and the division roadmaster, having charge of a division of the road for the purpose of keeping it in proper condition and repair, have a conversation with regard to the condition and safety of a particular portion of the road within that division, the declarations of the chief civil engineer, made in such conversation, may be given in evidence, as against the railroad company, for the purpose of showing that the railroad company had notice of the dangerous condition of a particular portion of the road within that division. *St. Louis & S. F. Ry. Co. v. Weaver*, 11 P. 408, 35 Kan. 412, 57 Am. Rep. 176.

⁹³ *Union Pac. Ry. Co. v. Fray*, 12 P. 98, 35 Kan. 700.

Declarations of the section foreman and depot agent of a railroad company, made after a fire, in regard to the condition and management of the engine alleged to have caused it, are mere hearsay. *Atchison, T. & S. F. R. Co. v. Osborn*, 51 P. 286, 58 Kan. 768.

⁹⁴ *City of Wynnewood v. Cox*, 122 P. 528, 31 Okl. 563, Ann. Cas. 1913E, 349.

⁹⁵ *Van Zandt v. Shuyler*, 43 P. 295, 2 Kan. App. 118.

Where, in ejectment against a husband and wife by the purchaser at sheriff's sale on execution against the husband, both defendants maintain that the wife was the sole owner, declarations of the husband asserting title are inadmissible against the wife. *Madden v. Stegman*, 127 P. 524, 88 Kan. 29.

In an action to reform a deed, where the husband, who acted as his wife's agent in making the conveyance (the land belonging to her) is made a defendant with his wife, and is charged with making the false representations which are the ground of the relief sought, his declarations, made after the conveyance, and after his agency had ceased, are admissible as to himself, and a general objection to them by both defendants is not sufficient. *Taylor v. Devorell*, 23 P. 628, 43 Kan. 469.

In an action to recover damages to property occasioned by a nuisance, evidence of statements made by plaintiff's husband is inadmissible. *Stephens v. Gardner Creamery Co.*, 57 P. 1058, 9 Kan. App. 883.

In an action for divorce, the admissions of plaintiff that he had committed adultery were admissible against himself, when not procured by connivance,

A party's admissions of the fact of his marriage, when deliberately made, are entitled to great weight; but denials are entitled to little weight in opposition.⁹⁶

Admissions of the wife as to incontinency may be given in evidence by the husband, but should be cautiously received and carefully weighed.⁹⁷

§ 1097. Principal and surety

Declarations and conduct of the principal become part of the *res gestæ* and admissible against a surety, where they were made during the transaction of the business for which the surety is bound, but not otherwise. Ordinarily, no act, conduct, declaration, or statement of the principal done or made prior to execution of the obligation can bind the obligors on a surety bond.⁹⁸

§ 1098. Guardian

A guardian's report is not binding against the ward as an admission, particularly where he has ceased to be the legal representative of the ward.⁹⁹

§ 1099. Conspirators

Where a party, offering in evidence statements of an alleged conspirator, has made out a *prima facie* case of conspiracy aliunde, such statements, if made during pendency of the wrongful enterprise,

fraud, coercion, or other improper means. *Burk v. Burk*, 24 P. 466, 44 Kan. 307, 21 Am. St. Rep. 283.

⁹⁶ *Coleman v. James* (Okla.) 169 P. 1064.

⁹⁷ *May v. May*, 80 P. 567, 71 Kan. 317.

⁹⁸ *Dietrich v. Dr. Koch Vegetable Tea Co.*, 56 Okla. 636, 156 P. 188.

Where it does not appear that admission of principal was part of the *res gestæ*, an objection to its admission in action against surety held proper. *Cook County Liquor Co. v. Brown*, 122 P. 167, 31 Okla. 614.

In an action on a note, where one of the signers set up defense that he was a surety, and that he signed under an agreement that the proceeds of the note were to be paid the maker in money, to buy property which the maker was to mortgage to the surety, and that the payee appropriated the proceeds of the note to an overdraft due by the maker, evidence as to what the maker said to the surety in the absence of the payee was properly excluded. *Clingan v. Bank of Commerce*, 130 P. 537, 37 Okla. 80.

⁹⁹ In an action by an infant by guardian, continued by next friend on death of guardian, a report of guardian to probate court as to value of property for destruction of which recovery is sought was inadmissible on behalf of defendant. *Missouri, O. & G. Ry. Co. v. Gentry*, 122 P. 537, 31 Okla. 579.

before its consummation, and in furtherance of its object, are admissible against his coconspirator.¹

§ 1100. Preliminary evidence

Before inscriptions or writings can be offered in evidence as admissions, it must be made to appear that the party to be charged made the admission or had notice of the warning.²

The acts and declarations of an agent are admissible against his principal where there is some evidence, though not conclusive, to show the existence of the agency.³

Before statements of an alleged conspirator are admissible against

¹ *Campbell v. Newton & Driskill*, 52 Okl. 518, 152 P. 841.

In a suit for fraud based on an exchange of corporate stock for property, a statement by plaintiff's associate relative to financial condition of the corporation held inadmissible. *Phillips v. Mitchell* (Okl.) 172 P. 85, writ of error dismissed 248 U. S. 531, 39 S. Ct. 7, 63 L. Ed. 405.

² Before inscriptions on a card attached to a railway tie, in the words "creosote treated ties," can be offered in evidence as an admission of the truthfulness of their recitals, it must be made to appear that the party to be charged made the admission or had notice of the warning. *Atchison, T. & S. F. Ry. Co. v. Palmore*, 75 P. 509, 68 Kan. 545, 64 L. R. A. 90.

³ *Drummond v. Krebs*, 55 P. 478, 8 Kan. App. 180.

In an action on a fire insurance policy, evidence of a corrupt offer made by defendant's secretary held admissible without proof of his authority to make such offer. *Western Nat. Life Ins. Co. v. Williamson-Halsell-Frazier Co.*, 131 P. 691, 37 Okl. 213.

Evidence that an alleged agent of a corporation acted with the corporation's vice president in superintending the construction of a canal for the corporation for several months, and gave directions for the corporation, which were approved by the officers and followed, and that he furnished funds to pay the contractors who constructed the canal, rendered his statements admissible against the corporation. *Amazon Irrigating Co. v. Briesen*, 41 P. 1116, 1 Kan. App. 758.

In a passenger's action for injuries, held, that it was not error to admit plaintiff's evidence as to what defendant's doctor said when he examined her, without first showing that the doctor in examining her was acting for defendant. *Ladd v. Chicago, R. I. & P. Ry. Co.*, 155 P. 943, 97 Kan. 543.

In an action by physicians against a company for services rendered its employé, testimony that the messenger who called for the physicians stated that he had been sent by the president or manager of the company, and that the company would pay for the services, was inadmissible, in the absence of any other evidence showing such messenger to be the agent of the company. *Chickasha Cotton Oil Co. v. Lamb & Tyner*, 114 P. 333, 28 Okl. 275.

The authority of a person to make representations and promises for another, alleged in an answer, having been denied in a verified reply, and no evidence of such authority having been given nor ratification shown, evidence of the representations and promises received under objection was properly stricken out. *Harris & Cole Bros. v. Strickler*, 120 P. 343, 86 Kan. 266.

his coconspirator, the party offering same must make out a prima facie case of conspiracy aliunde.⁴

§ 1101. Mode of proof

Evidence of prior statements of a party in interest can be proven by a witness who heard the statements. Statements made in court may be proven by the court stenographer.⁵

§ 1102. Explanation

Where declarations are offered in evidence as admissions against a party, and are calculated to show a claim inconsistent with the one made at the trial, explanation by such party is competent.⁶

§ 1103. Construction

An admission by a party must be taken according to its terms. No presumption of fact can be drawn from it, where the fact is expressly denied.⁷

Statement of one to a third person, indicating that he had forfeited a deposit he had made to be delivered as a first payment on the purchase price of land, may be regarded as his opinion of the law, rather than a statement of fact.⁸

An admission that a tax deed was issued implies, in the absence of showing to the contrary, that it was regularly issued and valid in all respects.⁹

⁴ Campbell v. Newton & Driskill, 52 Okl. 518, 152 P. 841.

In action for damages for assault and battery, alleging defendants' conspiracy, admission of declarations by one defendant before proof of conspiracy was not prejudicial to defendants, where it was followed by sufficient evidence to show conspiracy. Drysdale v. Wetz, 171 P. 653, 102 Kan. 680.

⁵ Whitehead v. Jefferson, 51 Okl. 42, 151 P. 681.

⁶ Chamberlain v. Iba, 74 N. E. 481, 181 N. Y. 486.

In an action for failure to deliver corn under an alleged contract, defendant may explain that an admission of a sale to plaintiff referred to a contract other than the one on which plaintiff relied. Davis v. McCrocklin, 8 P. 196, 34 Kan. 218.

⁷ Clarendon v. Weston, 16 Vt. 332.

In a shipper's action for damages to stock in transportation, an instruction that, defendant's counsel having admitted in open court that certain rates offered to plaintiffs at the starting point were tariffs of the defendant, he thereby admitted that defendant was the initial carrier held erroneous. Ray v. Missouri, K. & T. Ry. Co., 133 P. 847, 90 Kan. 244.

⁸ Monger v. Effland, 125 P. 46, 87 Kan. 710.

⁹ Buckner v. Wingard, 115 P. 636, 84 Kan. 682. An admission by a party claiming under a tax deed that his adversary is the owner of the original government title does not imply that the original title has not been extinguished by the tax deed. Id.

ARTICLE VI

QUANTUM, WEIGHT, AND SUFFICIENCY

Sections

- 1104. Consideration of testimony in general.
- 1105. Uncontradicted evidence.
- 1106. Quantum of proof in general.
- 1107. Prima facie evidence.
- 1108. Circumstantial evidence.
- 1109. Affirmative and negative evidence—Conclusions.
- 1110. Effect of opinion evidence.
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- 1113. Party bound by his own evidence.
- 1114. Contracts.
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- 1136. Ejectment.
- 1137. Attachment.
- 1138. Cancellation of instruments.
- 1139. Reformation of instruments.
- 1140. Divorce.
- 1141. Bastardy.

§ 1104. Consideration of testimony in general

A witness may be discredited by his manner of testifying.¹⁰

The trial court or jury must consider the appearance and demeanor of witnesses, their candor and opportunity for knowing the facts

¹⁰ National Union v. Kelley, 140 P. 1157, 42 Okl. 98.

and must weigh their motives and interest, and on consideration of all the circumstances must find for the party producing the more credible and preponderating evidence.¹¹

§ 1105. Uncontradicted evidence

While the jury are the exclusive judges of the credibility of witnesses they cannot arbitrarily or from partiality or caprice disregard unimpeached testimony;¹² but where the credibility of a witness is impeached, the jury may disregard his testimony, though it is undisputed.¹³

A jury is not bound by testimony simply because it is uncontradicted. They may discredit the witness for apparent prejudice against or sympathy for the parties, for apparent interest in the result, or on circumstances which in their judgment contradict his testimony.¹⁴

§ 1106. Quantum of proof in general

It is sufficient for plaintiff in a civil cause to establish his case by a preponderance of evidence.¹⁵

¹¹ *Wideman v. Faivre*, 163 P. 619, 100 Kan. 102, Ann. Cas. 1918B, 1168.

An inadvertent misstatement of fact by a witness in essential testimony held not to support assignment of error that the evidence was insufficient, where the witness' true meaning was apparent from his entire testimony. *Aldred v. Ray*, 54 Okl. 154, 153 P. 664, 7 A. L. R. 1.

¹² *Sundgren v. Stevens*, 119 P. 322, 86 Kan. 154, 39 L. R. A. (N. S.) 487.

¹³ *First Nat. Bank v. Brewer* (Okl.) 174 P. 1077.

A jury is not warranted in arbitrarily or capriciously rejecting the testimony of a witness, but neither is it required to accept and give effect to testimony which it finds to be unreliable, although it may be uncontradicted. *State v. Woods*, 102 Kan. 499, 170 P. 986, L. R. A. 1918C, 889.

¹⁴ *Missouri, K. & T. Ry. Co. v. Murphy*, 52 P. 863, 59 Kan. 774; *Cobe v. Coughlin Hardware Co.*, 112 P. 115, 83 Kan. 522, 31 L. R. A. (N. S.) 1126; *Healer v. Inkman*, 131 P. 611, 89 Kan. 398.

In a trial without a jury, where judgment is rendered against party having burden of proof, that evidence in support of his claim is not directly contradicted otherwise than by testimony attacked as incompetent does not affirmatively show that decision was influenced by such challenged testimony. *Collins v. Hayden*, 104 Kan. 351, 179 P. 308; *Howell v. Harper*, 121 P. 362, 86 Kan. 396.

¹⁵ *Weleetka Cotton Oil Co. v. Brookshire* (Okl.) 166 P. 408.

Plaintiff in a civil action is not required to prove his cause beyond any reasonable doubt, and if he shows it to be more probable that injury resulted in whole or in part from the negligence alleged, rather than from any other cause, it is sufficient. *St. Louis, I. M. & S. Ry. Co. v. True* (Okl.) 176 P. 758.

In a civil action, where a party relies on a deed, a preponderance of the

A verdict must reasonably be supported by the evidence. When based on mere conjecture, it is not based on sufficient evidence.¹⁶

Evidence is sufficient to sustain a judgment if there is any whatever reasonably tending to prove the essential facts,¹⁷ either directly or by permissible inference.¹⁸

A preponderance of the evidence means that kind and quality of evidence which is more satisfactory, satisfying, and convincing to the minds of the jurors.¹⁹

evidence is sufficient to establish that the deed is forged. *Redden v. Tefft*, 29 P. 157, 48 Kan. 302; *Roediger v. Union Pac. R. Co.*, 147 P. 837, 95 Kan. 146.

¹⁶ *Ingram v. Dunning*, 60 Okl. 233, 159 P. 927.

Evidence held insufficient to sustain a finding that the actual value of a span of horses was \$400. *Caulk v. Carlson*, 44 Okl. 532, 145 P. 335.

Evidence that an unknown person had written the name of a station on a freight car of a train, and that destinations were sometimes so indicated, was of insufficient probative force to warrant a finding that the car was then being moved to such station. *Barker v. Kansas City, M. & O. Ry. Co.*, 129 P. 1151, 88 Kan. 767, 43 L. R. A. (N. S.) 1121.

A finding of fact that certain cattle were included in a mortgage, including 1 and 2 year old steers, is not supported by evidence that such cattle were bulls and cows. *Wyman v. Herard*, 59 P. 1009, 9 Okl. 35.

¹⁷ *Great Western Coal & Coke Co. v. Serbantas*, 50 Okl. 118, 150 P. 1042.

¹⁸ *Missouri, O. & G. Ry. Co. v. Smith*, 55 Okl. 12, 155 P. 233.

¹⁹ *Murphy v. Estle*, 75 Okl. 75, 182 P. 83.

Under Act Cong. May 27, 1908, the enrollment record of a Creek freed-woman, showing that she was 18 years old in 1908, does not conclusively show that she was a minor when she made conveyances that year. *Jackson v. Lair*, 48 Okl. 269, 150 P. 162.

In an action to cancel a deed by a minor Creek freedman, evidence held to show that at the date of its execution the grantor was not 18 years of age. *Stevens v. Elliott*, 30 Okl. 41, 118 P. 407.

Evidence in an action by attorneys for compensation held to sustain a verdict for plaintiffs for \$6,750. *Turner v. Maxey*, 45 Okl. 125, 144 P. 1064.

Evidence held to show execution of bond of guardian by defendant surety company. *Donnell v. Dansby*, 58 Okl. 165, 159 P. 317.

In suit against former guardian and his bondsmen to set aside orders approving guardian's account, evidence held to support findings of false representations to county court that full and fair settlement had been made, and that all property coming into guardian's hands had been delivered to the wards. *Francis v. Sperry* (Okl.) 176 P. 732.

In suit against former guardian and his bondsmen to set aside orders approving guardian's account, evidence held to support finding of guardian's undue influence in securing final receipts and settlements from wards. *Francis v. Sperry* (Okl.) 176 P. 732.

In action to recover attorney's fees under oral contract making amount contingent on success, evidence held not to show that a judgment for plaintiff

The proof required to establish the affirmative of an issue depends upon the nature of the case. It must go to every essential

for \$2,000 was so excessive as to require its vacation, and the ordering of a new trial. *Cornelius v. Smith* (Okla.) 175 P. 754, 9 A. L. R. 233.

In a will contest by one claiming to be the widow of testator, evidence held not sufficient to show that relation between plaintiff and testator were meretricious and not matrimonial. *Coleman v. James* (Okla.) 169 P. 1064.

Evidence held not to support a conclusion that investment company loaning upon a mortgage had such knowledge of facts as should have put it upon inquiry, which, if followed, would have informed it of fraud in former sale of property by a minor's guardian. *F. B. Collins Inv. Co. v. Waide* (Okla.) 173 P. 835; *Id.*, 175 P. 229.

Evidence on application for dissolution of a corporation after a resolution to that effect, held, over objection, sufficient to sustain a judgment dissolving the corporation. In re *Northrop-Bell Oil & Gas Co.* (Okla.) 171 P. 1116.

Evidence establishing title and possession.—Evidence, in an action to quiet title, held sufficient to warrant a finding that plaintiff was in the peaceable possession of the real estate, claiming title, and that defendants never acquired any title themselves. *Cramer v. McCann*, 112 P. 832, 83 Kan. 719, 37 L. R. A. (N. S.) 108.

In an action to quiet title, evidence held to establish title in plaintiff. *Fish v. Sims*, 141 P. 980, 42 Okla. 535.

Evidence in an action to quiet title held to show a sufficient possession in plaintiff as against the claims of defendant. *Pierce v. Shelton*, 144 P. 219, 93 Kan. 189.

In an action to quiet title and to cancel a contract for exchange of land on the ground that defendant had incumbered his property before the exchange and had leased the same, evidence held to sustain judgment for plaintiff. *Snyder v. Wheeler*, 106 P. 462, 81 Kan. 508.

In an action to quiet title, evidence held sufficient to sustain a judgment for plaintiff on the theory that a deed to defendant was subsequent to an oral agreement of the grantors to convey the property to plaintiff in pursuance of an arrangement by which he was already in possession and had made improvements thereon, of which defendant had notice. *Crane v. Cheney*, 91 P. 67, 77 Kan. 815.

In an action to quiet title, it appeared that plaintiffs purchased the land of the agents of the owner on the 6th day of June, and defendants bought the same land, and the landlord's interest in the lease, of the owner, without previous knowledge of the sale, on the 8th, taking a bond for a deed, which was properly acknowledged and duly recorded on the 18th of the same month. Defendants entered on the land about the same time, with the consent of the tenant, to dig coal, and afterwards, on hearing of the sale by the agents, the owner made a deed for the same land to plaintiffs, which recited the fact that it was given subject to a certain mortgage, and the bond for a deed, given to defendants. Plaintiffs purchased the interest of the tenant in the premises, but permitted him to remain in possession. There was no other evidence of possession on the part of plaintiffs. Held that, as against plaintiffs, defendants were entitled to a decree quieting the title to the land. *Pilcher v. Brown*, 25 P. 565, 45 Kan. 192.

element, though in civil cases it need not ordinarily overcome every reasonable doubt.²⁰

²⁰ In action on note given in part for purchase of silo, defendant showing by way of defense that live stock fed on ensilage taken from silo were damaged, was required to go further and trace improper condition of ensilage and damages to some defect in silo itself. *Maston v. Glen Lumber Co.* (Okla.) 163 P. 128.

Attorney suing to enforce liability for contingent fee imposed by Laws 1909, c. 4, p. 117, against adverse party who had compromised with his client must establish client's meritorious cause of action and amount client would have been entitled to recover. *Culver v. Diamond*, 64 Okla. 271, 167 P. 223.

To be held liable as joint tort-feasors, there must be both allegation and proof of actual participation by the defendants in the commission of the tort. *Preston v. Lewis*, 50 Okla. 754, 151 P. 485.

In action upon an account, if jury on the evidence is unable to say that defendant is indebted to plaintiff for a definite sum, they should find for defendant. *Cain v. King* (Okla.) 168 P. 799.

Where property is to be delivered at the place where it is located when sold, the seller, before he can recover the price, is bound to prove delivery at that place. *Lodwick Lumber Co. v. E. A. Butt Lumber Co.*, 131 P. 917, 35 Okla. 797.

To recover for libel under Rev. Laws 1910, § 4959, it is sufficient for plaintiff to establish defamatory matter, that it was published of plaintiff, and general or special damages. *Dawkins v. Billingsley* (Okla.) 172 P. 69, 12 A. L. R. 144.

One who would attack a patent of the interior department for mistake of fact must plead and prove the evidence before the department from which the mistake resulted, the particular mistake, the way in which it occurred, and the fact that, but for mistake, the decision would have been otherwise, before the court can consider the original issue of fact determined by the department. *Ross v. Wright*, 116 P. 949, 29 Okla. 186. While a decision of the Land Department on matters of law is not binding on the courts, it should not be annulled unless clearly erroneous. *Id.*

Nuisance.—Where obstruction of public streets may or may not become a nuisance, depending on its location, use, or condition, determination of question by municipality having power to declare what shall be a nuisance is conclusive on courts. *Duncan Electric & Ice Co. v. City of Duncan*, 64 Okla. 211, 166 P. 1048; *Ex parte Jones*, 109 P. 570, 4 Okla. Cr. 74, 31 L. R. A. (N. S.) 548, 140 Am. St. Rep. 655; *In re Huling*, 109 P. 576, 4 Okla. Cr. 89.

Injunction—Taxes.—In a suit to restrain the collection of taxes levied in 1905 as excessive, plaintiff must allege and prove that the property was assessed at more than its fair cash value. *Brockhaus v. Baysinger*, 126 P. 223, 34 Okla. 483.

A property owner, seeking to enjoin the collection of a tax for lack of uniformity in the action of the county board of equalization in raising the returned valuation, must prove that his property was listed and returned for assessment at its fair cash value as required by Williams' Const. art. 10, § 8, and by the Enabling Act. *Williams v. Garfield Exchange Bank of Enid*, 38 Okla. 539, 134 P. 863.

Disbarment.—In disbarment proceedings, the guilt of the accused should be

It is frequently sufficient to prove the ultimate fact.²¹

Where the defendant, without denying execution of a note, pleads limitations, and plaintiff introduces a note showing on its face that it is barred by limitations, the defendant may rest his case on the evidence introduced by plaintiff.²²

To reform a written contract for mutual mistake by parol evi-

proved by a clear preponderance of the evidence, but not necessarily beyond a reasonable doubt. *State Bar Commission v. Sullivan*, 131 P. 703, 35 Okl. 745, L. R. A. 1915D, 1218.

Reality.—Actual possession of property at time of conversion is sufficient evidence of title to enable purchaser to maintain action for damages for conversion against a mere stranger. *United States Supply Co. v. Gillespie* (Okl.) 166 P. 139.

A party interpleading in condemnation proceedings held required to recover on the strength of his own title. *Phillips v. Byrd*, 143 P. 684, 43 Okl. 556.

In an Indian allottee's action to cancel conveyances executed prior to Act Cong. May 27, 1908, § 3, his age was a question of fact, to be established by competent testimony. *Freeman v. First Nat. Bank of Boynton*, 44 Okl. 146, 143 P. 1165, Ann. Cas. 1918A, 259.

²¹ *Action on foreign judgment*.—In order to recover on a foreign judgment of a court of general jurisdiction, it is not ordinarily necessary to introduce copies of any part of the record, except that showing the rendition of the judgment. *McLain v. Parker*, 129 P. 1140, 88 Kan. 717, judgment affirmed on rehearing 131 P. 153, 88 Kan. 873.

Attachment.—Where a foreign corporation was indebted to plaintiff upon a contract, and an attachment sued out was not questioned at the trial, it was not necessary for plaintiff to prove the issue and levy of the attachment. *Municipal Paving Co. v. Herring*, 50 Okl. 470, 150 P. 1067.

Where a mortgagor absconds, and, on attachment against his land, a mortgagee impleads, and asks to have the description in his mortgage corrected, so as to include the land attached, the testimony of the mortgagor is not necessary, and it may be shown by other evidence that he seemed to believe and acted as though the description in the mortgage was that of the land attached. *Bodwell v. Heaton*, 18 P. 901, 40 Kan. 36.

Conspiracy.—In action for conspiracy, it is not necessary to show that parties actually entered into formal agreement to do the things complained of, but such understanding may be shown by circumstantial evidence. *Felt v. Westlake* (Okl.) 174 P. 1041. Upon a charge of conspiracy, great latitude is allowed in the admission of circumstantial evidence; the limitations resting in the trial court's sound discretion. *Id.*

In action on the case in nature of a conspiracy, it is not necessary to show by direct evidence that parties entered into a formal agreement to do things complained of, but that may be shown by facts and circumstances from which a conspiracy may be inferred. *Democrat Printing Co. v. Johnson* (Okl.) 175 P. 737. In the admission of circumstantial evidence upon a charge of conspiracy, great latitude is allowed, and the limit to which such evidence is admissible rests in trial court's sound discretion. *Id.*

²² *Bradford v. Brennan*, 12 Okl. 333, 71 P. 655.

dence, the evidence must be convincing beyond a reasonable doubt.²³

It is not within the power of the Legislature to declare that a particular item of evidence shall preclude a party from establishing his rights in opposition to it except in those cases which fall within the established doctrine of estoppel at the common law, since in judicial investigations the law of the land requires an opportunity for a trial and there can be no trial if only one party is suffered to produce his proofs.²⁴

§ 1107. Prima facie evidence

"Prima facie evidence" of a fact is such evidence as in the judgment of the law is sufficient to establish the fact, and, if not rebutted remains sufficient for that purpose.²⁵

The residence of a man having a family which he maintains is prima facie where the family dwells.²⁶

§ 1108. Circumstantial evidence

In a civil case, facts may be proved by circumstantial evidence the same as by direct evidence, and the circumstantial evidence, in order to be sufficient to sustain a verdict, need not rise to that degree of certainty which will exclude every reasonable conclusion other than the one arrived at by the jury.²⁷

²³ *Schaefer v. Mills*, 76 P. 436, 69 Kan. 25.

Before a mortgage can be reformed on parol testimony alone, the court must be satisfied beyond a reasonable doubt of a mutual mistake, and that both parties intended to and believed they had correctly described the land in the mortgage. *Bodwell v. Heaton*, 18 P. 901, 40 Kan. 36.

In an action to modify a written contract for fraud, mere preponderance of the evidence is not enough. The facts must appear beyond reasonable controversy. *McCormick Harvesting Mach. Co. v. Hayes*, 53 P. 70, 7 Kan. App. 141.

²⁴ *Wilson v. Wood*, 61 P. 1045, 10 Okl. 279.

²⁵ *Meadors v. Johnson*, 112 P. 1121, 27 Okl. 544.

Plaintiff did not make out a prima facie case by showing that defendant owned automobile which struck him when used in business of borrowers and not under owner's direction. *Halverson v. Blosser*, 101 Kan. 683, 168 P. 863, L. R. A. 1918B, 498.

²⁶ *Jones v. Reser*, 61 Okl. 46, 160 P. 58.

²⁷ *Barker v. Creek Coal & Mining Co.*, 80 Okl. 86, 194 P. 195; *Missouri, K. & T. Ry. Co. v. Simerly* (Okl.) 180 P. 551; *Hashman v. Wyandotte Gas Co.*, 111 P. 468, 83 Kan. 328; *Chicago, R. I. & P. Ry. Co. v. Wood*, 72 P. 215, 66 Kan. 613.

To establish a theory by circumstantial evidence, the known facts relied on

The court or a jury may accept circumstantial evidence upon one side, and reject positive testimony presented on the same point by the other side.²⁸

An inference from testimonial evidence is permissible only when it is a probable explanation of such evidence and when other explanations are either less probable, or at least not exceedingly more probable. An inference from uncertain testimonial evidence or from a prior inference is not ordinarily, if at all, permitted to be drawn by the jury. A legitimate inference must have for its immediate basis testimonial evidence certain in nature.²⁹

§ 1109. Affirmative and negative evidence—Conclusions

The testimony of one who was in position to know and can testify positively to a fact is of more weight than the testimony of one who was not in such position and cannot state positively that the fact does not exist.³⁰

A statement in the nature of a conclusion does not rise to the rank of testimony.³¹

must be so related to each other that the only reasonable conclusion to be drawn therefrom is the theory sought to be established. *Chicago, R. I. & P. Ry. Co. v. Rhoades*, 68 P. 58, 64 Kan. 553.

²⁸ *Reed v. Scott*, 50 Okl. 757, 151 P. 484.

The court has the right to believe circumstantial evidence and disbelieve the direct evidence. *Bank of Wilber v. Freeburg*, 114 P. 207, 84 Kan. 235.

A fact in a civil case may be established by circumstantial evidence, and a jury may accept such evidence and base a verdict thereon, though opposed to the direct and positive evidence of witnesses. *Atchison, T. & S. F. Ry. Co. v. Colliati*, 88 P. 534, 75 Kan. 56.

²⁹ *St. Louis & S. F. R. Co. v. Model Laundry*, 141 P. 970, 42 Okl. 501.

A witness testifying to the "value" of chattels presumably means their market value, unless a different meaning appears. *Rogers v. O. K. Bus & Baggage Co.*, 46 Okl. 289, 148 P. 837, Ann. Cas. 1917B, 581.

³⁰ On the issue whether plaintiff and another were half-sisters and daughters of the same mother, E., testimony of defendant's witnesses that they never heard that plaintiff was the daughter of E. was purely negative and of no weight whatever. *Lauderdale v. O'Neill* (Okl.) 177 P. 113.

The testimony of one who was in a position to know, and who can swear positively, that the locomotive whistle was sounded at and before reaching a crossing of a public road, is of much greater weight than a statement of a witness who was not in such a position as to be able to state positively that no whistle was sounded. *Kansas City, Ft. S. & G. R. Co. v. Lane*, 7 P. 587, 33 Kan. 702; *Missouri Pac. Ry. Co. v. Pierce*, 18 P. 305, 39 Kan. 391.

³¹ *Howard v. Eddy*, 43 P. 1133, 56 Kan. 498.

The statement of a witness that a transaction testified to by him consti-

§ 1110. Effect of opinion evidence

The value of expert evidence is for the jury.³² It is to be considered like any other testimony, and the jury must give such testimony the weight they deem it entitled to when viewed in connection with all the other circumstances.³³

Expert testimony on scientific matters, though admissible to advise the jury, is never legally necessary, and is not binding upon them.³⁴

The opinion of witnesses as to the value of services of attorneys is not conclusive on the jury.³⁵

In an action for damages for an assault and battery, it was not necessary that any witness should express an opinion as to the amount of the damages.³⁶

tuted a loan was a conclusion by which the trial court, sitting without a jury, was not bound. *Wass v. Tennent-Stribbling Shoe Co.*, 41 P. 339, 3 Okl. 152.

³² *Fire Ass'n of Philadelphia v. Farmers' Gin Co.*, 39 Okl. 162, 134 P. 443.

³³ *Atchison, T. & S. F. R. Co. v. Thul*, 4 P. 352, 32 Kan. 255, 49 Am. Rep. 484; *Yates v. Garrett*, 92 P. 142, 19 Okl. 449.

In an action for seduction and breach of promise of marriage, followed by pregnancy, miscarriage, and sickness, defendant's expert testimony of physicians was not necessarily conclusive. *Bowes v. Sly*, 152 P. 17, 96 Kan. 388.

Expert testimony held not to conclusively show that the injuries complained of did not result from arsenical and strychnine poisoning. *Daniels v. Dick*, 147 P. 845, 95 Kan. 72.

Uncontradicted testimony of a Missouri lawyer of 15 years' experience and of a Missouri abstractor of 20 years' experience held to sustain a judgment that a title to a tract of Missouri land was merchantable and vested in the record owner free of incumbrances. *Spaeth v. Kouns*, 148 P. 651, 95 Kan. 320, L. R. A. 1915E, 271.

Opinions of witnesses, practicing lawyers of Nebraska, that a contract executed in Nebraska and specifying the part that the surviving husband or wife should take in the other's estate was invalid, held not conclusive in the absence of controlling decisions of Nebraska. *Eberhart v. Rath*, 131 P. 604, 89 Kan. 329, Ann. Cas. 1915A, 268.

³⁴ *Chicago, R. I. & P. Ry. Co. v. Gilmore*, 52 Okl. 296, 152 P. 1096.

Testimony of experts that it is not good practice to insulate wires carrying over 2,500 volts crossing highway on poles 20 feet high is not conclusive where wires were insulated when placed in position, but insulation had worn off. *Wade v. Empire Dist. Electric Co.*, 158 P. 23, 98 Kan. 366, rehearing denied 158 P. 1110.

³⁵ *Colley v. Sapp*, 44 Okl. 16, 142 P. 989, judgment affirmed on rehearing, 142 P. 1193; *Epp v. Hinton*, 102 Kan. 435, 170 P. 987; *Bentley v. Brown*, 14 P. 434, 37 Kan. 14.

³⁶ *Drysdale v. Wetz*, 171 P. 653, 102 Kan. 680.

Expert and opinion testimony as to genuineness of handwriting is competent; the weight to be given it being for the jury.³⁷

While the jury cannot wholly disregard the admissible opinions of experts, they may disregard such evidence as they deem unreasonable or not entitled to belief because contradicted by positive testimony.³⁸

§ 1111. Effect of admissions

Testimony cannot be introduced to contradict admissions made in the pleadings.³⁹

Admissions contained in a pleading in other litigation while admissible in another action between the party making them and a stranger are not conclusive of the facts alleged, but are open to explanation or rebuttal.⁴⁰

Where a party makes in his pleading solemn admissions against interest, in the absence of mistake, a court, in passing on the sufficiency of a subsequently amended pleading filed by him, should consider such admissions and treat them as admitted facts.⁴¹

Statements of a cause of an injury in a notice by an employé of

³⁷ *Baird v. Shaffer*, 101 Kan. 585, 168 P. 836, L. R. A. 1918D, 638.

³⁸ *Producers' Oil Co. v. Eaton*, 44 Okl. 55, 143 P. 9; *Baird v. Shaffer*, 101 Kan. 585, 168 P. 836, L. R. A. 1918D, 638.

The weight of the opinion of a witness as to the value or damage to cattle by rough handling during transportation, or his statement as to the price the cattle would bring in the market, was for the jury. *St. Louis & S. F. R. Co. v. Bilby*, 130 P. 1089, 35 Okl. 589.

Testimony in action for personal injuries in crossing accident that noise made in coupling cars, etc., was louder than usual, which was merely the conclusion of nonexpert witnesses, as against positive testimony of expert trainmen to contrary, did not make an issue of fact for jury. *Lusk v. Pugh* (Okl.) 176 P. 80.

³⁹ *Southwestern Broom & Warehouse Co. v. City Nat. Bank*, 52 Okl. 422, 153 P. 204.

Where it appeared from the proof and amended answer of defendant in replevin that he was not in possession at commencement of the suit, held, that the court properly directed a verdict for defendant though the original answer admitted possession. *Byers v. Sharp*, 49 Okl. 456, 153 P. 127.

⁴⁰ *Kington v. Ewart*, 164 P. 141, 100 Kan. 49; *Solomon R. Co. v. Jones*, 2 P. 657, 30 Kan. 601; *Murphy v. Hindman*, 48 P. 850, 58 Kan. 184.

A lien statement under oath and a cross-petition filed in one case by a party, while competent evidence against him at the trial of another case as admissions, are not conclusive, and carry nothing of estoppel in favor of a stranger to the proceedings in which they were filed. *Limerick v. Lee*, 87 P. 859, 17 Okl. 165.

⁴¹ *Page v. Gelser Mfg. Co.*, 87 P. 851, 17 Okl. 110.

a railroad company may be considered as affecting the credibility of plaintiff as a witness, as may also his statement taken soon after the injury, which should be considered in connection with his condition at the time as affecting his understanding, but neither the notice nor the statement can be held as a matter of law to bar his claim.⁴²

The fact that a railroad company settled a claim against it for damages resulting from a fire alleged to have been set through its negligence by sparks from a locomotive, is not conclusive evidence of its liability to the owner of the premises injured, in an action against it by an insurance company which had issued a policy on said premises, and paid the loss resulting from said fire.⁴³

§ 1112. Testimony of party

In determining the weight to be given to the evidence of a party to the action, the jury may take into consideration his manner, the probability of his story, and his self-contradictions,⁴⁴ and where there is evidence tending to show that his mind is impaired the jury may consider this in connection with his evidence, and give it such weight as it is entitled to receive.⁴⁵

⁴² Atchison, T. & S. F. Ry. Co. v. Hastings, 100 P. 68, 79 Kan. 499.

⁴³ Home Ins. Co. v. Atchison, T. & S. F. R. Co., 46 P. 179, 4 Kan. App. 60.

⁴⁴ Where an action is brought upon a note by an innocent holder thereof for value, and the note offered in evidence is regular and without any interlineations or any evidence of alterations, the maker testifying to an alteration need not be credited, as a matter of law, although no other evidence than the note is offered to impeach or contradict him. His manner, the improbability of his story, and his self-contradictions may justify the jury in wholly rejecting his testimony. Lowden v. Schoharie County Nat. Bank, 16 P. 748, 38 Kan. 533.

⁴⁵ Defendant objected to plaintiff's testifying in her own behalf, on the ground that she was of unsound mind. Evidence was introduced tending to show her mental condition. The objection was made by defendant, and a part of such testimony taken in the presence and hearing of the jury. The jury were instructed that there was testimony tending to show that, since the injury complained of, plaintiff's mind was somewhat impaired, and that, in determining the weight to be given to her testimony, they should take into consideration the testimony tending to show her mental condition, and from such testimony, together with her own evidence as to how the accident occurred, give her testimony the weight to which it was entitled. Held, that the instruction correctly stated the law. City of Guthrie v. Shaffer, 54 P. 698, 7 Okl. 459.

Where a fact is relevant, the plaintiff is not concluded by the defendant's testimony, given upon the plaintiff's examination.⁴⁶

§ 1113. Party bound by his own evidence

A party to an action is bound by his evidence with like effect as by an admission in his pleading.⁴⁷

Where a party voluntarily offers in evidence the record, pleadings, instructions, and journal entry showing adjudication of a former action between himself and another to establish his defense, he vouches for the authenticity and correctness of the record, and is estopped to impeach the validity or correctness thereof.⁴⁸

Any insufficiency in the proof offered by a plaintiff of defendant's corporate existence is immaterial where the defendant has supplied such proof by filing a copy of its charter.⁴⁹

In an action to recover for services rendered, an instruction asked by defendant, which implied that plaintiff could prove the contract

⁴⁶ *Flynn v. Crimmins*, 17 N. Y. St. Rep. 987. Where plaintiff placed defendant on the witness stand, and he admitted the purchase of some of the items, for which suit was brought, but he declared he paid for the same and denied the correctness of the account and all the items thereof, and any indebtedness therefor, all the testimony save that which might be construed into an admission could not be disregarded. *Ensign v. Hart*, 61 P. 823, 10 Kan. App. 32.

⁴⁷ *Holmes v. Leadbetter*, 69 S. W. 23, 95 Mo. App. 419.

Where shippers contracted with an agent in the employ of two railroad companies, and the contract was composed of a letter and telegrams in which there was no disclosure for which company the agent was acting, and in an action against one of the companies for negligently transporting stock the shippers used the testimony of the agent, and he testified that he was not acting for the defendant company, but for another company, a demurrer to plaintiff's evidence was rightly sustained. *Walter v. Missouri Pac. Ry. Co.*, 79 P. 1089, 71 Kan. 164.

In an action for breach of covenant of warranty, defendant can offer in evidence an instrument waiving all right of action on account of the covenant of warranty contained in a deed executed on a certain date, though a part of the instrument states that such deed was "an attempt to convey a good and sufficient title to the N. E. quarter" of a certain section, though the warranty deed was also for the northwest quarter, which was in dispute; the defendant not being absolutely bound by the terms of the instrument so as to prevent him from introducing other testimony which might be necessary to show its connection with the matter in dispute. *Hoffman v. Henricks*, 96 P. 589, 21 Okl. 479, 17 Ann. Cas. 379.

⁴⁸ *Richardson v. Southwestern Cotton Seed Oil Co.*, 81 P. 781, 15 Okl. 263.

⁴⁹ *Federal Betterment Co. v. Reeves*, 93 P. 627, 77 Kan. 111, 15 Ann. Cas. 796.

by his own evidence only and that none of the defendant's evidence could be taken into consideration for that purpose, was properly refused.⁵⁰

It is bad practice, but, where no objection is made on this ground, the party who has the burden of the issues may introduce all the evidence for and against every issue in the case; but, if he introduces evidence which, un rebutted, defeats his cause of action, he does so at his peril.⁵¹

§ 1114. Contracts

The party who alleges a contract, either as a cause of action or defense, has the burden of proving it, and must prove every fact essential to the cause of action or defense, whether the contract is express or implied.⁵²

⁵⁰ *Haak v. Struve*, 16 P. 686, 38 Kan. 326.

⁵¹ *Kibby v. Gibson*, 83 P. 968, 72 Kan. 375.

Where a party to sustain his defense introduces letters containing statements as to the matter in issue, and no reply to such letters denying such statements is introduced, the statements are evidence tending to show that they are true, and his silence is evidence tending to show such fact. *Richardson v. Southwestern Cotton Seed Oil Co.*, 81 P. 781, 15 Okl. 263.

⁵² *National Surety Co. v. Board of Education of City of Hugo*, 129 P. 25, 36 Okl. 569.

Where the petition on a builder's bond charged that the building had not been constructed according to the contract, but the contract was not pleaded, nor was it charged that it was lost or beyond the reach of plaintiff, nor were its contents proved, the plaintiff was not entitled to recover. *National Surety Co. v. Board of Education of City of Hugo*, 129 P. 25, 36 Okl. 569.

In an action for damages for failure to complete a contract to bore a well, the evidence was conflicting, it was error to direct a verdict for plaintiff. *Kendall v. Day*, 123 P. 1066, 32 Okl. 790.

In action for specific performance of oral contract by husband and wife to raise plaintiff as their own child, and that on their death she should inherit, as if they died intestate, there must be facts and circumstances sufficient to raise a convincing implication that contract was made, and to satisfy court of its terms. *Pantel v. Bower*, 104 Kan. 18, 178 P. 241.

Defendant, who had carried on a millinery business in a town for 10 years, and built up a large trade, sold it to plaintiff, agreeing that she would "never enter into, or be interested in any manner in, the millinery business in that city." In less than two years, however, a millinery business was opened under the name of defendant's husband, with money obtained from the sale of their homestead, the title of which was in his name. Defendant had the principal supervision of the business, and it was advertised in her name. Held sufficient to sustain a finding that defendant violated her contract, and to justify an injunction against her. *Richardson v. Emmert*, 24 P. 478, 44 Kan. 262.

Where warranty that mule traded was "sound and well" was relied upon

(1050)

In an action for breach of warranty on sale of personalty, the purchase price is prima facie the value of property as warranted, in the absence of other evidence.⁵³

§ 1115. Notes

The possession of the note on which suit is brought is prima facie evidence of title.⁵⁴

In an action on a note, where defendant sets up fraud and is shown to be the principal party in perpetrating it, and the proof is doubtful as to the other party having knowledge thereof, the defense will not be sustained.⁵⁵

§ 1116. Conveyances

The acknowledgment of a deed is prima facie evidence of its execution.⁵⁶

A recital in a deed of payment of consideration, though prima

and mule was accepted and died the following day, court or jury might find that there was a breach of warranty. *Jackson v. Bates* (Okla.) 170 P. 897.

In a suit by a creditor of a corporation to recover a stockholder's liability assigned to the creditor, where the subscription is denied, it is sufficient to prove the subscription and assignment to plaintiff, and he need not prove non-payment thereof. *Hargadine-McKittrick Dry Goods Co. v. Breedlove*, 130 P. 267, 36 Okla. 768.

⁵³ *Burgess v. Felix*, 140 P. 1180, 42 Okla. 193.

⁵⁴ In action against maker of unindorsed note brought by other than payee, plaintiff's duty of establishing ownership of instrument is sufficiently discharged by introduction of instrument, the possession thereof being prima facie evidence of title in plaintiff. *Southwest General Electric Co. v. Riddle* (Okla.) 168 P. 436.

Plaintiff, in an action on a negotiable note, by introducing in evidence the note and indorsement of the payee in blank, prima facie establishes his case. *Gillespie v. First Nat. Bank*, 95 P. 220, 20 Okla. 768.

Sufficiency of proof.—Where a petition declares on five promissory notes, purporting to be signed by a mark and not attested by a witness, and defendant denies the execution of the notes by a duly verified answer, and the plaintiff testifies that the maker's name was signed to the notes by him at the maker's request, and that no other person was present, the evidence was insufficient to sustain a cause of action. *Sivils v. Taylor*, 69 P. 867, 12 Okla. 47.

In an action on a note tried to the court, where execution was denied, and a comparison of the contested signature with signatures admittedly genuine admitted, a finding that the note was that of defendant was supported by evidence. *McMinn v. Johnson County Savings Bank*, 60 Okla. 236, 159 P. 921.

⁵⁵ *Price v. Winnebago Nat. Bank*, 79 P. 105, 14 Okla. 268.

⁵⁶ *Dyal v. Norton*, 47 Okla. 794, 150 P. 703.

facie evidence between the parties, is no evidence as to strangers and persons claiming in opposition to the deed.⁵⁷

In an action to enjoin the landowner from closing a road over his lands where the evidence did not show dedication by the defendant or some former owner or by some one expressly authorized or by official authority, a judgment for plaintiff will be reversed.⁵⁸

In an action to cancel a deed of conveyance conditioned on the grantee erecting and operating a cotton gin, where the evidence showed that defendant operated the gin one year and then let it remain idle for two years, it justified a finding that the condition subsequent in the deed had not been performed.⁵⁹

§ 1117. Gifts

The evidence to establish a gift inter vivos after death of the alleged donor must be clear and convincing in support of every element essential to a valid gift.⁶⁰

Delivery of a gift must be shown by evidence other than declarations of the alleged donor.⁶¹

§ 1118. Insurance

Proofs of death furnished an insurance company, while not conclusive evidence of the facts therein stated and subject to be explained, or to proof that statements contained therein are incorrect, furnish some evidence of the facts stated, and are prima facie evidence in behalf of the insurer.⁶²

Substantial compliance with the requirements of proof of loss is sufficient.⁶³

⁵⁷ *Adams Oil & Gas Co. v. Hudson*, 55 Okl. 386, 155 P. 220.

In action to have assignment of certificate of purchase of realty issued by state, as qualified by contemporaneous agreement for reconveyance declared a mortgage, and to have assignment annulled, evidence held to show that assignment was intended only as security for assignor's indebtedness. *Hall v. Russell* (Okl.) 178 P. 679.

⁵⁸ *Elliott v. Trisler* (Okl.) 167 P. 755.

⁵⁹ *Richardson v. Chatfield*, 129 P. 728, 36 Okl. 700.

⁶⁰ *Fouts v. Nance*, 55 Okl. 266, 155 P. 610, L. R. A. 1916E, 283. Evidence of finding in bank vault of note inclosed in envelope addressed to claimant, 18 months after the alleged gift and death of the alleged donor held not to show possession of the note by the claimant, where there is no evidence that he had access to the vault. *Id.*

⁶¹ *Fouts v. Nance*, 55 Okl. 266, 155 P. 610, L. R. A. 1916E, 283.

⁶² *Reserve Loan Life Ins. Co. v. Isom* (Okl.) 173 Pac. 841.

⁶³ *Insurance Co. of North America v. Cochran*, 59 Okl. 200, 159 Pac. 247.

Evidence that insured, within four or five days after an accident, wrote to

§ 1119. Trusts

The evidence of a constructive trust sought to be enforced must be clear and decisive.⁶⁴

Such a trust may be established by parol evidence.⁶⁵

Resulting trusts may be established by parol evidence, where such evidence is not otherwise incompetent.⁶⁶ They do not come within the provisions of the statute of frauds.⁶⁷

§ 1120. Wills

The court, in the exercise of his own sound discretion and judgment, with a due and reasonable regard for the evidence, must determine a testator's soundness of mind and testamentary capacity.⁶⁸

the company as to his injury, and that on the nineteenth day after the injury the company inclosed blanks, making no claim that it had not received the notice within 15 days, as required by the policy, was sufficient to warrant a finding that notice had been given within that time. *Continental Casualty Co. v. Wynne*, 129 P. 16, 86 Okl. 325.

⁶⁴ *Hayden v. Dannenberg*, 143 P. 859, 42 Okl. 776, Ann. Cas. 1916D, 1191.

⁶⁵ *Hayden v. Dannenberg*, 143 P. 859, 42 Okl. 776, Ann. Cas. 1916D, 1191.

⁶⁶ *Boyd v. Winte* (Okl.) 164 P. 781; *Babcock v. Collison* (Okl.) 175 P. 762.

⁶⁷ *J. I. Case Threshing Mach. Co. v. Walton Trust Co.*, 136 P. 769, 39 Okl. 748.

Evidence that the several deeds through which plaintiff's husband derived title were executed without consideration, and that the grantees, as understood, took only the legal title, and at all times the original grantor had the full equitable estate in the land and exercised control over them, is admissible. *Flesner v. Cooper*, 39 Okl. 133, 134 P. 379.

In suit to have resulting trust declared, testimony held admissible to prove parol agreement under which the trust arises. *McCoy v. McCoy*, 121 P. 176, 30 Okl. 379, Ann. Cas. 1913C, 146.

⁶⁸ Whether testator's unsoundness of mind amounts to incapacity to make a will must be determined by the court upon its own responsibility, though his whole neighborhood believes him to be of unsound mind. In *re Wasserman's Estate*, 170 Cal. 101, 148 P. 931. Strange beliefs and delusions shown to have been entertained by testator held to warrant a verdict against the validity of his will. *Id.*

Where the greater number of witnesses in a will case testified that testator was of sound mind, it was not an abuse of discretion for the court to set aside a finding that he was of unsound mind. In *re Motz's Estate*, 69 P. 294, 136 Cal. 558.

Evidence regarding an 88 year old testator's Spiritualistic activities, belief in mediums, etc., sustains verdict that his will leaving property, except for minor legacies, to a Spiritualist companion, who had obtained \$85,000 from him during his lifetime, was void for her undue influence and his mental incapacity. In *re Willits' Estate*, 175 Cal. 173, 165 P. 537.

To prove existence of alleged delusions of testator, it must be shown, not

Eccentricities are to be distinguished from acts denoting insanity or an unbalanced mind.⁶⁹

Declarations by testator, made while he is insane, that he was un-

only that they had no existence in fact, but also that there was no evidence, however slight or inconclusive, of any fact upon which the belief could be founded. In *re Allen's Estate*, 177 Cal. 668, 171 P. 686. Evidence held insufficient to show testator was victim of insane delusions when he made will. *Id.*

On an issue of testamentary capacity, the subscribing witnesses, one of whom was a physician, testified that testatrix was in full possession of her mental faculties at the time of making the will and codicil. A large number of intimate acquaintances testified to the same effect. Testatrix, though illiterate, was a shrewd business woman, and her acts at about the time of making the will and codicil showed full command of her faculties. No one testified to a contrary opinion, and the only evidence impeaching her capacity was that she had for years been addicted to the use of liquor, being sometimes intoxicated, and that she was at the time of the testamentary acts suffering severely from burns, which subsequently caused her death. The original will

⁶⁹ Testimony of eccentric acts by a testator held too trivial to show lack of testamentary capacity. In *re Packer's Estate*, 129 P. 778, 164 Cal. 525. Testimony tending to show that a testator's memory was somewhat weakened, without any showing of impairment of his ability to grasp the salient facts in relation to his property, its situation, and the objects of his bounty, was insufficient to show want of testamentary capacity. *Id.* In an action to revoke the probate of a will, evidence held insufficient to show want of testamentary capacity. *Id.*

The fact that testatrix had a strong dislike to her daughter-in-law, contestant's mother, whom her son had married against her wishes, and who had always repelled her advances towards a reconciliation, is not evidence of insanity. In *re Spencer*, 31 P. 453, 96 Cal. 448.

Testatrix was a woman of very excitable temper, and when excited was violent, both in language and action. She was highly suspicious of nearly every person with whom she had any relation; feared they were taking advantage of her or seeking to injure her. She was a sufferer from dyspepsia and other diseases of the stomach, which finally resulted in her death. She had a constant fear of being poisoned; charged those about her, while a widow, with trying to poison her; and, after her marriage with contestant, made the same charge against him. She also charged him with seeking to put her in an asylum and of unfaithfulness. Contestant had remarked that his wife was insane, and that he would break any will she would make, which remark was repeated to her. They occupied different apartments, and she had seen contestant with another woman, though there was no evidence that he was ever unfaithful to her, or attempted or thought of poisoning her. By her will, made shortly after her marriage with contestant, and also by her codicil executed some years later, and shortly before her death, she gave him $\frac{2}{50}$ of her estate. Held, that the evidence authorized the trial court in finding that testatrix was not fully convinced of the charges she made against her husband, and hence was not under any delusion in reference thereto at the time she made the will. In *re Scott's Estate*, 60 P. 527, 128 Cal. 57.

der undue influence at the time of executing the will, have no weight as evidence.⁷⁰

Suicide by a testator is not of itself sufficient to establish testamentary incapacity.⁷¹

gave only a small monthly income to her husband, with whom she was not on good terms, but the codicil made him residuary legatee, partial reconciliation between them appearing. Testatrix had made several wills, frequently changing the beneficiaries. Held, that a finding of a lack of testamentary capacity should be set aside. In *re Wilson's Estate*, 49 P. 172, 117 Cal. 262.

Evidence on the probate of a will of 10 witnesses, all to the effect that testator, although over 84 years of age, was a shrewd business man, capable of and actually managing his own affairs, both before and after the execution of the will, and the evidence of his attorney that he drew the will under the direction of testator, who read the same before signing it, and appeared perfectly sane at the time, was sufficient to establish testator's sanity, where the only evidence on the part of the contestant, his nephew, was that testator was infirm in body and absent-minded, and omitted to make provision for contestant under the erroneous belief that he had been provided for in the will of testator's deceased brother. In *re Dougherty's Estate*, 72 P. 358, 139 Cal. 10.

Testatrix, when she made the will propounded for probate, was old, and weakened by disease. Witnesses testified that she did not know what she was doing most of the time. She could not remember the names of her intimate acquaintances, or the identity of the persons. When her acquaintances called on her, she could not remember the next day she had seen them, and on one occasion forgot her own name. At the table she would not remember what she had eaten, or the fact that she was in the act of eating. Held, that a finding that testatrix had not testamentary capacity was justified. In *re Langley's Estate*, 73 P. 824, 140 Cal. 126.

In an action for the revocation of probate of a will, evidence held insufficient to justify a finding that the testatrix was not in full possession of her faculties, and did not understand the provisions of the instrument, purporting to be her will, at the time of its execution. In *re Kilborn's Estate*, 162 Cal. 4, 120 P. 762.

That testatrix had previously executed similar wills and was then of sound mind is a legitimate subject for argument as to her sanity while executing the will in question. In *re Clark's Estate*, 180 Cal. 395, 181 P. 639.

On the contest of an olographic will, containing merely a memorandum of testator's property, concluding with a clause giving the same to his wife, where the complaint alleges only that the concluding part of the will was written on a day subsequent to the memorandum, contestant cannot assume on the argument that the memorandum was made with "no thought of making a will, and that the intention of using it as a part of the will was an afterthought." In *re Clisby's Estate*, 78 P. 964, 145 Cal. 407, 104 Am. St. Rep. 58.

⁷⁰ In *re Lang's Estate*, 2 P. 491, 65 Cal. 19.

⁷¹ In *re Chevallier's Estate*, 113 P. 130, 159 Cal. 161.

In a will contest, an instruction that the fact that testatrix committed suicide, while not of itself sufficient evidence of unsoundness of mind, was proper to be considered on the question of her mental condition, and, if the jury

While undue influence may be shown by circumstantial evidence, it must amount to more than a mere suspicion, and be proof of circumstances which are inconsistent with the fact that the will was the spontaneous act of the testator.⁷²

Though circumstantial evidence of undue influence inducing a will is sufficient, it must do more than merely raise a suspicion or show mere opportunity to exercise the influence.⁷³

found that she did commit suicide, they might consider that fact in determining whether or not she was of sound mind at the time of the making of the will in question, was improperly refused. *In re Dolbeer's Estate*, 86 P. 695, 149 Cal. 227, 9 Ann. Cas. 795; *Schander v. Gray*, 149 Cal. 227, 86 P. 695, 9 Ann. Cas. 795.

⁷² *In re Lavinburg's Estate*, 161 Cal. 536, 119 P. 915.

⁷³ *In re Weber's Estate*, 114 P. 597, 15 Cal. App. 224; *In re Keegan's Estate*, 72 P. 828, 139 Cal. 123; *Monlhen v. Kane*, 139 Cal. 123, 72 P. 828.

The fact that testator's wife had and exercised an influence over her husband in his home affairs or in his business is not evidence of undue influence in the matter of his will. *In re Donovan's Estate*, 73 P. 1081, 140 Cal. 390. Where, in a contest of a will because of undue influence, it appeared that the testator was of sound mind, in the active management of his affairs; that he was a lawyer, and drew the will himself; that the will remained in his possession for three years, from the date of its execution to the date of his death; and there was no evidence that the will was executed at a time other than its date, or that his wife was present when it was made, or that she requested the testator to make a will, or that she made a suggestion with reference to it, or that she knew of its existence until after her husband's death—there was no evidence sufficient to show that the wife unduly influenced the testator. *Id.*

A will, however unnatural or at variance with testator's declarations, may not be held invalid, unless there be an actual showing of pressure overpowering the mind and mastering the volition of the testator at the moment of execution. *In re Baird's Estate*, 176 Cal. 381, 168 P. 561.

In an action to set aside a will by which testator left his estate to his partner's children, evidence that the partner had great influence over testator during the latter years of his life; that he frequently visited him during his last illness; that, as he was going over accounts with testator one time, both ceased talking when the landlady entered the room; that the attending physician importuned testator to make a will; and that he delayed for some time before doing so—is insufficient to show undue influence exercised by the partner, or some one at his request. *Carpenter v. Bailey*, 29 P. 1101, 94 Cal. 406. The fact that the partner had a family, which was supported by the partnership, could have no tendency to induce the testator to make his will in favor of his partner's children. *Id.* Evidence that testator wrote to his relatives several times; that his relatives wrote him, sometimes addressing to his partner; and that the letters were neither received nor returned from the dead-letter office—was insufficient to show that the partner suppressed the correspondence, in the absence of evidence that the partner received the letters, or that he alone was in the habit of going to the post office for letters. *Id.* In an action to

The courts cannot set aside wills for undue influence, unless there is direct and substantial evidence establishing such influence as will vitiate the will under the established rules of law.⁷⁴

set aside a will by which testator left his estate to his partner's children, evidence that the partner circulated a report that testator had visited his relatives, had been badly treated by them, and would not leave them any portion of his property, and thus suggested it to testator's disordered fancy, was insufficient to sustain a finding that the will had been procured by the fraud of the partner, where there was no evidence that testator ever heard of his partner's statement, and it appeared that testator had previously made a similar statement. *Id.*

Testator made a will in favor of a brother, with whom he lived, and to the exclusion of the children of two deceased brothers. He was 65 years old, of sound mind, but in bad health, and no pressure had ever been brought to bear upon him as to the disposition of his property, and he alone gave instructions as to his will. The will when executed was taken in charge by the scrivener, and there was no proof that the brother knew the will had been made. The witnesses to the will testified to the capacity of the testator, his reading of the will, and approval of a clause excluding the contestants. None of the contestants were ever denied access to him, but saw him often. One of the contestants testified that the testator seemed afraid of his brother, and that after the execution of the will he cautioned the witness, when he saw the brother approaching to say nothing; that the property would all be his by and by. The testator took a strong interest also in another of the contestants, a boy 13 years old. He often expressed an intention to provide for the boy, and the boy finally went to live with him at the house of the brother. This was three years or more before the execution of the will. The boy testified that whenever the brother found that the testator had been to see any of the other contestants he would curse and abuse him, and that, when the witness had been getting a whipping at the hands of the brother, the testator would tell him he was unable to interfere, as he would expect a whipping himself if he did. Held insufficient to establish undue influence. *In re McDevitt's Estate*, 30 P. 101, 95 Cal. 17.

On an issue as to whether a will was procured by undue influence of testator's wife, it appeared that testator frequently went alone to the office of the attorney who drew the will, and who had no acquaintance with testator's wife; that he conversed freely and intelligently respecting the provisions of the will; that about three years afterwards he confirmed the will, in a codicil thereto, at which time he also appeared to be mentally sound; that testator's wife, in his presence, and about a year after the will was executed, gave directions in respect to the work on their residence; that testator was always anxious to please his wife, and was more jovial when away from her; that five years afterwards a difference of opinion as to certain domestic affairs was settled in accordance with his wife's views; that the testator dealt largely in real estate, and conducted all his negotiations alone. Evidence as to testa-

⁷⁴ *In re Hodgdon's Estate*, 138 P. 111, 23 Cal. App. 415.

To set aside a will for undue influence clear proof is required. *In re Seller's Estate*, 176 Cal. 771, 170 P. 1138.

Evidence of the inequitable character of a will is insufficient, in the absence of other testimony of undue influence, to justify setting it aside.⁷⁵

mentary intent was given by the contestants themselves, who were children of the testator by a former wife, to the effect that the testator, at various times after the execution of the will, said he intended to divide his property between them. Held insufficient to show undue influence. *Herwick v. Langford*, 41 P. 701, 108 Cal. 608.

Where, three days after a will was executed, a codicil was added, naming three executors, evidence by contestants that two of the executors so named had sought to obtain from the attending physician, during such interval, management of the estate, and that after the execution of the codicil one of such executors had stated that the reason the codicil was made was that they wanted some one there, rather than at another city, to manage the estate, had no tendency to show undue influence, in the absence of any evidence that either of such executors had any interview with the testator, or ever spoke to him, or to any one for him, with reference to the codicil or disposition of his property. In *re Nelson's Estate*, 64 P. 294, 132 Cal. 182.

Evidence of mere opportunity to unduly influence testatrix is not sufficient without a preponderance of evidence that such influence was exercised, and induced a disposition of property other than would have been made without it. In *re Black's Estate*, 64 P. 695, 132 Cal. 392.

Testator, before executing his will, consulted an attorney who visited him for that purpose. At this interview no member of his family but his wife was present. His wife's community interest was explained to him to consist of one-half of the estate, which he declared would be sufficient for her, and he then, after discussing the matter with the attorney, determined the shares to be given his children. Held sufficient to overcome the presumption of undue influence arising from confidential relations between testator and the child receiving the largest share, coupled with activity on his part in preparing the will. In *re Higgins' Estate*, 104 P. 6, 156 Cal. 257.

At the time of the making of testatrix's will both herself and husband were afflicted with incurable diseases, and were both being cared for in hospitals. Testatrix knew that her husband could live but a short time, and had provided for his maintenance and burial. Neither testatrix nor her husband had any relative who would have succeeded to her property in case of intestacy. A short time prior to her death, while she was mentally competent to make a will, she notified her physician who had attended her for several weeks during her sickness, and to whom she had paid only \$20 that she desired to make a will leaving all her property to him. He thereupon called an attorney, who, at her request, and in the physician's absence, drew the will, which she executed in accordance with such desire, and which she delivered to the physician. Held, that a finding that the will was not the result of undue influence was sustained. In *re Wickes' Estate*, 72 P. 902, 139 Cal. 195.

The principal devisee under a will had persistently urged the testator to make the will, and took him to the home of the devisee's mistress, against the protests of testator's physician and nurse, when he was dangerously ill. Tes-

⁷⁵ In *re Kilborn's Estate*, 162 Cal. 4, 120 P. 762.

Under the statute providing that no will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the testator's death, nor unless its provisions are

tator had resisted previous importunities of such devisee to make a will in his favor, and had once expressed a wish to be taken away, saying that they were robbing him. The devisee accused the testator of ingratitude, and, though such devisee could not speak English, he testified that the dying testator executed and published the will exactly as required by law. The only persons present were the beneficiaries, devisee's mistress, and the executor, a saloon keeper, whom the testator exempted from giving bond, and who otherwise could not have qualified. The will was drawn by a lawyer at devisee's instance, who did not consult the testator, but submitted the will to the devisee after preparing it. Held, that a verdict finding that the will was the result of undue influence was not against the weight of the evidence. In *re Silvan's Estate*, 59 P. 571, 127 Cal. 226.

The niece of testatrix, who had expressed her intention to break up the intimacy between testatrix, and her sister, was sent for during testatrix's last illness, and shortly after her arrival differences arose between the testatrix and her sister, ending in the sister leaving the house. The niece held long whispered conversations with testatrix, who was in an enfeebled mental and physical condition, and appeared to be dominated by her niece; and at the close of one of these conversations deceased sent for her niece's husband, and a will was made in his favor. Held, that the facts justified a verdict of undue influence in the procurement of the will. In *re Kendrick's Estate*, 62 P. 605, 130 Cal. 360.

On an issue whether a will leaving all of testator's property to his wife was obtained by undue influence on her part, one of the subscribing witnesses testified that testator came into his office alone, and asked him to write the will; giving him a memorandum, and not indicating in any way that he was being coerced. The wife was not present. There was no evidence that she had ever asked him to make a will. A washerwoman testified as to quarrels between husband and wife, and said the wife was "boss," and others testified that he said she wanted all his property, etc. Held not an abuse of discretion to set aside a finding of undue influence. In *re Motz's Estate*, 69 P. 294, 136 Cal. 558.

Finding of undue influence in execution of will devising to deceased's mother land which her husband had given her, with agreement by her to devise it back to him if she died before he did, will not be disturbed on appeal; it appearing the will was made two years after their marriage, at which time he was 70 years old and she 30 years old, and 8 months before her death; that she was very ill at and several months before and after the time of executing it, though her mind was sound; that the relations between them were very pleasant till they returned, a year after this marriage, to where her folks lived, when trouble arose between them, as to the cause of which the evidence was conflicting; there being evidence that she was always affectionately attached to him, notwithstanding the hostility of her family, and their endeavor to destroy her affection for him; that she claimed he was as good to her as he could be, but her mother would not believe it; that her mother tried to keep

clearly proved by two credible witnesses, where the testimony of two witnesses coincides as to the provisions made in a lost portion of a will, the court is authorized to establish such provisions, though such witnesses may differ as to the exact language used by the testator,⁷⁶ or give conflicting testimony.⁷⁷

them apart, and to a great extent kept him from her; that her mother had conversations with her about disposing of her property, and knew it was to be devised to her; and that her brother had the will drawn, and she went with her mother to execute it, and then gave it to her. In *re Tibbetts' Estate*, 69 P. 978, 187 Cal. 123.

⁷⁶ In *re Camp's Estate*, 66 P. 227, 134 Cal. 233; Rev. Laws 1910, § 6227.

On application to probate a will as destroyed, the question whether money was given as part of the residue, as testified by one attesting witness, and as such charged by statute with debts and specific legacies, or whether it was given as a specific legacy, as testified by the other, charged by the will with those burdens, while more a matter of form than substance, is nevertheless a question materially affecting disposition of the personalty, and disposition thereof cannot be held to be distinctly proved by two witnesses, as required by Code Civ. Proc. § 1339, declaring no will shall be proved as destroyed unless its provisions are distinctly proved by at least two witnesses. In *re Paterson's Estate*, 102 P. 941, 155 Cal. 626, 26 L. R. A. (N. S.) 654, 132 Am. St. Rep. 116, 18 Ann. Cas. 625; *Smith v. Quigley*, 155 Cal. 626, 102 P. 941, 26 L. R. A. (N. S.) 654.

Where a will has been destroyed by public calamity during the lifetime of the testator without his knowledge, the testimony of one witness who had personal knowledge of its provisions, and the testimony of another witness who had gained her knowledge by having it read to her by the first witness, was not sufficient. In *re Guinasso's Estate*, 110 P. 335, 13 Cal. App. 518.

A will was drawn at testatrix's request by her attorney, and was executed in his office, under the direction of his law partner. Testatrix said to him that she wanted him to call witnesses to "this will of hers," the persons who signed as witnesses being then in the room. The attorney thereupon asked them to witness the document, whereupon testatrix and the witnesses immediately signed the instrument in the presence of each other, there being written after her signature and above theirs the usual attestation clause reciting that they signed at her request and in her presence, and that she declared the instrument to be her last will in their presence. Held, to warrant a finding that the will was duly executed, though some of the witnesses could not recall what occurred. In *re Johnson's Estate*, 93 P. 1015, 152 Cal. 778.

The evidence as to the execution of a will proved the signature of testatrix, the signatures of the subscribing witnesses, and the fact that they signed it

⁷⁷ In *re Silva's Estate*, 160 Cal. 116, 145 P. 1015.

That the two attesting witnesses were not in complete harmony as to what was said and done, and were doubtful as to their recollection of what testator said and as to whether he signed in the presence of witnesses or acknowledged the instrument to be his will to them, held not to show that the will was not duly executed. In *re Ballard's Estate*, 56 Okl. 149, 155 P. 894.

Unless the contents of a lost will are clearly proved, it cannot be probated.⁷⁸

Whether a will was canceled is to be determined from the intention of the testator.⁷⁹

§ 1121. Court records and files

The record entry of a judgment is indispensable to prove the evidence of it when it is made the basis of a claim or defense in another court.⁸⁰

The records of the county clerk showing the approval of the appointment of a deputy sheriff is some evidence of the appointment sufficient to make the question an issue of fact for the court or jury.⁸¹

The order of the county court discharging a guardian of an Indian because the ward had reached his majority is not competent evidence to establish the ward's age in a subsequent action to cancel a conveyance of his lands executed after such order.⁸²

A verified petition is not evidence on the trial of an action for a perpetual injunction.⁸³

In her presence and in the presence of each other. No evidence impeaching the execution of the will in any respect was offered. One of the attesting witnesses was dead, however. The other did not remember whether testatrix signed the instrument or acknowledged her signature to it in his presence, or whether she declared it to be her will in the presence of the attesting witnesses, or whether she requested him to sign as an attesting witness, but he did not testify that these things did not take place. Held, that there was sufficient proof of the execution. In *re Tyler's Estate*, 53 P. 928, 121 Cal. 405.

⁷⁸ In *re Kidder's Estate*, 6 P. 326, 66 Cal. 487.

⁷⁹ Evidence that a will was in testator's possession from the time of its execution until his death, that immediately after his death it was found among his effects in his trunk, and that when so found, ink lines were drawn over and through certain words was sufficient to authorize a finding that the cancellation was done by testator with the intent and purpose of revoking the part of the will through which the lines were drawn. In *re Wikman's Estate*, 84 P. 212, 148 Cal. 642. On the issue of cancellation of a portion of a will, evidence that at the time of the execution of the will testator took it away with him, and that immediately after his death it was found in his trunk among his other effects, is sufficient, in the absence of any showing to the contrary, to justify a finding that testator had possession and control of the will from the time of its execution until his death, notwithstanding testimony that testator several times showed the will to witness and offered to let her keep it and that she had it in her hands. *Id.*

⁸⁰ *Ex parte Stevenson*, 94 P. 1071, 20 Okl. 549.

⁸¹ *Correll v. Morgan* (Okl.) 174 P. 509.

⁸² *Johnson v. Alexander* (Okl.) 167 P. 989.

⁸³ *Jones v. Johnson*, 47 P. 523, 57 Kan. 629.

§ 1122. Partnership

A prima facie case of partnership is made out by evidence that persons are sharing profits, pursuant to agreement, that they have described themselves as partners, or that they are the common proprietors of a business conducted for mutual profit.⁸⁴ However, the fact that the books of a partnership show a person to be a partner is not conclusive of the fact, against such person.⁸⁵

§ 1123. Agency and official capacity

Agency may be proved by the agent's testimony,⁸⁶ as may also the extent of his authority.⁸⁷

The general rule is that declarations of an alleged agent, standing alone, are incompetent to establish agency;⁸⁸ but an exception

⁸⁴ Cobb v. Martin, 123 P. 422, 32 Okl. 588.

In action against alleged partners, evidence of written agreement of partnership is prima facie proof of partnership. *Moning Dry Goods Co. v. Wiseman*, 60 Okl. 94, 159 P. 259. Partnership is prima facie proved by evidence that defendants share in profits pursuant to agreement, that they have described themselves as partners in a writing, or by evidence of common management and profit. *Id.*

Where plaintiff, in an action for commissions on sales of lumber, testified that he informed defendant H. concerning his agreement with defendant B. to sell lumber on commission, that H. told him that the arrangement was satisfactory, and to go ahead, and promised to pay him something on account of sales already made, the proof was sufficient to establish a prima facie case of partnership between defendants H. and B. *Bashor v. Hayes*, 111 P. 487, 83 Kan. 444.

⁸⁵ *Manspeaker v. Thomas* (Kan.) 44 P. 683.

⁸⁶ *Whitcomb v. Oller*, 137 P. 709, 41 Okl. 331.

⁸⁷ *Whitcomb v. Oller*, 137 P. 709, 41 Okl. 331.

⁸⁸ *Whitcomb v. Oller*, 137 P. 709, 41 Okl. 331.

Agency cannot be proved against another by evidence of the declarations of an agent, and, where one purports to act as agent for another, that fact of itself is not sufficient evidence upon which to submit the question of agency to the jury. *Oklahoma Automobile Co. v. Benner* (Okl.) 174 P. 587.

Statement by principal in guaranty contract that he was acting as agent of creditor, made at time of securing signature of trustees, will not establish that fact, so as to charge creditor with notice of his fraud in obtaining signatures. *J. R. Watkins Medical Co. of Winona, Minn., v. Coombes* (Okl.) 166 P. 1072.

In a suit to cancel a mortgage executed to an insurance company because the agents failed to pay over the money, plaintiffs were not bound by a provision of the application that the agents were the agents of the applicant, but the court could from all the evidence determine whether they were the agents for the mortgagors or the mortgagee. *Union Cent. Life Ins. Co. v. Pappan*, 128 P. 716, 36 Okl. 344.

to this rule is that, where the suit by the principal is based upon a contract entered into by an assumed agent, his declarations in making the contract are competent testimony.⁸⁹

To constitute color of office rendering an officer's sureties liable for his wrongful acts, something else must be shown besides the fact that in doing the act complained of the officer claimed to be acting in an official capacity.⁹⁰

Where the mortgagee's oral consent to a sale of mortgaged property by mortgagor as his agent is relied upon as a defense to action for conversion of mortgaged property, the evidence as to such consent must be clear, positive, and unequivocal.⁹¹

The range of time within which specific instances to show a continuing agency are admissible to prove a continuing agency, is within the trial court's discretion.⁹²

§ 1124. Sales

The fact that merchandise was charged on the books of the vendor to the person to whom it was delivered is evidence to show that the sale was made on its credit, but is not conclusive.⁹³

When the language of a written contract of sale of personalty is ambiguous, and the intent of the parties as to passing of title is material and the evidence is conflicting, the question is for the jury.⁹⁴

On the trial of the issue of fact whether a sale was made at a certain price, either party may show the value of the property involved.⁹⁵

That personal property was sold for too high a price is not per se prima facie evidence of fraud by the seller.⁹⁶

Where the evidence tended to show that lumber was sold to a contractor, and that the seller notified the owner of the sale, it showed the seller's status as a subcontractor.⁹⁷

⁸⁹ *Iowa Dairy Separator Co. v. Sanders*, 140 P. 406, 40 Okl. 656.

⁹⁰ *Hughes v. Board of Com'rs of Oklahoma County*, 50 Okl. 410, 150 P. 1029.

⁹¹ *Phelan v. Barnhart Bros. & Spindler*, 75 Okl. 49, 181 P. 718.

⁹² *Brownell v. Moorehead* (Okl.) 165 P. 408.

⁹³ *Kesler v. Cheadle*, 72 P. 367, 12 Okl. 489.

⁹⁴ *Kirkham v. B. F. Fullerton & Son*, 122 P. 652, 32 Okl. 461.

⁹⁵ *Carpenter v. Roach*, 55 Okl. 103, 155 P. 237.

⁹⁶ *Campbell v. Newton & Driskill*, 52 Okl. 518, 152 P. 841.

⁹⁷ *Neves v. Mills* (Okl.) 176 P. 509.

§ 1125. Fraud

Circumstances altogether inconclusive, separately considered, may by their number and joint operation, especially when corroborated by moral coincidences, constitute conclusive proof of fraud;⁹⁸ but fraud must ordinarily be established by clear and convincing preponderance of the evidence.⁹⁹

⁹⁸ *Wingate v. Render*, 58 Okl. 656, 160 P. 614.

In an action by a client against her former attorney, evidence held insufficient to sustain a finding that she had not been induced to assign her claim against the estate of her deceased guardian by fraudulent representations as to the value of the estate by the attorney. *Mohr v. Sands*, 44 Okl. 330, 133 P. 238.

In an action against an administrator to recover real estate belonging to the heirs fraudulently purchased by him at his own sale, the petition and order setting aside the final settlement of such administrator in the probate court are properly introduced in evidence, though defendant's counsel have admitted in open court the granting of such order. *Branner v. Nichols*, 59 P. 633, 61 Kan. 356.

In a personal injury action by a passenger, who signed release, evidence held to warrant verdict in her favor. *Chicago, R. I. & P. Ry. Co. v. Cotton*, 62 Okl. 168, 162 P. 763.

⁹⁹ Where a release is attacked on the ground of fraud, the party alleging fraud is bound to establish it by clear and convincing proof. *St. Louis & S. F. R. Co. v. Bruner*, 52 Okl. 349, 152 P. 1103.

Where fraud is alleged in procuring execution of a deed, proof must sustain allegations by a preponderance of evidence. *Adams v. Porter*, 58 Okl. 225, 158 P. 899. In action for possession of land on ground of fraud in including it in description in deed, evidence held insufficient to sustain allegations of petition. *Id.*

Where fraud in the procurement of a written instrument is alleged, such allegation must be proved by a preponderance of evidence so great as to overcome all opposing evidence and repel all opposing presumptions of good faith. *Owen v. United States Surety Co.*, 38 Okl. 123, 131 P. 1091.

In a suit attacking a conveyance of land as in fraud of creditors, the inquiry extends to all circumstances bearing on the question. *Wimberly v. Winstock*, 46 Okl. 645, 149 P. 238.

Where fraud is alleged in the procuring of the execution of written instruments or deeds, the proof must sustain the allegations by a preponderance of evidence so great as to overcome all opposing evidence, and repel the opposing presumptions, and should be of such weight and exigency as to satisfactorily establish the wrongful conduct charged; honesty and fair dealing as a rule being presumed. *Moore v. Adams*, 108 P. 392, 28 Okl. 48.

Where in a suit to quiet title, fraud in procuring written instruments or deeds is relied on, the proof to sustain this contention must be clear and satisfactory. *Elliott v. Merriman*, 47 Okl. 717, 150 P. 695.

§ 1126. Negligence and cause

Negligence, like any other fact, may be found from circumstantial evidence when facts and circumstances proved are sufficient to warrant a reasonable inference of the negligence alleged.¹ The

¹ *Lusk v. Phelps* (Okl.) 175 P. 756.

Where an accident has occurred resulting in the death of all the persons immediately connected therewith, and there is no direct proof as to how the accident occurred, the manner of its occurrence may be shown by circumstantial evidence from which the jury may infer the manner and cause of the accident if the inference is reasonable, although not a necessary resulting fact. *Waters-Pierce Oil Co. v. Deselms*, 89 P. 212, 18 Okl. 107, judgment affirmed (1909) 29 S. Ct. 270, 212 U. S. 159, 53 L. Ed. 453.

Cause of action for negligence may be established by circumstantial evidence. *Weleetka Cotton Oil Co. v. Brookshire* (Okl.) 166 P. 408.

In an action by an employé for injuries from alleged negligence of a master, the causal connection between the accident and the alleged negligence may be established by circumstantial evidence. *Petroleum Iron Works Co. v. Wantland*, 114 P. 717, 28 Okl. 481.

Proof that switch tracks in railroad yard were located so closely together as not to afford sufficient space for hostler's helper to properly discharge his duties, resulting in his death, sufficiently shows primary negligence of company. *Missouri, O. & G. Ry. Co. v. Overmyre*, 58 Okl. 723, 160 P. 933.

That an animal has been killed by a train may be proved by circumstantial evidence. *Missouri, K. & T. Co. v. Simerly* (Okl.) 180 P. 551.

Where a shipment of goods is delivered to a carrier in good condition and delivered by it to the consignee in a damaged state, the carrier is prima facie liable. *Armstrong, Byrd & Co. v. Illinois Cent. R. Co.*, 109 P. 216, 26 Okl. 352, 29 L. R. A. (N. S.) 671.

Evidence that a car left the track while in transit, and turned over, causing injury to the shipment, made out a prima facie case of negligence. *Missouri, O. & G. Ry. Co. v. French*, 52 Okl. 222, 152 P. 591.

Where the evidence showed that the track was straight for miles, so that a reasonable inference of negligence arose, and defendant's servants who saw the killing did not testify, judgment for plaintiff will not be reversed. *St. Louis & S. F. R. Co. v. Smith*, 127 P. 479, 36 Okl. 28.

In action for damages for property destroyed by sparks from a locomotive, circumstantial evidence, or reasoning and conjecture from known facts, is competent; but the process is defective if the circumstances depend also on conjecture and speculation. *St. Louis & S. F. R. Co. v. Mobley* (Okl.) 174 P. 510.

Evidence, showing that a fire originated from sparks of a passing engine, is prima facie proof of negligence of the railroad company. *Missouri, O. & G. Ry. Co. v. Gentry*, 52 Okl. 374, 152 P. 1076; *Wichita Falls & N. W. Ry. Co. v. Arnold*, 56 Okl. 352, 156 P. 296; *Same v. Gant*, 56 Okl. 727, 156 P. 672.

One injured while riding as a passenger on platform of caboose of a freight train makes out a prima facie case when he shows injury was caused by an unusually sudden stop which was unnecessary, and surrounding circumstances indicate negligence. *Chicago, R. I. & P. Ry. Co. v. Grace*, 61 Okl. 12, 159 P. 1011.

In an action against a mining company for the death of a shot firer from

question of proximate cause, also, may be determined from circumstantial evidence.²

In a civil case, it is not necessary to prove beyond a doubt, but only to make it appear more probable that the injury came in whole or in part from defendant's negligence rather than from any other cause.³

gases from a windy shot caused by the reversal of an air fan on account of its not having been suitably adjusted, evidence tending to show that the omitted appliances were reasonably necessary would support a verdict for plaintiff, based on the assumption that the omission to suitably adjust the fan with the additional appliance was the proximate cause of the injury. *Coalgate Co. v. Hurst*, 107 P. 657, 25 Okl. 588, writ of error dismissed (1912) 32 S. Ct. 838, 225 U. S. 697, 56 L. Ed. 1262. The proximate cause of the death may be established by circumstantial evidence. *Id.*

Proof that a master is using machinery of a certain kind and that an accident happens in its use does not tend to show negligence without some evidence that it is not properly performing its function. *Phoenix Printing Co. v. Durham*, 122 P. 708, 32 Okl. 575, 38 L. R. A. (N. S.) 1191.

Where a servant with 12 years' experience as a carpenter was injured by boring a hole with an auger bit, the cutting points of which had become dulled from use, and no other defect was shown, the evidence failed to show negligence of the master, and judgment for plaintiff was not sustained. *St. Louis & S. F. R. Co. v. Mayne*, 127 P. 474, 36 Okl. 48, 42 L. R. A. (N. S.) 645.

² *St. Louis & S. F. R. Co. v. Darnell*, 141 P. 785, 42 Okl. 394.

To sustain verdict for causing death, plaintiff must not only prove negligence, but also that negligence was proximate cause of death. *Clinton & O. W. Ry. Co. v. Dunlap*, 56 Okl. 755, 156 P. 654. Generally it is impossible to prove that negligence was proximate cause of death by direct evidence, and it is sufficient to show circumstances and surroundings if inference therefrom is reasonable one. *Id.*

Evidence to justify a finding that a master was negligent must show a breach of duty, such that a reasonable person should have foreseen would naturally cause injury; a mere possibility of injury being insufficient, where a reasonable man would not consider the injury likely to result. *Chicago, E. I. & P. Ry. Co. v. Nagle*, 55 Okl. 235, 154 P. 667.

³ *St. Louis & S. F. R. Co. v. Rushing*, 31 Okl. 231, 120 P. 973; *St. Louis & S. F. R. Co. v. Hart*, 45 Okl. 659, 146 P. 436.

Where plaintiff sues carrier for loss of an eye, he need not prove by expert that infection causing removal was caused by the injury, where there was other evidence justifying such inference. *Missouri, K. & T. Ry. Co. v. Edmonds* (Okl.) 174 P. 1052.

In an action for death of a shot firer in a mine from gases from a windy shot, resulting from the reversing of an air fan, evidence from which it might be inferred that the master in constructing or operating the fan had omitted the care which a careful man would ordinarily bestow to prevent the occurrence of accidents held to support a verdict for plaintiff. *Coalgate Co. v. Hurst*, 107 P. 657, 25 Okl. 588, writ of error dismissed 32 S. Ct. 838, 225 U. S. 697, 56 L. Ed. 1262.

Proof that a telegraph company incorrectly transmitted a message is *prima*

§ 1127. Novation

A novation must be proven by a clear preponderance of the evidence.⁴

To establish novation by the substitution of a new debtor, the evidence must clearly show that the three parties agreed to the substitution.⁵

§ 1128. Title

The question as to when title to personal property passes, should be taken from the jury only where there is but one conclusion deducible from the evidence.⁶

Evidence that plaintiff is the consignor and consignee, and also the owner of a shipment of cattle shows that he is the real party in

fact evidence of its negligence. *Levy Bros. v. Western Union Telegraph Co.*, 39 Okl. 416, 135 P. 423.

A *prima facie* case of negligence is established by showing that hogs were in a field improperly fenced by the defendant railroad company and strayed therefrom onto the tracks and were killed by defendant's train. *St. Louis & S. F. R. Co. v. Steele*, 133 P. 209, 37 Okl. 536.

The statement at the trial by carrier's attorney that it admitted that it did misroute but denied loss, dispenses with proof that the carrier was in fault, even if it was not liable for misconduct of a connecting carrier. *McCullough v. Missouri Pac. Ry. Co.*, 160 P. 214, 98 Kan. 710.

Evidence in an action for the destruction of a barn and contents by fire held sufficient to sustain a verdict for plaintiff, where it was not strong enough to reasonably convince the jury that the fire originated from sparks emitted from the defendant railroad company's engines. *Kansas City Southern Ry. Co. v. Henderson*, 54 Okl. 320, 153 P. 872. Recovery cannot be had for the burning of a barn on proof of the mere possibility that the fire was caused by sparks emitted from the defendant railway company's engine. *Id.*

In a coal miner's action for injury from negligent construction of shower bath, where there was no evidence that operator had failed to do all required by Laws 1913, c. 125, § 1, in its construction, there was no primary negligence shown. *Rock Island Coal Mining Co. v. Taylor*, 75 Okl. 78, 182 P. 81.

Where a female passenger miscarries two or three days after arrival at her destination, and where, during the journey, the carrier may have been guilty of negligence, but there is no evidence that the miscarriage was caused by such negligence, a verdict partly based on such sickness cannot be sustained. *St. Louis & S. F. R. Co. v. Criner*, 137 P. 705, 41 Okl. 256.

⁴ *McFarland v. T. W. Lanier & Bro.*, 50 Okl. 336, 150 P. 1097.

⁵ *Gaar, Scott & Co. v. Rogers*, 46 Okl. 67, 148 P. 161.

⁶ *Mangelsdorf Bros. Co. v. Kolp*, 64 Okl. 33, 165 P. 1141.

In a suit by bank claiming ownership of a certain note of defendant secured by a chattel mortgage, and seeking possession of mortgaged property by writ of replevin, evidence held to sustain a judgment for defendant for possession of property, or, if its return could not be had, for its value and for usable value thereof. *Union State Bank v. Woodside* (Okl.) 178 P. 109.

interest, and the proper party to prosecute an action for their injury.⁷

Inventory of her separate personal property, filed by the wife in the office of the register of deeds in the county of her residence, pursuant to statute, is notice and prima facie evidence of her title to such property.⁸

To recover in an action of trover, it must be alleged that the plaintiff is entitled to possession.⁹

§ 1129. Payment—Receipts

Receipts are prima facie evidence but not conclusive evidence of payment of money indicated therein, and are always open to explanation, and the party alleged to have executed it may show its allegations to be false, or that it was executed and delivered by mistake or fraud.¹⁰

A receipt is not an instrument that the law requires for the protection of, or as notice to, third parties, but is only prima facie evidence of the payment of an obligation.¹¹

The possession of a note after its maturity is ordinarily prima facie evidence of payment.¹²

§ 1130. Amount of damages

In arriving at the amount of damages to be awarded the jury may make certain inferences, though there is no proof on that point.¹³

In personal injury cases the testimony of physicians is not necessary to a recovery of damages.¹⁴

⁷ Midland Valley R. Co. v. Pugh, 126 P. 759, 33 Okl. 648.

⁸ Bagg v. Shoenfelt (Okl.) 176 P. 511; Rev. L. 1910, § 3356.

⁹ Shelton v. Jones (Okl.) 167 P. 458, L. R. A. 1918A, 830.

¹⁰ Columbian Nat. Life Ins. Co. v. Wirthle (Okl.) 176 P. 406.

¹¹ Kuykendall v. Lambert (Okl.) 173 P. 657.

¹² Caulk v. Carlson, 44 Okl. 532, 145 P. 335.

¹³ Where the injury is objective, and it is plainly apparent from nature of injury that injured person must necessarily undergo future pain and suffering, the jury may infer that fact from proof of such an injury alone. Weatherly v. Manatt (Okl.) 179 P. 470; Shawnee-Tecumseh Traction Co. v. Griggs, 50 Okl. 566, 151 P. 230. Where the injury is subjective, expert testimony that plaintiff with reasonable certainty will experience future suffering is essential to a recovery therefor. Id.

In action for husband's wrongful death, consideration of plaintiff's means in arriving at verdict was error, as her right to recovery is based upon her pecuniary loss. Missouri, O. & G. Ry. Co. v. Lee (Okl.) 175 P. 367.

¹⁴ Where plaintiff's right arm, side, and leg were injured and partly para-

Mortality tables are not indispensable to assist the jury in estimating the expectancy of life in cases to recover for death by wrongful act.¹⁵

§ 1131. Usury

To entitle one to recover under the statutory provisions for usurious interest paid, it must be shown by a preponderance of the evidence that the taking, receiving, or charging of interest greater than allowed was knowingly done.¹⁶

§ 1132. Copy of articles of incorporation

"A copy of any articles of incorporation filed in pursuance" of article 1, chapter 15, Rev. Laws 1910, "and certified by the secretary of state, must be received in all courts and other places as prima facie evidence of the facts therein stated, and of the existence of such corporation."¹⁷

§ 1133. Recovery of penalties

To recover penalties as provided by the statute, the facts must be proved by a preponderance of the evidence.¹⁸

§ 1134. Abandonment of homestead

Abandonment of a homestead must be established by the most clear, conclusive, and undeniable evidence.¹⁹

lyzed, and he stated effect of his injuries as to disabling him from manual labor, jury might judge extent of his permanent disability, and testimony of physicians thereon was not necessary to his recovery therefor. *St. Louis, I. M. & S. Ry. Co. v. Cantrell*, 63 Okl. 187, 164 P. 110, L. R. A. 1917D, 980.

¹⁵ *Atchison, T. & S. F. R. Co. v. Hughes*, 40 P. 919, 55 Kan. 491.

¹⁶ *First Nat. Bank of Soper v. Beecher* (Okl.) 161 P. 327.

¹⁷ Rev. Laws 1910, § 1229.

¹⁸ All that is required of the state in civil actions for the recovery of the penalty prescribed by Comp. Laws 1909, § 4191, for letting buildings to be used for violations of the liquor law, is to prove the fact by a preponderance of the evidence. *Hammett v. State*, 141 P. 419, 42 Okl. 384, Ann. Cas. 1916L 1148.

¹⁹ *McCammon v. Jenkins*, 44 Okl. 612, 145 P. 1163.

Where a person removes from land and continuously lives on other lands five years, and then executed a deed of the former lands, such facts make a prima facie case of abandonment of the lands as a homestead. *Perkins v. Cassell*, 124 P. 7, 32 Okl. 827.

Proof of abandonment of homestead must be clear and convincing; and, where the only evidence is that of the claimant, and shows a removal without

§ 1135. Financial status

Where a party testifies that he is worth from \$12,000 to \$15,000, and trespass threatened by him will result in suspension of an extensive oil refinery, a finding that he could not respond in damages if trespass were carried out was warranted.²⁰

§ 1136. Ejectment

In ejectment, proof of possession under claim of title, by the plaintiff's ancestor, entitles the plaintiff to recover, unless the defendant sustains the burden resting on him to show a better title or right of possession.²¹

The evidence requisite to sustain an action in form in ejectment, but in substance for relief on the ground of fraud, is the same as would be required if the facts of the transaction were pleaded, instead of the conclusion authorized by the statute in actions of ejectment.²²

§ 1137. Attachment

In an action for a wrongful levy of an attachment order, proof of dissolution of the attachment does not show want of probable cause in commencing the attachment proceeding.²³

§ 1138. Cancellation of instruments

Where there is a gross inadequacy or a total want of consideration slight evidence of fraud or undue influence will justify the cancellation of a deed where its enforcement would shock the conscience.²⁴

any fixed intent to return, a finding of abandonment will not be disturbed. *Carter v. Pickett*, 39 Okl. 144, 134 P. 440.

Contract by owner of land, including his family homestead, to sell land if buyer performs certain obligations thereunder, is contingent and does not show a fixed and definite intention to abandon the homestead, even though owner and family are in act of moving away from it when contract is made. *Elliott v. Bond* (Okl.) 178 P. 242.

²⁰ *Burnett v. Sapulpa Refining Co.*, 59 Okl. 276, 159 P. 360.

²¹ *Byrne v. Kernals*, 55 Okl. 573, 155 P. 587.

²² *New v. Smith*, 119 P. 380, 86 Kan. 1.

²³ *Jones Leather Co. v. Woody* (Okl.) 169 P. 878.

²⁴ *Marshall v. Grayson* (Okl.) 166 P. 86.

In an action for rescission and cancellation, where the evidence shows that plaintiffs were owners of certain land in the state, and defendants were owners of land in Missouri; that, relying on certain false representations by defendants, plaintiffs exchanged said lands; that the lands in Missouri were not as

In an action to cancel a void conveyance it is not necessary to allege and prove that plaintiff is in possession.²⁵

§ 1139. Reformation of instruments

To justify the reformation of an instrument for mutual mistake, the proof must establish the mistake to a moral certainty, beyond reasonable controversy, but not beyond the possibility of controversy.²⁶ It must be clear and convincing.²⁷

§ 1140. Divorce

To entitle a husband to a divorce on the ground of abandonment by his wife, temporarily insane, the evidence of defendant's intention to abandon plaintiff must be clear and uncontradicted.²⁸

To prove adultery by circumstances, two facts must be established, a criminal disposition in minds of both the party accused and the particeps criminis, and an opportunity to commit the crime.²⁹

Where the act of adultery is denied both by the wife and her alleged paramour, a finding of adultery cannot be sustained merely upon the fact of opportunity therefor, when the existence of the opportunity is equally capable of an innocent explanation.³⁰

Though the testimony of plaintiff in divorce is not directly contradicted, the court is not bound to accept the statements as true if the court has reason to doubt his good faith, or if there are discrediting circumstances which develop during the trial.³¹

The existence of impotency as a ground for a divorce against an accused wife, susceptible as it is, of certain determination by ex-

represented, and a part thereof wholly worthless; that thereupon plaintiffs notified defendants and offered to rescind—it was sufficient to establish a prima facie cause of action, and a demurrer to the evidence was erroneously sustained by the trial court. *Clark v. O'Toole*, 94 P. 547, 20 Okl. 319.

²⁵ *Burckhalter v. Vann*, 59 Okl. 114, 157 P. 1148.

²⁶ *Cleveland v. Rankin*, 48 Okl. 99, 149 P. 1131; *Davidson v. Bailey*, 53 Okl. 91, 155 P. 511.

To justify a reformation of a deed, failing to conform to the agreement of the parties through mutual mistake, the proof must be clear, unequivocal, and decisive. *Dockstader v. Gibbs*, 126 P. 229, 34 Okl. 497. Evidence held sufficient to show that a deed did not conform to the agreement of the parties through mutual mistake, justifying reformation. *Id.*

²⁷ *Schafer v. Midland Hotel Co.*, 137 P. 864, 41 Okl. 111.

²⁸ *Franklin v. Franklin*, 35 P. 1118, 53 Kan. 143.

²⁹ *Hartshorn v. Hartshorn* (Okl.) 168 P. 822.

³⁰ *Burke v. Burke*, 44 Kan. 307, 24 P. 466, 21 Am. St. Rep. 283.

³¹ *May v. May*, 80 P. 567, 71 Kan. 317.

pert examination, to which she offers to submit, should not be decided against her, unless such decision is supported by the evidence of a physician who has made such examination; since the best evidence obtainable should as in other cases be required.³²

§ 1141. Bastardy

A bastardy proceeding under the provisions of the statute is in the nature of a civil action, and the issues need be supported by a preponderance of the evidence.³³

³² *Bunger v. Bunger*, 117 P. 1017, 85 Kan. 564, Ann. Cas. 1913A, 126.

A decree denying a divorce for impotency of the wife will not be disturbed, where there was testimony of seven physicians who had examined her that she was physically normal. *Bunger v. Bunger*, 132 P. 1004, 90 Kan. 39.

³³ *Pcwelton v. State* (Okl.) 169 P. 1093.

Since an action brought under Rev. Laws 1910, § 4401, for the support of a bastard child is in the nature of a civil action, plaintiff is required to prove her case only by a fair preponderance of the evidence. *Libby v. State*, 142 P. 406, 42 Okl. 603.

CHAPTER XVI

JURY

Sections

- 1142-1150. Article I.—Right to jury trial.
1151-1162. Article II.—Jury panel.
1163-1171. Article III.—Qualifications, challenges, and exemptions.
1172-1175. Article IV.—Oath, number, term, and summoning.
1176-1189. Article V.—Custody, conduct, and deliberations.
1190-1203. Article VI.—Verdict.
1204-1216. Article VII.—Special interrogatories and findings.

ARTICLE I

RIGHT TO JURY TRIAL

Sections

1142. Right to jury trial—Verdict.
1143. Waiver.
1144. In equity cases.
1145. Trial of issues.
1146. In actions at law or in equity or mixed actions.
1147. In particular actions or proceedings.
1148. In special proceedings.
1149. On intermediate appeal.
1150. Infringement of right.

§ 1142. Right to jury trial—Verdict

"The right of trial by jury shall be and remain inviolate, and a jury for the trial of civil and criminal cases in courts of record, other than county courts, shall consist of twelve men; but, in county courts, and courts not of record, a jury shall consist of six men. This section shall not be so construed as to prevent limitations being fixed by law upon the right of appeal from judgments of courts not of record in civil cases concerning causes of action involving less than twenty dollars. In civil cases, and in criminal cases less than felonies, three-fourths of the whole number of jurors concurring shall have power to render a verdict. In all other cases the entire number of jurors must concur to render a verdict. In case a verdict is rendered by less than the whole number of jurors, the verdict shall be in writing and signed by each juror concurring therein." ¹

¹ Const. Okl. art. 2, § 19.

The right to a trial by jury secured by the Constitution is a trial according to the course of the common law as it existed and substantially as that in use when Constitution was adopted, except as specifically modified by other provisions of Constitution.²

The provision contained in the Constitution of the United States does not guarantee a trial by jury to litigants in civil actions in the courts of the several states.³

The courts will enforce a rigid observance of the statutes designed to preserve inviolate the right of trial by jury, and the purity of jury trials.⁴

§ 1143. Waiver

"The trial by jury may be waived by the parties, in actions arising on contract, and with the assent of the court, in other actions, in the following manner: By the consent of the party appearing, when the other party fails to appear at the trial by himself or attorney. By written consent, in person or by attorney, filed with the clerk. By oral consent, in open court, entered on the journal."⁵

"In all issues of fact joined in any court, all parties may waive the right to have the same determined by jury; in which case the

² One Cadillac Automobile, 1918 Model, v. State, 75 Okl. 134, 182 P. 227.

The right of trial by jury, declared inviolate by Const. art. 2, § 19, except as modified in the Constitution itself, means the right as it existed in the territory at the time of the adoption of the Constitution. *Mathews v. Sniggs*, 75 Okl. 108, 182 P. 703; *State v. Cobb*, 104 P. 361, 24 Okl. 662, 24 L. R. A. (N. S.) 639; *Hale v. Marshall*, 52 Okl. 688, 153 P. 167; *Parker v. Hamilton*, 49 Okl. 693, 154 P. 65; *In re Byrd*, 122 P. 516, 31 Okl. 549; *Ex parte Dagley*, 128 P. 699, 35 Okl. 180, 44 L. R. A. (N. S.) 389; *Ex parte Linke*, 128 P. 702, 35 Okl. 192.

Const. art. 2, § 19, does not prevent Legislature from abrogating common-law right of action for injury to employé and substituting Sess. Laws 1915, c. 246, the Workmen's Compensation Law, providing award of compensation without jury trial. *Adams v. Iten Biscuit Co.*, 63 Okl. 52, 162 P. 938.

One of the elements of a jury trial as it existed before admission of the state was power of the trial judge to instruct the jury upon the law. *Baker v. Newton*, 112 P. 1034, 27 Okl. 436.

³ One Cadillac Automobile, 1918 Model, v. State, 75 Okl. 134, 182 P. 227; *Adams v. Iten Biscuit Co.*, 63 Okl. 52, 162 P. 938; *St. Louis & S. F. R. Co. v. Brown*, 45 Okl. 143, 144 P. 1075.

Const. U. S. Amend. 6, guaranteeing a trial by jury of 12, does not apply to the state courts of Oklahoma. *Brown v. State*, 106 P. 975, 3 Okl. Cr. 475.

⁴ *Ridley v. State*, 115 P. 628, 5 Okl. Cr. 522; *Henderson v. State* (Okl. Cr. App.) 197 P. 720; *Watson v. State*, 124 P. 329, 7 Okl. Cr. 508.

⁵ Rev. Laws 1910, § 5016.

finding of the judge, upon the facts, shall have the force and effect of a verdict by jury."⁶

In all cases where a trial by jury does not constitute an essential part of due process of law, it may be waived by the party.⁷

A jury is waived by failure to make demand therefor,⁸ by voluntary absence from the trial,⁹ though the case is set at a nonjury term,¹⁰ by going to trial before the court without objection,¹¹ by

⁶ Const. Okl. art. 7, § 20.

⁷ Ex parte Plalstridge (Okl.) 173 P. 646.

⁸ By proceeding with the hearing without demanding a jury, the parties are deemed to have waived a jury trial of the question of fact involved. Feight v. Thisler, 114 P. 249, 84 Kan. 185; Ruth v. Witherspoon-Engler Co., 164 P. 1064, 100 Kan. 609, rehearing denied Ruth v. Witherspoon-Englar Co., 166 P. 481, 101 Kan. 406.

In a suit to enjoin a city from shutting off gas from plaintiffs' office building, the answer set up a counterclaim for installing meters, rent thereof, and for gas used. No demand was made for a jury, but after a full trial an exception was taken to the judgment. Held, that plaintiffs waived the right to jury trial. Cunningham v. City of Iola, 119 P. 317, 86 Kan. 86, rehearing denied 119 P. 1135, 86 Kan. 402.

⁹ Where an appeal is taken, without supersedeas, from a judgment awarding alimony and maintenance, and plaintiff in error refuses to comply with Supreme Court's order to pay clerk counsel fees, etc., and disposes of his property and remains outside of state beyond court's process, the dismissal of his appeal is not a conviction of, or imposition of penalty for, contempt without a jury hearing, in violation of the Constitution his right to a hearing under such constitutional provision being waived by his voluntarily absents himself. Spradling v. Spradling (Okl.) 181 P. 148; Const. Okl. art. 2, § 25.

A defendant by not appearing at the time a case is assigned for trial waives his right to a trial by jury. Weems v. McDavitt, 30 P. 481, 49 Kan. 260.

Under Comp. Laws 1909, § 5808, a jury may be waived by consent of the party appearing, when the other party fails to appear at the trial. Farmers' & Merchants' Ins. Co. v. Cuff, 116 P. 435, 29 Okl. 106, 35 L. R. A. (N. S.) 892; National Life Ins. Co. v. Same, 116 P. 437, 29 Okl. 113; German-American Ins. Co. v. Same, 116 P. 438, 29 Okl. 114.

¹⁰ Where defendant is in default, and the case is set at a nonjury term, defendant not being present, and plaintiff not demanding a jury, the case being properly triable to the court, setting of case at a nonjury term is not ground for vacation of default. Pulaski Oil Co. v. Conner, 62 Okl. 211, 162 P. 464, L. R. A. 1917C, 1190.

¹¹ A jury may be waived without a written stipulation, both parties going to trial before the court without objection, and their counsel consenting to the court's statement that he would render judgment on the merits. Landrum v. Landrum, 50 Okl. 746, 151 P. 479.

Where, in a suit to quiet title, plaintiff made no objection to a trial of the case to the court as a suit in equity, any right he might have had to a jury trial was waived. Butts v. Butts, 114 P. 1048, 84 Kan. 475.

an erroneous statement of the party demanding a jury that only equitable issues are involved,¹² or by an agreement to refer the case.¹³

That each party separately moves for peremptory instructions, does not constitute a waiver of the right to have a verdict returned by the jury.¹⁴

After the decision of the court, granting a motion to refer a cause an agreement by the parties to try the case to the court does not revive the right of the party opposing the reference to demand a jury trial.¹⁵

Where plaintiff's attorney answered, in response to the judge's question as to what there was in the case for a jury, that there was a question of damages, and no objection was made to the judge's proposal to submit such question, and decide the other questions himself, plaintiff waived his right to have any other issues submitted to the jury.¹⁶

¹² Where the issues joined by the pleadings would require the granting of a jury trial on demand, but the parties state to the court, at the time of demand, that the only matters in issue are the priorities of certain alleged liens, the refusal of a jury trial is not error. *Wiscomb v. Cubberly*, 33 P. 320, 51 Kan. 580.

¹³ Where proceeding to foreclose a mechanic's lien was brought in a United States court of Indian Territory, before the admission of the state, on the law docket, and upon defendant's motion, over plaintiff's objection, was transferred to the equity docket, plaintiff, by agreeing with defendant in open court to refer the case to a master to make findings and report upon all questions of law and fact, waived any right he may have had to a jury trial. *Jones v. Balsley & Rogers*, 27 Okl. 220, 111 P. 942.

¹⁴ Const. art. 7, § 20, provides that in all issues of fact joined in any court all parties may waive the right to a jury trial. Comp. Laws 1909, § 5808, provides that the trial by jury may be waived by the parties in actions arising on contract, and with the assent of the court in other actions, either by the consent of the party appearing when the other party fails to appear at the trial, by written consent filed with the clerk, or by oral consent in open court entered on the journal. Held, that the fact that both plaintiff and defendant each verbally moved for peremptory instructions did not constitute a waiver of the right to have a verdict returned by the jury. *Farmers' Nat. Bank of Tecumseh v. McCall*, 106 P. 866, 25 Okl. 600, 26 L. R. A. (N. S.) 217.

¹⁵ *Lapham v. Kansas & Texas Oil, Gas & Pipe Line Co.*, 123 P. 863, 87 Kan. 65, Ann. Cas. 1913D, 813.

Where a party objects to the reference of a cause, and demands a jury trial, which objection and demand are overruled, but subsequently consents to the appointment of a referee, he abandons the objection and demand, and waives the jury trial, and the right to insist on the error in denying such trial. *Smith v. Burlingham*, 24 P. 947, 44 Kan. 487.

¹⁶ *Carlson v. Allen*, 135 P. 669, 90 Kan. 457.

The attorney of record for a minor who has sued through her legal guardian, or a guardian ad litem, may waive a jury trial.¹⁷

That an action on a money demand is set for trial at a nonjury term does not deprive a party of a jury trial on an issue of fact, where the right is not waived or a reference ordered.¹⁸

§ 1144. In equity cases

The constitutional guaranty does not give a right to a jury trial in an equity case;¹⁹ but in such cases the judge may call a jury or consent to a jury to advise him on questions of fact, and may, in his discretion, adopt or reject their conclusions.²⁰

¹⁷ *Wiley v. Edmondson*, 43 Okl. 1, 133 P. 38.

Where the record showed that all the parties appeared in open court and waived a jury trial, and agreed to submit the cause to the court for trial, and that the judgment entry stated that the parties, including a guardian ad litem, expressly waived a jury trial, the parties were bound by the record, and the agreement of the guardian ad litem was equally binding as in the case of the other parties. *Rehl v. Likowski*, 6 P. 886, 33 Kan. 515.

¹⁸ *Board of Com'rs of Alfalfa County v. Ferguson* (Okl.) 166 P. 437.

Where an action for money only was set for trial at a nonjury term, whether by clerk of court or at request of defendants not appearing in record, and defendants' motion for a continuance was denied, defendants' demand for a jury was not waived under Const. art. 7, § 20, and Rev. Laws 1910, § 5016. *Campbell v. Powell*, 76 Okl. 286, 185 P. 328.

¹⁹ The guaranty of the Constitution has no reference to the trial of issues of fact in equity cases. *Mathews v. Sniggs*, 75 Okl. 108, 182 P. 703.

Neither litigant is entitled, as a matter of right, to a jury trial. *Success Realty Co. v. Trowbridge*, 50 Okl. 402, 150 P. 898.

Code Civ. Proc. § 279 (Gen. St. 1915, § 7179), providing for a jury trial of "issues of fact arising in actions for the recovery of money," etc., refers solely to issues of fact involving merits of action, and not to issues of fact upon which court's jurisdiction depends. *Williams v. J. F. Ball Bros. Lumber Co.*, 105 Kan. 284, 182 P. 552.

An action by a devisee under a valid will to cancel a deed which testator was fraudulently procured to execute while of unsound mind is equitable, so that neither party is entitled to a jury trial as matter of right. *Bethany Hospital Co. v. Philippi*, 107 P. 530, 82 Kan. 64, 30 L. R. A. (N. S.) 194; *Robertson v. Ridenour-Baker Grocery Co.*, 163 P. 655, 100 Kan. 133.

²⁰ *Gamel v. Hynds* (Okl.) 171 P. 920; *Gorman v. Carlock* (Okl.) 179 P. 38; *Anderson v. Kelley*, 57 Okl. 109, 156 P. 1167; *Tobin v. O'Brieter*, 85 P. 1121, 16 Okl. 500; *Hogan v. Leeper*, 133 P. 190, 37 Okl. 655, 47 L. R. A. (N. S.) 475; *Watson v. Borah*, 132 P. 347, 37 Okl. 357; *Asher v. Doyle*, 50 Okl. 460, 150 P. 878; *Galer v. Berrian*, 140 P. 155, 43 Okl. 303; *Oklahoma Trust Co. v. Stein*, 136 P. 746, 39 Okl. 756; *Crump v. Lanham* (Okl.) 168 P. 43; *Barnes v. Lynch*, 59 P. 995, 9 Okl. 156; *Success Realty Co. v. Trowbridge*, 50 Okl. 402, 150 P. 898; *City of Chickasha v. O'Brien*, 58 Okl. 46, 150 P. 282; *Bethany Hospital Co. v. Philippi*, 107 P. 530, 82 Kan. 64, 30 L. R. A. (N. S.) 194; *Bates v.*

He may take the advice of different juries at different times if he so desires.²¹ However, it is not only his right, but his duty, to finally determine all questions of fact as well as law.²² He should

Bates, 59 P. 639, 61 Kan. 859; Wood v. Turbush, 66 P. 991, 63 Kan. 779; Fairbanks, Morse & Co. v. Simmons, 173 P. 277, 103 Kan. 202; Maclellan v. Seim, 46 P. 959, 57 Kan. 471.

In cases wherein the parties are not entitled to a jury trial as a matter of right, the court may submit to the jury a part only of the questions of fact. Parker v. Hamilton, 49 Okl. 693, 154 P. 65.

In equity suit, court has right to submit any question of fact to jury upon which it desires their aid, and where court adopted jury's finding which was supported by evidence, matter will be treated as settled on appeal. Baughman v. Hebard (Okl.) 166 P. 88.

In equity court may call in jury to advise it upon specific questions of fact, and, in its discretion, may adopt or reject its findings, and in such case a general verdict is unnecessary unless court requires it. Garnett v. Storm, 64 Okl. 137, 166 P. 401.

Submission to a jury of issues in an action to rescind a contract and for a return of the purchase price and the reception of a verdict and answers to special questions held not error, regardless of whether a jury could have been demanded. Hull v. Prairie Queen Mfg. Co., 141 P. 592, 92 Kan. 538.

That a jury called to the aid of a court in order to make certain special findings of fact was kept together and required to continue their consideration of the facts for parts of four days held not an abuse of discretion. Taylor v. Holyfield, 104 Kan. 587, 180 P. 208.

Where, in an action by a creditor of a decedent, against those whom he claims have fraudulently converted, and are fraudulently concealing, property belonging to the decedent, and praying discovery thereof in the interest of the plaintiff and all other creditors of the decedent, the issues have been submitted to a jury for the purpose of making advisory findings, it is not error for the court to refuse to be governed by such findings, but it may change them and make new ones, as under the evidence it thinks proper, as the action is triable to the judge and not to the jury as matter of right. Culp v. Mulvane, 71 P. 273, 66 Kan. 143.

Where, in equity, submission is made as though the jury were the ultimate triors of the facts, but if the court should determine to disregard the findings, it should allow the party against whom such determination is made to be heard before it as a court in all particulars in which a trial to the court differs from a trial to the jury. Vickers v. Buck Stove & Range Co., 68 P. 1081, 65 Kan. 97.

When issues submitted to a jury are not such as to entitle the parties to a jury trial as a matter of right, the court may consider the answers as merely advisory, and disregard any finding not supported by the evidence. Caldwell v. Brown, 44 P. 10, 56 Kan. 566.

A finding of the jury in an action for foreclosure, on an issue as to the

²¹ Mitchell v. Simpson, 63 P. 440, 62 Kan. 343.

²² Wat-tah-noh-zhe v. Moore, 129 P. 877, 36 Okl. 631; Shorten v. Judd, 55 P. 286, 60 Kan. 73, Limerick v. Jefferson Life Ins. Co., 169 P. 1090; Kentucky Bank & Trust Co. v. Pritchett, 44 Okl. 87, 143 P. 338.

not submit the case to the jury for a general verdict, but only distinct questions of fact for its advice.²³ In such cases error cannot ordinarily be predicated upon the order of proof,²⁴ refusal to propound interrogatories,²⁵ or refusal to instruct on questions of law applicable to a phase of the case, but not to any issue submitted to the jury.²⁶

§ 1145. Trial of issues

"Issues of law must be tried by the court, unless referred. Issues of fact arising in actions for the recovery of money, or of specific real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided."²⁷

This statute governs and the former distinction between actions and suits in equity is immaterial in determination of such right.²⁸

validity of a mortgage, could be considered by the court as merely advisory, and set aside as contrary to the evidence, and be replaced by a finding of the court. *Moors v. Sanford*, 41 P. 1064, 2 Kan. App. 243.

Where the court properly consolidates an action for specific performance with an action for replevin, the verdict rendered in the consolidated action is advisory only and may be disregarded by the court. *Akins v. Holmes*, 133 P. 849, 89 Kan. 812.

²³ *Watson v. Borah*, 132 P. 347, 37 Okl. 357.

In equity, submission of cause to jury for general verdict held error. *Apache State Bank v. Daniels*, 121 P. 237, 32 Okl. 121, 40 L. R. A. (N. S.) 901, Ann. Cas. 1914A, 520.

²⁴ In equity, where jury is merely advisory, the order of introduction of proof is discretionary, and the court may open the case at any time during the trial to admit additional proof as to any matter in issue. *Garnett v. Storm*, 64 Okl. 137, 166 P. 401.

²⁵ Whether interrogatories shall be propounded to the jury is in the discretion of the court. *Ball v. White*, 50 Okl. 429, 150 P. 901; *Mosler v. Walter*, 87 P. 877, 17 Okl. 305.

²⁶ *Shanks v. Pearson*, 78 P. 446, 70 Kan. 160.

In an action in the nature of a suit in equity, the court, in its discretion, submitted two questions of fact for the jury to answer, and subsequently, upon the findings of the jury and all the evidence in the case, rendered judgment for the defendant. Held, that the plaintiff was not prejudiced by the refusal of the court to instruct the jury upon matters of law applicable to the whole case, but which would not have aided the jury in deciding the particular questions of fact submitted to them. *Stickel v. Bender*, 15 P. 580, 37 Kan. 457.

²⁷ Rev. Laws 1910, § 4993.

²⁸ *Childs v. Cook* (Okl.) 174 P. 274; *Word v. Nakdimen* (Okl.) 178 P. 257.

Where a party defendant in a foreclosure suit claims an adverse title paramount to the mortgagor and the mortgagee in possession of the property,

Defendant in ejectment, notwithstanding his defense may be equitable, is entitled to a jury trial on any material issue of fact raised by the pleadings and the evidence.²⁹

The court and not a jury tries the issues of fact arising on a hearing of an application to strike the assignment of a judgment and satisfaction thereof from the record.³⁰

Where a third party files a denominated "interplea in attachment" claiming title and right to possession of attached property, he is a petitioner in replevin, and plaintiffs' general denial of allegations therein is triable by jury.³¹

In an action involving mutual accounts, a jury is not required on a further hearing of evidence by the court after rendition of verdict.³²

The parties are not entitled to a jury on the trial of the issue presented by a motion to discharge an attachment,³³ or garnishment.³⁴

and the plaintiff seeks to litigate and determine such adverse title, such defendant is entitled as of right to a trial by jury. *Busenbark v. Park*, 49 P. 682, 6 Kan. App. 1; *Gordon v. Munn*, 111 P. 177, 83 Kan. 242, 21 Ann. Cas. 1299.

In action for partition only, wherein defendant filed a cross-petition to have his title to land quieted, it was not error to refuse plaintiff's application for a jury trial on issues arising out of cross-petition and a reply denying its truth; that being a matter of equitable cognizance triable without a jury. *Foresman v. Foresman*, 103 Kan. 698, 175 P. 985.

Defendants, in possession of the land in controversy, with right to sue plaintiffs to quiet title, when sued, could, by counterclaim under Rev. Laws 1910, §§ 4745, 4746, avail themselves of such right, subject to same right as to trial by court as if their action had been first brought there and they were plaintiffs. *Mathews v. Sniggs*, 75 Okl. 108, 182 P. 703.

Where the answer sets up an equitable defense solely to defeat plaintiffs' recovery, and in which no affirmative relief by cross-petition is asked, defendants did not have same right as to trial by court as if their action had been first brought. *Mathews v. Sniggs*, 75 Okl. 108, 182 P. 703.

In a suit to establish and enforce a trust in land and to compel a convey-

²⁹ *Baldrige v. Sunday* (Okl.) 176 P. 404.

³⁰ *Leonard v. Ross*, 56 Okl. 118, 155 P. 885.

³¹ *Millus v. Lowrey Bros.*, 63 Okl. 261, 164 P. 663, L. R. A. 1918B, 336; Rev. Laws 1910, § 4701.

³² *Brooks v. Brooks*, 122 P. 889, 86 Kan. 944.

³³ *McComb v. Watt*, 39 Okl. 412, 135 P. 361.

A motion to discharge exempt property from attachment is triable to the court or judge, and neither party is entitled to a jury. *Cassady v. Morris*, 91 P. 888, 19 Okl. 203.

³⁴ *Kessler v. Frost*, 103 Kan. 711, 175 P. 967.

Issues arising on the pleadings as to the sufficiency of the grounds on which a judgment is sought to be vacated or modified, together with the validity of the defense or plea interposed, are triable to the court without the intervention of a jury.³⁵

Where two opposing parties claim the legal title to a sum of money paid into court by a third, the action is properly triable by a jury.³⁶

Where the answer in an action against the surety on a note does not state a defense, defendant's request for a jury trial is properly refused.³⁷

§ 1146. In actions at law or in equity or mixed actions

The court looks to the pleadings to determine the nature of the action and decide on the right to a jury.³⁸

The principal difficulty in determining whether or to what extent a case is triable by a jury as a matter of right arises in mixed actions. A jury trial is demandable in an action on notes and foreclosure of a lien, when issue is joined as to the amount due,³⁹ whether such issue be joined on the petition or on a cross-petition,⁴⁰

ance, or for relief in the nature of damages, the defendant, by filing a cross-petition asking for a money judgment, could not change the nature of the cause of action from an equitable action, so as to entitle him to a jury trial. *Brush v. Boyer*, 104 Kan. 168, 178 P. 445.

³⁵ *Poff v. Lockridge*, 98 P. 427, 22 Okl. 462.

³⁶ *Seward v. Seward*, 53 P. 63, 59 Kan. 387.

³⁷ *Goodacre v. Skinner*, 28 P. 705, 47 Kan. 575.

³⁸ Whether a party is entitled to a jury trial must be determined from the pleadings. *Boam v. Cohen*, 145 P. 559, 94 Kan. 42.

If the pleadings show an issue of fact in any civil action to recover money or specific real or personal property, it must be tried by jury, unless a jury is waived or a reference ordered under other provisions of the Code. *Childs v. Cook* (Okl.) 174 P. 274.

Defendants in action for breach of conditions of bond joining issue of fact as to damages are entitled to trial by jury. *White v. Hocker*, 58 Okl. 38, 153 P. 440.

³⁹ *Sherman v. Randolph*, 74 P. 102, 13 Okl. 224.

In an action on a promissory note secured by a chattel mortgage, where a personal judgment against defendant is prayed for, and the execution of the note is denied under oath, defendant is entitled to a jury. *State Journal Co. v. Commonwealth Co.*, 22 P. 982, 43 Kan. 93.

An action for judgment on notes and to foreclose a mortgage securing their payment, wherein issue is joined as to the indebtedness due, is properly triable before a jury, being one "for the recovery of money" within Rev. Laws 1910, § 4993. *Holmes v. Halstid*, 76 Okl. 31, 183 P. 969.

⁴⁰ Where a cross-petition seeks judgment on a note and foreclosure of a

but not where the action in the main is for rescission, though possession of realty is prayed for,⁴¹ or where, in an action to rescind a contract, cancel a debt, and quiet title, defendant's answer is in the nature of ejectment to which a general denial is filed,⁴² or because of the mere filing of an answer, setting up title in defendant and denying the existence of the highway to enjoin the obstructing or closing of which the action is brought.⁴³

Issues in civil actions for recovery of money or property must be tried by jury, unless waived, but all other issues may be tried by the court, subject to power to submit to jury or order reference.⁴⁴

§ 1147. In particular actions or proceedings

Issues of fact arising in a civil action, other than one for recovery of money, or of specific real or personal property, are triable to the court, subject to its power to order any issues to be tried by a jury or referred as provided by statute.⁴⁵

An action to establish a partnership, declare a trust in an oil and gas lease, and for an accounting, is triable to the court.⁴⁶

In an action partly based on a claim of equitable title to land which, if it existed, would restore to one of plaintiffs the title she had conveyed to one of defendants, with an answer setting up legal title under which conveyed, and seeking to quiet title against plaintiff's alleged equitable title, her lease, and her occupancy, the issues

mortgage, and an issue is joined as to the amount due, the defendant is entitled to a jury trial. *Brewer v. Martin*, 138 P. 166, 40 Okl. 350.

⁴¹ *Moore v. Kelly*, 57 Okl. 348, 157 P. 81.

⁴² *Hartsog v. Berry*, 45 Okl. 277, 145 P. 328.

⁴³ *Kansas City v. Burke*, 144 P. 193, 93 Kan. 236, denying rehearing 141 P. 562, 92 Kan. 531.

⁴⁴ *McCoy v. McCoy*, 121 P. 176, 30 Okl. 379, Ann. Cas. 1913C, 146.

Since a defendant is not entitled as a matter of right to a jury in the trial of cases in equity, a court commits no error in submitting one cause of action to the jury and in trying all other issues itself; the action submitted to the jury being one for the recovery of money while the other causes of action are in equity. *Woodman v. Davis*, 4 P. 262, 32 Kan. 344.

Under Code Civ. Proc. §§ 266, 267, 289, 291, 292, while all issues of fact in the district court may be tried by a jury, in some cases they must be so tried, unless the parties waive a jury; but, in others, it is within the discretion of the court whether they shall be so tried. *Smith v. Wise*, 25 P. 204, 44 Kan. 742.

⁴⁵ *Gorman v. Carlock* (Okl.) 179 P. 38.

⁴⁶ *Gorman v. Carlock* (Okl.) 179 P. 38.

made were equitable, and the court did not err in refusing a jury trial thereon, though trial to the court effectually disposed of the entire case.⁴⁷

A suit to establish and enforce a trust in lands and to compel a conveyance, or in case defendant has placed it out of his power to convey, for relief in the nature of damages is an equitable action, and defendant is not entitled, as a matter of right, to demand a jury;⁴⁸ but a claimant out of possession who has open to him the remedy of ejectment cannot escape a jury trial of a question of fact on which his claim depends by presenting that issue in some form of equitable action.⁴⁹

Where a claimant in possession sues to quiet title, his opponent is not guaranteed a jury merely because the controversy involves the ownership and in a sense and remotely the right of possession.⁵⁰

That the petition in an action to recover real property prays that the title be quieted does not make the action a nonjury cause properly triable by jury.⁵¹

A trial by jury is not required in suits brought to enjoin and abate a public nuisance.⁵²

An action to cancel a license to practice medicine on the ground that it is fraudulently obtained is an equitable proceeding, and the licensee is not entitled to a jury trial as a matter of right.⁵³

A special proceeding to enforce an attorney's lien on the proceeds of a judgment is of an equitable nature, and neither party is entitled as of right to trial by jury.⁵⁴

In injunction against trespassers on realty, a jury is not demand-

⁴⁷ Mathews v. Sniggs, 75 Okl. 108, 182 P. 703.

⁴⁸ Brush v. Boyer, 104 Kan. 168, 178 P. 445.

⁴⁹ Foresman v. Foresman, 103 Kan. 698, 176 P. 147.

⁵⁰ Foresman v. Foresman, 103 Kan. 698, 176 P. 147.

⁵¹ Mitchell v. Gafford (Okl.) 175 P. 227.

⁵² Reaves v. Territory, 74 P. 951, 13 Okl. 396; Gragg v. State (Okl.) 175 P. 201.

In action by the state to abate a public nuisance, the defendant is not entitled to a jury trial. Balch v. State (Okl.) 164 P. 776.

On the trial of an action to enjoin the maintenance of a liquor nuisance, defendant is not entitled to a jury trial as a matter of right. Cowdery v. State, 80 P. 953, 71 Kan. 450.

⁵³ Gulley v. Territory, 91 P. 1037, 19 Okl. 187.

⁵⁴ Epp v. Hinton, 102 Kan. 435, 170 P. 987.

able.⁵⁵ The same is true in a suit to cancel a deed for undue influence.⁵⁶

A suit to cancel deeds of a member of the Creek Tribe of Indians because executed in violation of a congressional enactment is of equitable cognizance, and the parties are not entitled, as matter of right, to a jury trial.⁵⁷

In foreclosure, where defendant against whom no money judgment is sought sets up incompetency of maker of note and mortgage and seeks cancellation, defendant is not entitled to jury trial.⁵⁸

In a guardian's action to rescind a transaction on the ground of mental incapacity, involving the cancellation of instruments and other equitable relief, a jury trial was properly denied.⁵⁹

An action against heirs or devisees to acquire title to realty, because decedent had agreed to will it to plaintiff, being in the nature of an action for specific performance, a jury cannot be demanded as of right.⁶⁰

An action by a grantor in a warranty deed to have the deed declared a mortgage and to redeem is equitable in character, and neither party is entitled to a general verdict.⁶¹

Defendant in a suit to cancel a deed of trust alleged to have been executed under duress is not entitled to a jury trial though the effect of the cancellation will be to restore the maker of the instrument to control of the land conveyed.⁶²

A jury trial cannot be demanded as a matter of right in an action to recover on a note, and to foreclose a mortgage, where the plead-

⁵⁵ *Raedell v. Anderson*, 158 P. 45, 98 Kan. 216.

⁵⁶ *Houston v. Goemann*, 99 Kan. 438, 162 P. 271.

⁵⁷ *Williams v. Diesel* (Okl.) 165 P. 187.

A suit by a citizen of the Creek Nation to clear title to part of an allotment on the ground that her deed was procured by fraud, in violation of the act of Congress is triable by the court, subject to its power to order issues tried by jury. *Carter v. Prairie Oil & Gas Co.*, 58 Okl. 365, 160 P. 319; Act Cong. April 26, 1906, c. 1876, § 19, 34 Stat. 144; Rev. Laws 1910, § 4994.

⁵⁸ *Echols v. Reeburgh*, 62 Okl. 67, 161 P. 1065.

⁵⁹ *Kuhn v. Johnson*, 137 P. 990, 91 Kan. 138.

A jury trial is not a matter of right, in an action to set aside a conveyance for mental incapacity of the grantor and fraud of the grantees. *Appling v. Jacobs*, 139 P. 374, 91 Kan. 793.

⁶⁰ *Nelson v. Schoonover*, 131 P. 147, 89 Kan. 388, rehearing denied 132 P. 1183, 89 Kan. 779; *Akins v. Holmes*, 133 P. 849, 89 Kan. 812.

⁶¹ *Hockett v. Earl*, 133 P. 852, 89 Kan. 733.

⁶² *Hogan v. Leeper*, 133 P. 190, 37 Okl. 655, 47 L. R. A. (N. S.) 475,

ings admit the right to recover the amount claimed to be due upon the note, and nothing is left in controversy but the right to foreclose the mortgage.⁶³

An action by a creditor of a decedent against those whom he claims have fraudulently converted and are fraudulently concealing property belonging to decedent, praying discovery thereof in the interest of the plaintiff and all others of deceased's creditors who should choose to come into the action and avail themselves of such recovery, is in the nature of a creditors' bill, and as such triable to the judge, and not to the jury as a matter of right.⁶⁴

An action for contribution by a stockholder of an insolvent corporation against other resident solvent stockholders, in which it is claimed that certain of the stockholders are insolvent and others are nonresidents of the state, asking for the apportionment of the liabilities of the resident solvent stockholders and a personal judgment against each, is an equitable action, and defendant stockholders are not entitled to a jury.⁶⁵

Where a receiver has been appointed for a bank in prosecuting a claim on its assets, a court may, if it sees fit, award a trial by jury as to the matters of fact or damages.⁶⁶

While the foregoing cases are illustrations of nonjury matters, the court holds in the following kind of cases a jury may be had as a matter of right:

Where the pleadings show that an issue of fact has arisen in any civil action to recover money or specific real or personal property, such issue must be tried by the jury, unless the jury is waived or a reference is ordered under other provisions of the Code.⁶⁸

⁶³ Morgan v. Field, 10 P. 448, 35 Kan. 162.

⁶⁴ Culp v. Mulvane, 71 P. 273, 66 Kan. 143.

⁶⁵ Merrill v. Prescott, 74 P. 259, 67 Kan. 787.

⁶⁶ State v. State Bank of Circleville, 114 P. 381, 84 Kan. 366.

⁶⁸ Word v. Nakdimen (Okl.) 178 P. 257; Rev. Laws 1910, § 4993.

Under Rev. Laws 1910, § 4993, providing that issues of fact arising in actions to recover money shall be tried by a jury unless waived, or a reference is ordered, it was error to refuse a trial by jury of issues in a bastardy proceeding as to whether defendant had settled with the mother of the child and whether the settlement was voluntary or had been obtained by duress. Anderson v. State, 140 P. 1142, 42 Okl. 151.

Under express provisions of Comp. Laws 1909, §§ 5785, 5786, all issues of fact, in actions to recover money or specific property, must be tried by a jury, unless waived or a reference is ordered; while all other issues are triable

In an action to enforce compensation where the validity of a release or other discharge of liability is involved, either party may under the Workmen's Compensation Act, demand a trial of that issue by a jury.⁶⁹

Under the statutes, issues of fact in an action for recovery of money only must be tried to a jury, unless jury trial is waived or reference ordered.⁷⁰

Where an action should have been, and in substance was, an action to recover real estate, defendant's right to a trial by jury could not be defeated by plaintiff's bringing the action in equity in the form of a suit to quiet title.⁷¹

by the court, subject to its power to submit issues to a jury or direct a reference. *Wat-tah-noh-zhe v. Moore*, 129 P. 877, 36 Okl. 631.

Under Willson's Rev. & Ann. St. 1903, § 4453, providing that issues of fact in actions for money or specific real or personal property shall be tried by a jury, unless waived, or a reference be ordered, and section 4454, providing that all other issues of fact shall be tried by the court, subject to its power to order any issue tried by jury or referred, a defendant in foreclosure against whom no money judgment was sought, was not entitled to a jury trial on the issues raised by his cross-petition setting up a cause of action involving the application of equitable doctrines. *Maas v. Dunmyer*, 96 P. 591, 21 Okl. 434.

⁶⁹ *Vogler v. Bowersock*, 102 Kan. 456, 170 P. 805.

⁷⁰ *Avery v. Hays*, 61 Okl. 145, 160 P. 712; Rev. Laws 1910, §§ 4989-4991, 4993, 4994.

Issues of fact arising in an action for the recovery of money must be tried to the jury, unless jury is waived or reference ordered as provided by statute. *Bennett v. Moore*, 62 Okl. 159, 162 P. 707.

Gen. St. 1901, § 4713, provides that issues of fact arising in actions to recover money, or specific property, shall be tried by a jury, unless a jury trial is waived, or a reference ordered. Section 4714 provides that all other issues of fact shall be tried by the court, etc. In an action to recover judgment on a note and foreclose a mortgage securing it, a defendant claimed that it had purchased the mortgaged land from the mortgagor's wife, under execution, and acquired a sheriff's deed thereto, and defendant mortgagor answered, denying that his wife had title when the judgment was rendered upon which the execution issued, but that she held it in trust for him. Held, that the defendant mortgagor was not entitled to a jury trial. *Sigel-Campion Live Stock Commission Co. v. Haston*, 81 Kan. 656, 106 P. 1096.

⁷¹ *Butts v. Butts*, 114 P. 1048, 84 Kan. 475.

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§ 1148. In special proceedings

A proceeding to contest a will under the laws of the territory of Oklahoma is not a suit at common law, wherein the parties were entitled to a trial by jury as a matter of right.⁷²

Where the proceeding is one to establish boundaries and not to establish title or recover possession, a jury trial is properly denied.⁷³

The law in force in the territory of Oklahoma on its admission as a state did not give persons committed to an insane hospital a right of trial by jury on the question of insanity.⁷⁴

A disbarment proceeding being a civil proceeding, the accused cannot demand a trial by jury as a matter of right.⁷⁵

The law in force in Oklahoma Territory at statehood gave respondent, in an action in the nature of quo warranto, the right of trial by jury, and this right remains in force under the Constitution, declaring that the right of trial by jury shall remain inviolate.⁷⁶

Where an issue of fact is joined in mandamus, the parties are entitled, as a matter of right, to a trial by jury.⁷⁷

Disobedience of an order of the district court to pay alimony being an indirect contempt of court, the party charged is entitled to

⁷² Cartwright v. Holcomb, 97 P. 385, 21 Okl. 548.

A will contest is not a suit wherein the parties are entitled to a trial by jury as a matter of right under Const. art. 2, § 19. Parker v. Hamilton, 49 Okl. 693, 154 P. 65.

⁷³ Terrell v. Chessmore, 94 Kan. 611, 146 P. 1152.

⁷⁴ Ex parte Dagley, 128 P. 699, 35 Okl. 180, 44 L. R. A. (N. S.) 389; Ex parte Linke, 128 P. 702, 35 Okl. 192.

Gen. St. 1909, § 8470, providing for a jury in lunacy inquests of four persons, one of whom must be a physician, does not violate the right to a jury trial guaranteed by the Constitution. State v. Linderholm, 114 P. 857, 84 Kan. 603, 892. On appeal from the probate to the district court in a lunacy proceeding, the proceeding is not changed, and the jury provisions of the Civil and Criminal Codes are not applicable. Id.

⁷⁵ State Bar Commission v. Sullivan, 131 P. 703, 35 Okl. 745, L. R. A. 1915D, 1218.

On trial of an attorney for disbarment for unprofessional conduct, he is not entitled to a trial by jury. In re Norris, 57 P. 528, 60 Kan. 649.

⁷⁶ State v. Cobb, 104 P. 361, 24 Okl. 662, 24 L. R. A. (N. S.) 639.

A proceeding by information in the nature of quo warranto is a suit at common law, within the meaning of Const. U. S. Amend. 7, providing for the right of trial by jury in such suits. Bradford v. Territory, 34 P. 66, 1 Okl. 366.

⁷⁷ Territory v. Chicago, R. I. & P. Ry. Co., 39 P. 389, 2 Okl. 108.

demand trial by jury, and refusal to grant such jury trial, when demanded, constitutes reversible error.⁷⁸

In proceedings by the state before the Corporation Commission to recover excess charges collected by a telephone company, the company is not entitled to a jury trial.⁷⁹

§ 1149. On intermediate appeal

On appeal to the district court from the county commissioners' disallowance of a claim, either party is entitled to a jury trial, unless the right is waived, or a reference is ordered.⁸⁰

A landowner, under the drainage act, appealing from the decision of the board of commissioners upon exceptions to the action of the viewers, is not entitled to trial by jury in the district court.⁸¹

The findings of the jury, where the questions of undue influence and testamentary capacity are submitted to them by the district court on appeal from a refusal to admit a will to probate are advisory only.⁸²

Where, on appeal to the district court from a judgment of the county court admitting a will to probate, the cause is transferred to the superior court, the latter court may order trial by jury.⁸³ However, the verdict of the jury to which the superior court submits issues involved on appeal in a will contest is merely advisory.⁸⁴

§ 1150. Infringement of right

The Legislature may deny the right to a jury in confiscation cases and cases before a referee.⁸⁵

⁷⁸ Wood v. Wood (Okl.) 174 P. 269; Const. art. 2, § 25, Rev. Laws 1910, § 2279.

⁷⁹ Pioneer Telephone & Telegraph Co. v. State, 138 P. 1033, 40 Okl. 417.

⁸⁰ Board of Com'rs of Alfalfa County v. Ferguson (Okl.) 166 P. 437.

⁸¹ Catron v. Deep Fork Drainage Dist. No. 1, 130 P. 263, 35 Okl. 447.

⁸² Bilby v. Stewart, 55 Okl. 787, 153 P. 1173.

⁸³ Parker v. Hamilton, 49 Okl. 693, 154 P. 65.

⁸⁴ Parker v. Hamilton, 49 Okl. 693, 154 P. 65.

⁸⁵ Laws 1917, c. 188, § 2, providing that the court having jurisdiction of property seized as having been used in unlawful transportation of intoxicating liquors shall, without a jury, order a hearing and take evidence and determine as in civil cases, does not violate the United States Constitution or Const. Okl. art. 2, § 19, as denying a jury trial. One Cadillac Automobile, 1918 Model, v. State, 75 Okl. 134, 182 P. 227.

Code Civ. Proc. § 304, authorizing the appointment of a referee to hear and report on the whole issue, or any specific question of fact in a case pending in the district court, where the issue shall require an examination of mutual

In an action at law pending before admission of the state, in which the parties were entitled to a jury trial, it was error for the court, over objection, after a jury had been impaneled, to refer the case to a referee for trial.⁸⁶

The court cannot, for alleged misconduct of a juror, withdraw him during the progress of the trial, and continue the trial with the remaining 11 jurors, without the consent of all the parties.⁸⁷

The right to a jury trial is not infringed by the statute authorizing the court to permit the jury to separate.⁸⁸

accounts, is not in violation of the seventh amendment to the constitution of the United States, providing that, in suits at "common law," where over \$20 is involved, the right of trial by jury shall be preserved. *Brewer v. Asher*, 56 P. 714, 8 Okl. 231.

Under Sess. Laws 1907-08, c. 69, art. 3, §§ 5, 6, as amended by Sess. Laws 1911, c. 70, §§ 9, 10, held that a party interpleading and claiming title to the property seized and answering that the property was not kept with intent to violate such act is entitled to a jury trial. *Bogan v. State*, 56 Okl. 367, 156 P. 233; *Board of Com'rs of Grant County v. McKinley*, 56 P. 1044, 8 Okl. 128.

⁸⁶ *Taby v. McMurray*, 30 Okl. 602, 120 P. 664.

⁸⁷ *Board of Com'rs of Cloud County v. Morgan*, 52 P. 896, 7 Kan. App. 213.

⁸⁸ *Wilson's Rev. & Ann. St.* 1903, § 5512, authorizing the court in its discretion to permit the jury to separate before final submission of the cause, is not repugnant to Const. Bill of Rights, § 19, declaring that the right of trial by jury shall remain inviolate. *Armstrong v. State*, 103 P. 658, 2 Okl. Cr. 567, 24 L. R. A. (N. S.) 776.

ARTICLE II

JURY PANEL

Sections

- 1151. Jury commission.
- 1152. Meeting of jury commissioners—Quorum.
- 1153. Jury lists.
- 1154. Lists to be certified.
- 1155. District court—How drawn.
- 1156. Venires—How served—Form.
- 1157. Open venires—Talesmen—Form.
- 1158. County court—How selected.
- 1159. Procedure when regular panel exhausted.
- 1160. Qualifications of jurors—Exemptions.
- 1161. Former list removed when new list selected.
- 1162. Irregularities in drawing.

§ 1151. Jury commission

"It shall be the duty of the judge of the district court, for each county, to appoint, on or before the first day of January of each year, three discreet, honorable and reputable persons, one from each county commissioner's district, having the qualifications of jurors as prescribed in this chapter, not more than two of whom shall be of the same political party, and who shall not be interested in any cause, civil or criminal, pending in any court of this State, which persons shall constitute a board of jury commissioners for the district and county courts: Provided, that in counties where the district judge, for any cause, fails to appoint the jury commissioners for a period of fifteen days, after the first day of January, it shall be the duty of the county judge of such county to appoint the jury commissioners as herein provided, and they shall at once meet to perform these duties as hereinafter provided: Provided, further, that no commissioner shall serve more than one year in succession." ⁸⁹

"If for any cause the jury commissioners should not be appointed at the time prescribed, or should fail to select jurors as required, or should the panel be set aside, or the jury list returned into the court be lost or destroyed, the district or county judge presiding shall forthwith convene the jury commissioners, who shall

⁸⁹ Rev. Laws 1910, § 3689.

proceed to supply a sufficient number of jurors for the term, who shall possess the qualifications of jurors as herein provided." ⁹⁰

§ 1152. Meeting of jury commissioners—Quorum

"In the absence of any one of the said board of jury commissioners, two members thereof shall have the power to perform all the duties of said commissioners; and in the event there is any disagreement between the said commissioners about any matters coming before them, two members thereof shall have the power to determine any and all such matters. In the event the said commissioners shall for any cause whatever fail to meet at the time and place and upon the days designated herein for their meeting, they shall meet as soon thereafter as possible, and legally perform all the duties herein provided, the same as though they met at the time and place and on the days herein specified." ⁹¹

§ 1153. Jury lists

"Said jury commissioners shall meet in the office of the county clerk, on the first Monday in January and July of each year, and at such other times as the district judge may order, and, after taking and subscribing their official oath, they shall proceed to select, for the district court, one list of names, of not less than two hundred persons, or such other number as the district judge may order, and a second and different list for the county court, of not less than two hundred names, or such other number as the county judge may order, which lists shall be selected from the names on the tax rolls of the county. No name of any person who does not possess the qualifications of a juror as prescribed by this chapter, or who has served upon a regular jury panel within the preceding twelve months, shall be placed upon a jury list. Each jury list shall be made up of names of persons from the various municipal townships in the county in proportion, as nearly as practicable, to the voting strength of such township." ⁹²

§ 1154. — Lists to be certified

"The board of jury commissioners shall make two separate certified lists of the names drawn for the said courts, showing the elec-

⁹⁰ Rev. Laws 1910, § 3697.

⁹¹ Rev. Laws 1910, § 3702.

⁹² Rev. Laws 1910, § 3690.

tion precinct from which each juror was selected; one of said lists for the district court shall be delivered to the clerk of the district court and there retained, and the list for the county court to the judge of the county court of said county, and there retained." ⁸⁸

§ 1155. District court—How drawn

"The district clerk, or his deputy, as soon as said list is delivered to him, shall forthwith write each of said names upon a separate slip of paper, which slips shall be of uniform size and color, and shall fold said slips, and place them in a box provided with two locks and keys, of different designs, and securely lock the same, leaving no opening when said box is closed and locked. The key of one lock shall be retained by the clerk, or his deputy, and the other one shall be delivered to the sheriff of said county, or his deputy. Prior to or during any term of court at which a grand or petit jury shall be required, the judge of the district court shall certify to the clerk of the district court the number of jurors that will be required for either a grand or petit jury and shall direct said jury to be drawn and summoned at such time as he may indicate. Upon receiving such order, the clerk of the district court, or his deputy, shall notify the sheriff, or his deputy, of the time of the drawing of such jury, and the sheriff, or one of his deputies, and the clerk of the district court, or one of his deputies, shall take the box containing the names of jurors so selected, and thoroughly shake the same. They shall then, together, in the presence of each other, open said box, and, after placing the same in a position that neither can see into it, shall draw from it alternately one at a time, and record the same, until the number of jurors have been drawn, as required for any term of court as specified in the order of the judge. As soon as said jurors are drawn and the names are recorded, the slips drawn shall be destroyed, and the box with unused names shall be securely locked and retained in the office of the district clerk, one key being retained by the sheriff, or his deputy. The list of names, as originally delivered by the commissioners shall be sealed in an envelope and filed in the clerk's office. Upon the completion of said drawing, said clerk, or his deputy, shall issue separate venirens for the grand and petit jurors, returnable at such a time as the judge in his order may direct. The first names drawn, to the number stated in the

⁸⁸ Rev. Laws 1910, § 3691.

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judge's order, not to exceed twenty-four, if a grand jury is ordered, shall be summoned as grand jurors, and the grand jury shall be empaneled from said persons. If the judge so directs, the persons summoned for the grand jury panel and not used may be transferred to the petit jury panel. Additional and other drawing of as many names as the court may order may be had at any such time as the court or judge may order for the completion of a grand or petit jury panel, or for the empaneling of a new grand or petit jury, during any term of court, if, in the judgment of the court the same shall be necessary, or, if, for any cause, the court, in its discretion, shall deem other jurors necessary. The court may excuse or discharge any person drawn and summoned as a grand or petit juror, whenever, in its discretion, such action shall be deemed expedient. No juror shall be allowed to serve more than two weeks at one term, unless at the end of such period, he is upon a panel engaged in the consideration of a case, in which event he may be excused when such case is terminated: Provided, that if the judge is of the opinion that the jury business of a term of court may be concluded within six days, he may require a jury, or a juror, to remain until the termination of said jury service, by entering an order to that effect upon the court journal; and this provision shall apply to both the district and county courts." ⁹⁴

§ 1156. Venires—How served—Form

"The summons of the venires for the grand and petit juries for the district and superior courts and the petit juries for the county courts of this state shall be served by the clerk of such court by mailing a copy of such summons containing the time, place and the name of the court upon which said jurors are required to attend, by registered mail to the person named in the venires not less than ten (10) days before the day said juror is to appear as a juror in such court. The clerk shall make a return of such service by filing therewith the registry return of the service thereof; provided, that this shall not prevent service of special venire or talesmen by the sheriff of the county." ⁹⁵

⁹⁴ Rev. Laws 1910, § 3692.

⁹⁵ Sess. Laws 1918, p. 113, § 1, amending Rev. Laws 1910, § 3695.

SUMMONS OF VENIRE FOR PETIT JURY

State of Oklahoma, }
County of _____ } ss.:

To _____ Greeting:

You are hereby summoned and commanded to be and appear before the district court to be held in and for said county in the city of _____, on the _____ day of _____, A. D. 19—, at the hour of _____ o'clock, a. m., to serve as a juror in said court, and have you then and there this writ.

Hereof fail not under penalty of law.

Witness my hand and official seal this _____ day of _____, 19—.

_____, Court Clerk,

By _____ Deputy Court Clerk.

§ 1157. Open venires—Talesmen—Form

"At any time during the term of any court, after the petit jury has been drawn and summoned in the manner herein provided for, when, for the trial of any cause, civil or criminal, the regular panel of jurors shall appear to be insufficient, the jury may be completed from talesmen, or the court may direct that an open venire be issued to the sheriff or other suitable person, for such number of jurors as may be deemed necessary, to be selected from the body of the county, or from such portion of the county as the court may order: Provided, that no person shall serve as a talesman oftener than once a year." **

OPEN VENIRE FOR JURY

(Caption.)

The State of Oklahoma to the Sheriff of _____ County—Greeting:

You are hereby commanded to summon _____ persons possessing the qualifications of jurors, from the body of the county and not from the bystanders, to be and appear before this court at the court room thereof in the court house in the city of _____, said county and state, on the _____ day of _____, 19—, at the hour of _____ o'clock _____ m., to serve as jurors in a case there pending in

** Rev. Laws 1910, § 3693.

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which A. B. is plaintiff and C. D. is defendant, until excused by this court, and thereof to fail not at their peril; and have you then and there this writ with your return hereof.

Witness the honorable ———, Judge of said Court, and the seal thereof, this ——— day of ———, 19—.

(Seal.)

———, Court Clerk,

By ———, Deputy.

§ 1158. — County court—How selected

"The county judge or his clerk shall, as soon as said list is delivered to him, forthwith write each of said names upon a separate slip of paper, which shall be of uniform size and color, and shall fold said slips and place them in a box provided with two locks and keys, of different designs, and securely lock the same, leaving no opening when said box is closed and locked, and the key of one lock shall be retained by the county judge, or his clerk, and the other key shall be delivered to the sheriff of the county or his deputy, and said box retained in the office of the county judge. The list of names, as originally delivered by the commissioners, shall be sealed in an envelope and filed in the county clerk's office. Prior to, or during, any term of court, at which a petit jury may be required for the trial of either civil or criminal cases, the county judge shall proceed, either personally, or through his clerk, to notify the sheriff of said county of the time of the drawing of not to exceed twenty-four names from said box. Upon receipt of said notice the sheriff, or one of his deputies, and the county judge, or his clerk, shall take the box containing the names of the jurors for the county court and thoroughly shake the same. They shall then, together in the presence of each other, open said jury box, and after placing the same in a position that neither can see into it, shall draw therefrom alternately, one at a time, and record the same until the required number of jurors have been drawn. As soon as said jurors are drawn and the names recorded, the slips so drawn shall be destroyed and the box with the unused names shall be securely locked and retained in the office of the county judge; one key being retained by the sheriff, or his deputy, as aforesaid. Upon the completion of said drawing, the venire shall be issued by said county judge, or his clerk, containing the names of said jurors returnable at such time as the judge shall, in his order, direct: Pro-

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vided, that additional and other drawings may be had at such times as the judge of said county court may order for the completion of the panel, or for the impaneling of a new jury during the term, if, in the judgment of the court, the same becomes necessary. The court may, for any cause in its discretion, excuse any person drawn and summoned as a petit juror. Jurors in the county court shall receive the same compensation as jurors in the district court." ⁹⁷

§ 1159. Procedure when regular panel exhausted

"At the trial of any cause in the county court, after the regular panel has been discharged, and after the issues shall have been made up if, in the discretion of the court, justice will be best subserved by so doing, the judge thereof may forthwith issue an order directed to the sheriff, or his deputy to summon twelve good and lawful men, from the body of the county, possessing the qualifications of jurors, as provided herein, and should one or more of said jurors so summoned be disqualified to try said cause, the judge shall forthwith order one or more jurors to be summoned as herein provided, until the full number of twelve jurors qualified to try such cause shall be in the jury box, from which a jury of six shall be selected and qualified to try such cause. Each party shall have the right to three peremptory challenges, which shall be by striking three names, and the six remaining shall constitute the jury to try the cause." ⁹⁸

§ 1160. Qualifications of jurors—Exemptions

"All male citizens, residing in this State, having the qualifications of electors, of sound mind and discretion, of good moral character, not justices of the Supreme Court or judges of the Criminal Court of Appeals, district court, superior court or county court, sheriffs or deputy sheriffs, constables, jailers, licensed attorneys engaged in the practice of law, habitual drunkards, not afflicted with a bodily infirmity amounting to a disability, and who have never been convicted of any infamous crime or served a term of imprisonment in any penitentiary, for the commission of a felony, are competent jurors to serve on all grand and petit juries within their coun-

⁹⁷ Rev. Laws 1910, § 3694.

⁹⁸ Rev. Laws 1910, § 3696.

ties: Provided, that persons over sixty years of age, ministers of the gospel, and county or district officials, practicing physicians, undertakers, pharmacists, teachers in public schools, postmasters, and carriers of the United States mail, members of the national guard, and all members of good standing of any regular organized fire department, if they claim their exemption, shall not be compelled to serve as jurors in this state.”⁹⁹

§ 1161. Former list removed when new list selected

“Before placing in the jury box the names selected by the jury commission at any of its meetings, as herein provided, it shall be the duty of the clerk of the district court, or his deputy, and of the county judge, or his clerk, to remove from the respective jury boxes any names remaining therein, and to record the same upon the journal of the respective courts, and to certify to the correctness thereof.”¹

§ 1162. Irregularities in drawing

“A substantial compliance with the provisions of this chapter shall be sufficient to prevent the quashing or setting aside of any indictment of a grand jury chosen hereunder, unless the irregularity in drawing, summoning or impaneling the grand jury resulted in depriving a defendant of some substantial right, but such irregularity must be specifically presented to the court on or before the cause is first set for trial. A substantial compliance with the provisions of this chapter shall be sufficient to prevent the setting aside of any verdict rendered by a jury chosen hereunder, unless the irregularity in drawing and summoning or impaneling the same resulted in depriving a party litigant of some substantial right: Provided, however, that such irregularity must be specifically presented to the court at or before the time the jury is sworn to try the cause.”²

⁹⁹ Rev. Laws 1910, § 3698.

¹ Rev. Laws 1910, § 3700.

² Rev. Laws 1910, § 3701.

ARTICLE III

QUALIFICATIONS, CHALLENGES, AND EXEMPTIONS

Sections

- 1163. Challenges to panel.
- 1164. Statutory grounds for challenge.
- 1165. Qualifications in general.
- 1166. Waiver of objection.
- 1167. Order of challenges.
- 1168. Challenges for cause.
- 1169. Vacancies filled at once.
- 1170. Talesmen.
- 1171. Exemptions.

§ 1163. Challenges to panel

That a venire for special jurors was served by a biased, prejudiced, or incompetent person should be taken advantage of by challenge to the special venire.³

To authorize the quashing of a venire, the defendant must show irregularities in connection therewith which are reasonably calculated to deprive him of a substantial right.⁴

A challenge to the panel can be founded only on material departure from the forms of law, or an intentional omission to summon one or more jurors, and the burden is on defendant to show that the illegality is such as to have caused material prejudice.⁵

³ Saunders v. State, 111 P. 965, 4 Okl. Cr. 264, Ann. Cas. 1912B, 766.

Disallowance of challenge made to the jury panel pursuant to Rev. Laws 1910, § 5848, on account of bias of the summoning officer held error. Koontz v. State, 139 P. 842, 10 Okl. Cr. 553, Ann. Cas. 1916A, 689.

⁴ January v. State, 16 Okl. Cr. 166, 181 P. 514; Edwards v. State, 127 P. 872, 8 Okl. Cr. 341; Wood v. State, 107 P. 937, 3 Okl. Cr. 553.

A challenge to the array or panel will lie for bias or irregular action of the summoning officer. Harjo v. United States, 1 Okl. Cr. 590, 98 P. 1021, 20 L. R. A. (N. S.) 1013.

See Rev. Laws 1910, § 3701.

On a motion to set aside the jury panel on the ground that the jury commissioners were improperly appointed and the jury improperly drawn, the burden is on the persons attacking the regularity of the proceedings to establish their contention, and, when this is not done, the motion to set aside should be overruled. Munn v. State, 114 P. 272, 5 Okl. Cr. 245.

⁵ Maddox v. State, 12 Okl. Cr. 462, 158 P. 883.

A challenge to a petit jury panel can be founded only on a material departure from the law for the drawing and returning of the jury, or intentional misconduct of the sheriff in summoning them, and must show that defendant

A failure to select jurors from all the cities and townships of the county, is not ground for challenge to the array.⁶

That a jury was composed solely of white men is not ground for a challenge to the panel, unless negroes were excluded therefrom solely on account of their race and color.⁷

Remarks of a trial judge to petit jurors at the beginning of the term where the defendant was convicted form no ground of challenge to the entire panel as such challenge can be based only on the grounds stated in the statute.⁸

Prejudice of individual jurors against the accused is no ground for challenge to the panel, but should be raised by challenging for cause the prejudiced jurors individually.⁹

After learning that several petit jurors are not eligible, the court may purge the jury without sustaining a challenge to the array.¹⁰

Where any portion of the jurors are disqualified by having served the statutory period, and not having been held over by proper order of court for six days, and the others in the panel are not affected by the disqualification, this question should be raised by a challenge for cause, and when this is not done the objection is waived.¹¹

has suffered some material prejudice. *Wadsworth v. State*, 9 Okl. Cr. 84, 130 P. 808.

⁶ *State v. Schmidt*, 87 P. 742, 74 Kan. 627; *Same v. Thorp*, Id.; *Same v. Thomas*, Id.

⁷ *McIntosh v. State*, 128 P. 735, 8 Okl. Cr. 469.

Where a negro under oath challenges the panel, on the ground that the commissioners and sheriff had excluded from the jury all persons of African descent on account of their race, the court should hear evidence, and, if negroes were intentionally excluded, the challenge should be sustained. *McIntosh v. State*, 128 P. 735, 8 Okl. Cr. 469.

Where a negro is charged with crime, and challenges the panel on the ground that the commissioners and sheriff excluded from the jury all negroes on account of their race and color, and offers evidence to sustain the challenge, if the court is of the opinion that as a matter of fact negroes were intentionally excluded on the ground charged, the motion should be sustained. *Smith v. State*, 111 P. 960, 4 Okl. Cr. 328, 140 Am. St. Rep. 688.

⁸ *Pate v. State*, 15 Okl. Cr. 90, 175 P. 122; Rev. Laws 1910, § 5842.

⁹ *Remer v. State*, 109 P. 247, 3 Okl. Cr. 706.

¹⁰ Where 26 persons are summoned as petit jurors, and it is affirmatively shown on the part of the defendant that 2 or 3 of the panel are not eligible, the court can purge the jury without sustaining a challenge to the array. *State v. Whisner*, 10 P. 852, 35 Kan. 271.

¹¹ *Stuard v. State*, 116 P. 204, 6 Okl. Cr. 94, denying rehearing 114 P. 1133, 5 Okl. Cr. 686.

After a jury has been selected, it is too late to challenge the array and panel.¹²

It is not error for the trial court to refuse to hear evidence offered in support of a challenge to the panel of jurors, where the challenge states no facts which, if proved, would justify the court in sustaining it.¹³

§ 1164. Statutory grounds for challenge

"If there shall be impaneled, for the trial of any cause, any petit juror, who shall have been convicted of any crime which by law renders him disqualified to serve on a jury; or who has been arbitrator on either side, relating to the same controversy; or who has an interest in the cause; or who has an action pending between him and either party; or who has formerly been a juror in the same cause; or who is the employer, employee, counselor, agent, steward or attorney of either party; or who is subpoenaed as a witness; or who is of kin to either party; or any person who shall have served once already on a jury, as a talesman on the trial of any cause, in the same court during the term, he may be challenged for such causes; in either of which cases the same shall be considered as a principal challenge, and the validity thereof be tried by the court; and any petit juror who shall be returned upon the trial of any of the causes hereinbefore specified, against whom no principal cause of challenge can be alleged, may nevertheless, be challenged on suspicion of prejudice against, or partiality for either party, or for want of competent knowledge of the English language, or any other cause that may render him, at the time, an unsuitable

¹² Beatty v. State, 113 P. 237, 5 Okl. Cr. 105.

A challenge to the array if not made before the parties have exhausted their peremptory challenges and challenges for cause is not made in time. State v. Everson, 64 P. 1034, 63 Kan. 66.

¹³ Remer v. State, 109 P. 247, 3 Okl. Cr. 706.

While the trial court, when a challenge to a petit jury panel is presented and properly denied, must try the issue of fact, it is not error for the court to overrule such challenge, where, if true, it fails to state facts sufficient to justify the discharge of the jury. Wood v. State, 107 P. 937, 3 Okl. Cr. 553.

A challenge to a panel because of a material departure from prescribed forms as to selection, drawing, and return of panel, and because panel was not a fair, impartial panel, to defendant's material prejudice, was properly denied under Rev. Laws 1910, § 5843, because not specifying facts showing how panel was not summoned as prescribed by law. Wilson v. State (Okl. Cr. App.) 183 P. 613.

juror; but a resident and taxpayer of the state or any municipality therein shall not be thereby disqualified in actions in which such municipality is a party. The validity of all challenges shall be determined by the court."¹⁴

§ 1165. Qualifications in general

Parties to an action have no vested right in any particular juror, and all that either can insist upon is that jurors actually selected shall be competent, disinterested, and selected according to law.¹⁵

The competency of a juror is a question for the court, but its discretion is not intended to deprive the defendant of his right to a trial by an impartial jury, nor does the statute change the essential qualifications of jurors.¹⁶

A challenge for cause is properly overruled, where the court is satisfied that the juror is competent and he states that he will try the case on the evidence.¹⁷

In the absence of an express statute making a juror who had been convicted of felony in another state incompetent, such conviction and sentence can have no effect by disqualification beyond the limits of the state in which the judgment was rendered.¹⁸

At common law, the fact that a juror was an alien or had been convicted of crime was a cause of challenge, and there was no distinction between a person convicted of a felony and an alien.¹⁹

The fact that a juror was in the court room and heard the evi-

¹⁴ Rev. Laws 1910, § 4997.

¹⁵ *Bank of Buffalo v. Venn* (Okl.) 171 P. 450.

¹⁶ *Temple v. State*, 15 Okl. Cr. 176, 175 P. 733; *State v. Molz*, 139 P. 376, 91 Kan. 901.

Under Williams' Const. § 14, every citizen accused of crime is entitled to have justice administered by an impartial jury, without sale, denial, delay, or prejudice. *Tegeler v. State*, 9 Okl. Cr. 138, 130 P. 1164. Comp. Laws 1909, § 6814, relating to challenges of jurors for bias, must be construed in connection with the constitutional guaranties of trial by an impartial jury without sale, denial, delay, or prejudice. *Id.*

Where trial court excuses juror because of bias in favor of one defendant and his acquaintance with the family of defendant, his action was a matter of discretion, under Rev. Laws 1910, § 5858, subd. 2. *Collins v. State*, 15 Okl. Cr. 96, 175 P. 124.

¹⁷ *State v. Compton*, 146 P. 1161, 94 Kan. 642.

¹⁸ *Queenan v. Territory*, 71 P. 218, 11 Okl. 261, 61 L. R. A. 324, judgment affirmed 23 S. Ct. 762, 190 U. S. 548, 47 L. Ed. 1175.

¹⁹ *Queenan v. Territory*, 71 P. 218, 11 Okl. 261, 61 L. R. A. 324, judgment affirmed 23 S. Ct. 762, 190 U. S. 548, 47 L. Ed. 1175.

dence on a plea in bar did not disqualify him to serve in the main case subsequently tried.²⁰

In an action against a city the court may on challenge, excuse from the jury all residents and taxpayers of the city.²¹

In a prosecution for obtaining money on bogus school warrants, school district officers and residents of the school district on which the warrants were drawn are competent jurors.²²

The question on a challenge to a juror for prejudice, known in old practice as "challenge to the favor," is for the court.²³

If for any reason the trial court is of the opinion or suspects that a juror is not impartial, it is its duty to excuse such juror on challenge by one of the parties.²⁴

"Impartial," applied to jurors, means not favoring one more than another; treating all alike; unbiased; equitable, fair, and just.²⁵

The statute providing that no person shall be disqualified as a juror for forming or expressing an opinion upon the matter to be submitted to such jury, founded upon rumor, statements in public journals, or common notoriety, provided it appears to the court that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters to be submitted to him, is not violative of Const. Bill of Rights, § 20, guaranteeing a trial by an impartial jury.²⁶

²⁰ State v. Scott, 42 P. 264, 1 Kan. App. 748.

²¹ City of Oklahoma City v. Meyers, 46 P. 552, 4 Okl. 626.

It is not error for the court to excuse one from a jury, in an action for damages for personal injury against a city, when such person shows on his voir dire that he is a resident citizen and taxpayer of said city, and other competent jurors were selected, examined, and impaneled, as provided by law. City of Guthrie v. Shaffer, 54 P. 698, 7 Okl. 459.

²² State v. McDonald, 52 P. 453, 59 Kan. 241.

²³ Border v. Carrabine, 30 Okl. 740, 120 P. 1087.

²⁴ Boucher v. State, 111 P. 1006, 4 Okl. Cr. 576, rehearing denied Boucher v. Same, 112 P. 762, 4 Okl. Cr. 138, 130 P. 1164.

²⁵ Tegeler v. State, 9 Okl. Cr. 138, 130 P. 1164.

²⁶ Turner v. State, 111 P. 988, 4 Okl. Cr. 164; Rev. Laws 1910, § 5861; State v. Bussey, 50 P. 891, 58 Kan. 679; State v. Treadwell, 38 P. 799, 54 Kan. 507; Horn v. State, 13 Okl. Cr. 354, 164 P. 683; State v. Stewart, 116 P. 489, 85 Kan. 404; State v. Bane, 42 P. 376, 1 Kan. App. 537; State v. Brannon, 50 P. 986, 6 Kan. App. 765.

The formation and expression of an opinion by a juror necessary to work a disqualification must be an abiding bias of the mind, caused by substantial facts in the case, in the existence of which the juror believes,—an opinion, upon the merits of the case, upon the guilt or innocence of the accused of the

The opinion necessary to disqualify a juror must be one based on what purports to be the facts, and one that will combat the evidence.²⁷

Light impressions constitute no sufficient objection to a juror, but those deep impressions which close the mind against the testimony that may be offered in opposition to them will disqualify a juror.²⁸

Where a juror testifies that he has a fixed opinion as to the guilt of defendant, which it will take strong evidence to remove, he is disqualified, and the mere fact that he may be of opinion that he can try the case fairly and impartially does not qualify him.²⁹

charge laid in the indictment, and upon the evidence substantially as expected to be presented on trial. *Huntley v. Territory*, 54 P. 314, 7 Okl. 60.

Rev. Laws 1910, § 5861, providing when a person shall not be disqualified as a juror by reason of having formed or expressed an opinion, held valid. *Gentry v. State*, 11 Okl. Cr. 355, 146 P. 719.

A juror's opinion based on rumor or from reading the public press will not disqualify, if the court is satisfied that the opinion will not combat the evidence or resist its force. *Johnson v. State*, 97 P. 1059, 1 Okl. Cr. 321, 18 Ann. Cas. 300; *Turner v. State*, 111 P. 988, 4 Okl. Cr. 164; *Smith v. State*, 14 Okl. Cr. 250, 174 P. 1107; *Stone v. State*, 12 Okl. Cr. 313, 155 P. 701; *Jones v. State*, 129 P. 446, 8 Okl. Cr. 576; *Gentry v. State*, 11 Okl. Cr. 355, 146 P. 719; *State v. Beatty*, 25 P. 899, 45 Kan. 492; *State v. Truskett*, 118 P. 1047, 85 Kan. 804; *State v. Treadwell*, 38 P. 813, 54 Kan. 513; *State v. Beuerman*, 53 P. 874, 59 Kan. 586; *State v. Start*, 56 P. 15, 60 Kan. 256; *State v. Morrison*, 68 P. 48, 64 Kan. 669.

It is not necessarily an abuse of discretion to sustain a challenge to a juror who has formed an opinion based on rumors or newspaper reports, when he states that he will render a fair and impartial verdict. *Bradford v. Territory*, 37 P. 1061, 2 Okl. 228.

²⁷ *Scribner v. State*, 108 P. 422, 3 Okl. Cr. 601, 35 L. R. A. (N. S.) 985.

The overruling of a challenge to a juror is ground for reversal, where he stated that the facts had been detailed to him and that he had a fixed opinion as to defendant's guilt or innocence. *Morehead v. State*, 12 Okl. Cr. 62, 151 P. 1183, Ann. Cas. 1918C, 416.

The exclusion of a question to a juror on voir dire, if it would have any bearing on him if it should develop during the trial that the defendant had previously been convicted of manslaughter, was proper. *Manning v. State*, 123 P. 1029, 7 Okl. Cr. 367.

Where the state relies in part upon the testimony of an accomplice, and a juror testifies that he would disregard the testimony of the accomplice however corroborated, it is not error to sustain a challenge for cause. *Gilbert v. State*, 127 P. 889, 8 Okl. Cr. 329.

It is not error to overrule challenge to juror for cause, where juror is indebted to one of the parties. *Forbes v. Madden*, 158 P. 850, 98 Kan. 559.

²⁸ *Tegeler v. State*, 9 Okl. Cr. 138, 130 P. 1164.

²⁹ *Tegeler v. State*, 9 Okl. Cr. 138, 130 P. 1164; *Scribner v. State*, 108 P. 422,

The rejection of a juror turns not on whether he says he has an opinion, but whether as matter of law he had such opinion as under the law is a disqualification.³⁰

In the summary hearing of a challenge to a juror, on the ground of predetermined opinion, formed or expressed, the real question is whether the juror knows facts or has received information of facts which he believes to be true, and from such facts has a settled conviction or opinion as to the issue or as to any material fact to be tried by the jury.³¹

A juror is not disqualified to sit by reason of having formed or

3 Okl. Cr. 601, 35 L. R. A. (N. S.) 985; *State v. Snodgrass*, 34 P. 750, 52 Kan. 174; *State v. Vogan*, 42 P. 352, 56 Kan. 61; *State v. Brownfield*, 73 P. 925, 67 Kan. 627.

In an action against a railroad company for personal injuries, a juror admitted that it would require a continual effort to deal with the railroad company in the same way that he would with an individual, and that, perhaps, he could not consider the case in an impartial way. Held incompetent. *Atchison, T. & S. F. R. Co. v. Chance*, 45 P. 60, 57 Kan. 40.

In an action by a nonresident to recover for personal injuries, where a juror states that he has a prejudice against nonresidents bringing such actions where they might have been brought in the state of plaintiff's residence, and that he will require more evidence in such case on the part of plaintiff, it is error to overrule a challenge for cause. *Naylor v. Metropolitan St. Ry. Co.*, 71 P. 835, 66 Kan. 407.

³⁰ *State v. Van Wormer*, 103 Kan. 309, 173 P. 1076.

Where juror on his voir dire stated that he had no opinion, and had expressed no opinion as to result of defendant's trial for rape, and denied testimony of three witnesses that they had heard him say that "they will stick Dr. McLemore," the defendant, his acceptance was not error. *State v. McLemore*, 164 P. 161, 99 Kan. 777, judgment reversed on rehearing 166 P. 497, 101 Kan. 259.

A juror's mere expression of an opinion in common conversation, without anything showing ill will or a fixed belief, is not a legal ground of challenge for cause. *Pope v. State*, 15 Okl. Cr. 162, 175 P. 727; Rev. Laws 1910, § 5858.

³¹ *State v. Smith*, 85 P. 1020, 74 Kan. 383, judgment reversed on rehearing, 89 P. 21, 74 Kan. 383.

Whether what a juror calls an opinion disqualifies him is a question of fact to be determined from his appearance, manner, character of his answers, and source of his information, and from these the court is to determine whether his opinion is fixed and positive, and if it appears that he is an unprejudiced man, whose opinion is wholly contingent on the report he has read, he is not subject to challenge. *State v. Stewart*, 116 P. 489, 85 Kan. 404.

A juror, who states that he "would think" defendant "was guilty, or he would not be charged," is incompetent. *Grant v. State*, 11 Okl. Cr. 396, 146 P. 919.

expressed an opinion on matters involved in the case over which there is no dispute.³²

One otherwise qualified is not disqualified as a juror because he is more in favor of the enforcement of the law that appellant is charged with having violated than of any other law.³³

³² State v. Everett, 62 P. 657, 62 Kan. 275.

Where the examination of a juror in a criminal trial on his voir dire discloses that he has formed an opinion as to a fact material to be proven, and on his belief thereof has formed an opinion as to defendant's guilt, he should be excused on a challenge for cause. State v. Smith, 85 P. 1020, 74 Kan. 383, judgment reversed on rehearing 89 P. 21, 74 Kan. 383.

Disputed questions.—On the trial of defendant charged with having received deposits as an officer of a bank, knowing its insolvency, a challenge to a juror, who has a fixed opinion as to the insolvency of the bank when the deposits were received, should be sustained, the questions as to the solvency, and the knowledge the defendant had being the principal ones to be tried. State v. Tomblin, 48 P. 144, 57 Kan. 841.

In a prosecution for larceny, a juror, while being examined, stated upon his voir dire that he had an opinion that the defendant took stolen cattle to market. This being a material question in the case, towards which the testimony of several witnesses for the state was directed, it was error to overrule the defendant's challenge of the juror for cause. State v. Otto, 58 P. 995, 61 Kan. 58.

Undisputed questions.—A juror is not incompetent in a contested will case because he knew and saw the testator prior to the time of the unsoundness of mind alleged by those attacking the will to exist, though he had an opinion as to the condition of the testator's mind at the time he last saw him. Delaney v. City of Salina, 9 P. 271, 34 Kan. 532.

Where the fact that a bank burglary had been committed was notorious and unquestioned, opinions of jurors that the bank had been broken into and robbed did not disqualify them in the trial of one charged with the crime. State v. Hoerr, 129 P. 153, 88 Kan. 573.

The mere fact that a person called as a juror had formed or expressed an opinion that defendant shot and killed the deceased did not disqualify him as a juror, where the shooting and killing was conceded by defendant, who claimed that it was done in self-defense. State v. O'Shea, 57 P. 970, 60 Kan. 772; State v. Sorter, 52 Kan. 531, 34 P. 1036.

On trial for murder, where defendant justifies on the ground of self-defense, the act of killing is not the issue to be tried, and the juror who states that he has formed an opinion as to the guilt of defendant is not for that reason disqualified, though it appears that the opinion is based on the belief that defendant killed deceased, but he has expressed no opinion, or formed any, as to whether the defendant was justified in so doing. State v. Morrison, 72 P. 554, 67 Kan. 144.

That jurors had formed an opinion as to the killing, which was admitted, did not disqualify them where no opinion concerning the sanity of the defendant, which was the material question, was shown. State v. Olsen, 127 P. 625, 88 Kan. 136; State v. Gould, 19 P. 739, 40 Kan. 258.

³³ State v. Kelley, 78 P. 151, 70 Kan. 98.

Prejudice of the individual jurors against a particular crime is no ground

A conviction would not be reversed because the court retained on the jury, over defendant's objection, one who believed the punishment fixed by law too severe for the offense charged.³⁴

In a prosecution for homicide, a juror is not disqualified by implied bias because he states on his voir dire that he has previously sat as a juror on the trial of a murder case.³⁵

Persons with conscientious scruples against the infliction of death as a punishment for crime are incompetent jurors in a case where such penalty may be inflicted, though the statute permits the jury to fix the punishment either at death or imprisonment for life.³⁶

When the common-law method of summoning and impaneling jurors in a criminal case is resorted to, the jurors so selected must have the qualifications prescribed in the statutes, or, in the absence of any statutory provisions, must have the common-law qualifications of freeholders of the vicinage.³⁷

for a challenge to the panel or to the individual jurors. *Remer v. State*, 100 P. 247, 3 Okl. Cr. 706.

On a prosecution for larceny of a horse the fact that it is shown by the answers of some of the jurors on their voir dire that they are members of an association for the prevention of horse stealing, and to reclaim stolen horses, and bring the offender to justice, does not render them incompetent, where there is nothing in the rules of the association or elsewhere that would require them to prosecute or convict an innocent person, or to convict on less or weaker evidence than is required, or that would affect their duties as jurors. *State v. Flack*, 29 P. 571, 48 Kan. 146.

The fact that a person is a member of the "Good Templars" society, the object of which is, not the enforcement of the prohibitory liquor law, but the promotion of temperance among its members by moral suasion, does not disqualify such person from serving as a juror in a criminal prosecution for the violation of the prohibitory liquor law. *State v. Estlinbaum*, 27 P. 996, 47 Kan. 291.

³⁴ *State v. Vogan*, 42 P. 352, 56 Kan. 61.

³⁵ *Johnson v. State*, 97 P. 1059, 1 Okl. Cr. 321, 18 Ann. Cas. 300.

³⁶ *Smith v. State*, 114 P. 350, 5 Okl. Cr. 282.

Under the express provisions of Comp. Laws 1909, § 6812, subd. 8, a juror in a murder case was incompetent who stated on his voir dire that he had conscientious scruples against the infliction of the death penalty. *Hopkins v. State*, 9 Okl. Cr. 104, 130 P. 1101, Ann. Cas. 1915B, 736.

³⁷ *Goodson v. United States*, 54 P. 423, 7 Okl. 117.

The statute requiring the jury list to be selected from the assessment roll of the preceding year, has reference to the assessment roll of real estate as well as that of personal property. *State v. Gereke*, 86 P. 160, 74 Kan. 196, judgment reversed on rehearing *Same v. Gerike*, 87 P. 759, 74 Kan. 196.

A township assessor, by failing to enter on the assessment rolls the name of a person who is duly assessed, and is otherwise qualified to sit as a juror

Selection of the names of jurors from the poll list instead of the tax list is not error, in the absence of a showing that different names were selected than would have been selected from the tax list.³⁸

A violation of the statute providing that no elector's name shall be placed in the jury box by the jury commissioners who has served upon a regular panel within the 12 months last past will render the person whose name was thus improperly placed in the box subject to challenge for cause when called upon to serve the second time.³⁹

A challenge of a juror on the ground that he has served as a juror in a court of record during the year next preceding the trial is not good, unless it is shown that the juror actually sat in the trial of a case.⁴⁰

A person who has previously served as a juror in a court of record during the same year, though as a talesman, is disqualified, and a challenge to him should be sustained,⁴¹ unless his service has been merely during the same term of court.⁴²

The term of service of petit jurors is fixed at two weeks, and no juror is eligible for longer service, unless the court enters an order in the journal that it is of the opinion that the jury business can be concluded within six days, except in cases where jurors are engaged

on the trial of causes in the district court, cannot thereby disqualify him from serving as such juror. *State v. Lowe*, 44 P. 20, 56 Kan. 594.

The mere showing that persons called as jurors did not pay taxes on personal property the preceding year does not prove that they were disqualified as jurors, where it does not appear but that they may have been on the assessment rolls of real property. *State v. Reed*, 37 P. 174, 53 Kan. 767, 42 Am. St. Rep. 322.

Where a juror's name does not appear on the assessment list of his township for the year preceding that of the drawing of the jury, he having paid taxes on land for that year, but not having been assessed on his personal property, a challenge to him on that ground is improperly overruled. *State v. Arnstein*, 59 P. 602, 9 Kan. App. 697.

³⁸ *Maddox v. State*, 12 Okl. Cr. 462, 158 P. 883.

³⁹ *Fooshee v. State*, 108 P. 554, 3 Okl. Cr. 666.

⁴⁰ *State v. Lowe*, 44 P. 20, 56 Kan. 594.

That a person has "served once already on a jury, as a talesman, on the trial of any cause," is by statute a principal ground of challenge, and it was error to overrule challenges on that ground. *Atchison, T. & S. F. R. Co. v. Snedeger*, 49 P. 103, 5 Kan. App. 700.

⁴¹ *City of Kansas City v. Kirkham*, 59 P. 675, 9 Kan. App. 236.

⁴² *Irwin v. Irwin*, 41 P. 383, 3 Okl. 184.

in the trial of a case; but it is necessary for a juror to serve actually two weeks before he is ineligible for future service at the end of the term for which he is selected.⁴³

A juror should not be permitted to sit on successive cases involving the same persons or facts.⁴⁴

The question of the competency of an individual juror in a criminal case relates to the time he is impaneled and sworn to try such case.⁴⁵

The fact that persons drawn as jurors were served with process on Sunday, and were excluded from the court room while other jurors were being examined as to their qualifications, does not disqualify them for jury service.⁴⁶

Where one selected as a juror from the tax rolls is a minor at the time of selection, but becomes of age and a qualified elector before he is impaneled, it does not deprive defendant of an impartial jury, as guaranteed by the Constitution.⁴⁷

§ 1166. Waiver of objection

A ground of disqualification of a juror, which is discovered before or during the trial, is waived by failure to object until after the verdict.⁴⁸

A party is compelled to use all reasonable means to discharge all

⁴³ Stuard v. State, 116 P. 204, 6 Okl. Cr. 94, denying rehearing 114 P. 1133, 5 Okl. Cr. 686.

⁴⁴ Jurors impaneled to try a defendant for larceny might be challenged for actual bias, where, on day before they had convicted him of forgery on evidence involving certain issues of fact in instant trial, and where same witnesses would be called to give same testimony on same issue, as they were not "impartial," within Oklahoma Constitution and Rev. Laws 1910, § 5858. Temple v. State, 15 Okl. Cr. 176, 175 P. 733.

Accused was tried for rape November 29th, and, over his objection, five of the jurors, who tried and convicted on November 5th a companion of accused for a rape committed at the same time in the former case, were permitted to sit in his trial, several of them after he had exhausted his peremptory challenges. Held error. State v. Hammon, 113 P. 418, 84 Kan. 137.

⁴⁵ Brown v. State, 14 Okl. Cr. 609, 174 P. 1102.

⁴⁶ State v. Kornstett, 61 P. 805, 62 Kan. 221.

⁴⁷ Brown v. State, 14 Okl. Cr. 609, 174 P. 1102.

⁴⁸ Sackett v. Rose, 55 Okl. 398, 154 P. 1177, L. R. A. 1916D, 820; Horton v. State, 136 P. 177, 10 Okl. Cr. 294; Humphrey v. Same, 11 Okl. Cr. 287, 146 P. 230; Moore v. State, 111 P. 822, 4 Okl. Cr. 212; Queenan v. Territory, 71 P. 218, 11 Okl. 261, 61 L. R. A. 324, judgment affirmed 23 S. Ct. 762, 190 U. S. 543, 47 L. Ed. 1175; Robinson v. Territory, 85 P. 451, 16 Okl. 241, judgment reversed 148 F. 830, 78 C. C. A. 520.

objectionable jurors before the commencement of the trial, and a failure to do so must be construed as a waiver of all known objections.⁴⁹

Where, after part of the evidence was in one of the jurors was excused because of sickness, the objection to continuing the trial with part of the same jurors who had heard part of the evidence is one which could be waived by defendant.⁵⁰

If the statute providing that no elector's name shall be placed in the jury box by the jury commissioners, who has served upon a regular panel within the 12 months last past, is violated, and a person whose name is improperly placed in the box is not challenged for cause when called upon to serve the second time, his competency cannot afterwards be raised.⁵¹

A person charged with a misdemeanor may waive the drawing of a jury from the box.⁵²

§ 1167. Order of challenges

"The plaintiff first, and afterward the defendant, shall complete his challenges for cause. They may then, in turn, in the same order, have the right to challenge one juror each, until each shall have peremptorily challenged three jurors, but no more."⁵³

Each of several defendants jointly tried is entitled to the full number of peremptory challenges allowed a single defendant; and the right is not lost by failure to demand a separate trial.⁵⁴

All challenges to the array upon the ground that the jury was not selected, drawn, or summoned according to law must precede those made to the poll for favor, undue influence, or prejudice.⁵⁵

⁴⁹ State v. Stockman, 58 P. 1032, 9 Kan. App. 422.

⁵⁰ Turner v. Territory, 82 P. 650, 15 Okl. 557.

⁵¹ Fooshee v. State, 108 P. 554, 3 Okl. Cr. 666.

⁵² Andrews v. State, 113 P. 201, 5 Okl. Cr. 73.

⁵³ Rev. Laws 1910, § 4998.

The court cannot increase the statutory number of peremptory challenges. Denham v. State (Okl. Cr. App.) 192 P. 241.

⁵⁴ State v. Stokley, 128 P. 189, 88 Kan. 381.

Where two defendants each have independent defenses, each may be allowed three peremptory challenges. Healer v. Inkman, 146 P. 1172, 94 Kan. 594.

⁵⁵ State v. Wright, 25 P. 631, 45 Kan. 136; Same v. Elgle, 25 P. 632, 45 Kan. 138.

After the regular panel of jurors had been exhausted in a trial for a misdemeanor, and the sheriff had commenced to select the talesmen, defendant

§ 1168. Challenges for cause

The enumerated causes of challenge to a juror provided in the statute are not exclusive.⁵⁶

A liberal latitude should be given the defendant in the examination of jurors on their voir dire. The purpose of such examination is to ascertain whether there are grounds for a challenge for actual or implied bias and to enable the defendant to exercise intelligently his peremptory challenges.⁵⁷

The extent of the examination of jurors on their voir dire is in the sound discretion of the court, and will not be interfered with unless an abuse is shown.⁵⁸

In order to justify sustaining a challenge to a juror on account of a suspicion of prejudice, it must appear from his examination that there is just cause therefor.⁵⁹

objected to the sheriff or his deputies making the selection because of the interest they might have in the result. The court, with the consent of both parties, then named the talesmen, and among those so named was one who had been previously selected by the sheriff. The defendant exhausted his last peremptory challenge upon this talesman. Held, that the action of the court was not cause for a new trial. *State v. Plum*, 31 P. 308, 49 Kan. 679.

Where, in a criminal case, to correct errors in overruling challenges to jurors for cause, the district court, after the jurors had been challenged peremptorily, allows such challenges to stand as challenges for cause, and allows the defendant other peremptory challenges in their stead, which he duly exercises, the departure from the prescribed order does not constitute misconduct in law, and substantial prejudice must appear to warrant a new trial. *State v. Bonar*, 81 P. 484, 71 Kan. 800.

⁵⁶ *Johnson v. State*, 97 P. 1059, 1 Okl. Cr. 321, 18 Ann. Cas. 300; Rev. Laws 1910, § 5861.

⁵⁷ *Temple v. State*, 175 P. 733, 15 Okl. Cr. 176.

That jurors stated on their voir dire that they had formed no opinion as to defendant's guilt or innocence, and could and would be impartial, was wholly immaterial, as in view of Rev. Laws 1910, § 5861, relating to formed or expressed opinions, they could not be judges of their own impartiality. *Temple v. State*, 15 Okl. 176, 175 P. 733.

Question to juror who stated that he had heard deceased had made a dying statement as to whether he had an opinion that deceased believed that she would not recover was improper, where he was not acquainted with deceased. *State v. Smith*, 103 Kan. 148, 174 P. 551.

Question, on voir dire examination by defendant's counsel, as to whether defendant's intoxication and threat against deceased six months before crime would be evidence in juror's mind of his guilt, was improper. *State v. King*, 165 P. 665, 101 Kan. 189.

⁵⁸ *Swift & Co. v. Platte*, 74 P. 635, 68 Kan. 1.

⁵⁹ *Union Pac. Ry. Co. v. Motzner*, 55 P. 670, 8 Kan. App. 431.

All of a juror's answers on examination on his voir dire, and not portions only, must be looked to in order to ascertain his fitness to sit as juror.⁶⁰

Contradictory answers of a juror concerning his qualification do not necessarily prove his unfitness, and if, after proper instruction by the court, he appears to be competent, it is not error to overrule a challenge based upon such answers.⁶¹

It is error in a voir dire examination of jurors in personal injury cases to permit counsel for plaintiffs to ask questions which unnecessarily suggest to the jurors the fact that defendant is insured in an accident company which will pay the attorneys defending and also any judgment resulting from accident to employes of defendant.⁶²

Where a juror called in a prosecution for murder stated that he had previously sat in a murder trial, counsel for accused could ask him what the verdict was in that case in order to exercise intelligently a peremptory challenge.⁶³

Where a juror states he has an opinion, the accused should be given an opportunity to examine him fully as to the extent of his opinion.⁶⁴

Where a juror's fairness and impartiality is questioned, the trial court must be clearly satisfied that he is fair and impartial, and must resolve all doubts in favor of the defendant.⁶⁵

A juror should be excluded unless the court is clearly satisfied of his fairness and freedom from prejudice against accused.⁶⁶

The issues raised upon a challenge for cause to a juror in a criminal case, on the ground of his formed and expressed opinion based upon rumor, common notoriety, and statements in public journals, is one of mixed law and fact.⁶⁷

⁶⁰ State v. Daugherty, 65 P. 695, 63 Kan. 473.

⁶¹ State v. Labore, 103 P. 106, 80 Kan. 664.

⁶² Swift & Co. v. Platte, 72 P. 271, 68 Kan. 1, judgment reversed 74 P. 635, 68 Kan. 1.

⁶³ Johnson v. State, 97 P. 1059, 1 Okl. Cr. 321, 18 Ann. Cas. 300.

⁶⁴ Scribner v. State, 108 P. 422, 3 Okl. Cr. 601, 35 L. R. A. (N. S.) 985.

⁶⁵ Temple v. State, 15 Okl. Cr. 176, 175 P. 733.

⁶⁶ Johnson v. State, 97 P. 1059, 1 Okl. Cr. 321, 18 Ann. Cas. 300; Scribner v. State, 108 P. 422, 3 Okl. Cr. 601, 35 L. R. A. (N. S.) 985.

⁶⁷ Pope v. State, 15 Okl. Cr. 162, 175 P. 727; Stone v. State, 12 Okl. Cr. 313, 155 P. 701; Gentry v. State, 11 Okl. Cr. 355, 146 P. 719.

While the jurors of the regular panel of the county court are available, it is not necessary to qualify more than six jurors before challenges are exercised.⁶⁸

The burden rests upon a party interposing a challenge to a juror for cause to show that the cause exists, and a juror's incompetency does not necessarily appear by proof that he has served within a year next preceding his examination, but it must appear that he has served as a juror within the year next preceding "the selection of jurors for that year."⁶⁹

Each defendant jointly tried on a criminal charge is entitled to challenge peremptorily the number of jurors permitted by statute in such case, but the number allowed the state remains the same.⁷⁰

The rule that gives to the prosecution and defendant, each, three peremptory challenges, does not mean that, where two or more defendants are tried jointly for a misdemeanor, each may challenge three jurors, but that all of the defendants may jointly challenge that number.⁷¹

§ 1169. Vacancies filled at once

"After each challenge, the vacancy shall be filled before further challenges are made; and any new juror thus introduced may be challenged for cause as well as peremptorily."⁷²

§ 1170. Talesmen

"When the requisite number of jurors cannot otherwise be obtained, the sheriff shall select talesmen to supply the deficiency from

⁶⁸ *White v. Oliver*, 122 P. 156, 32 Okl. 479.

⁶⁹ *State v. Hamilton*, 87 P. 363, 74 Kan. 461.

⁷⁰ *State v. Dreany*, 69 P. 182, 65 Kan. 292.

⁷¹ *Cochran v. United States*, 76 P. 672, 14 Okl. 108, judgment affirmed 147 F. 206, 77 C. C. A. 432.

In the Indian Territory, one charged with a felony was entitled to 20 peremptory challenges, and under section 28 of the Schedule of the Oklahoma Constitution, accepting Act Cong. March 4, 1907, c. 2911, § 3, 34 Stat. 1287, amending section 20 of the enabling act (Act June 16, 1906, c. 3335, 34 Stat. 277), and providing that all criminal cases pending in the Indian Territory not transferred to the federal courts shall be proceeded with in the state courts under the laws then in force in the Indian Territory, one tried in a state court for a felony committed in the Indian Territory before statehood is entitled to 20 peremptory challenges, and it is error to restrict him to 5. *Harris v. United States*, 111 P. 982, 4 Okl. Cr. 317, 31 L. R. A. (N. S.) 820, Ann. Cas. 1912B, 810.

⁷² Rev. Laws 1910, § 4999.

the bystanders, or the body of the county, as the court may direct."⁷³

The fact that the court, in drawing necessary additional jurors for the trial of a criminal case, limited the names drawn to jurors living within six miles of the court house, in order to save time and expense, was not reversible error, where the defendant did not object thereto and did not exhaust his peremptory challenges.⁷⁴

§ 1171. Exemptions

The statute exempting from jury duty certain classes of persons, is for the benefit of those included within said classes, and if one summoned as a juror belongs to one of said classes, but fails to claim his exemption, no one is injured by his service on the jury.⁷⁵

Licensed dentists are exempt from jury service.⁷⁶

⁷³ Rev. Laws 1910, § 5000.

At any time during the term after the regular panel has been summoned and proves insufficient, the court may direct that the jury may be completed from the talesmen or open venire issued under the statute. *Watson v. State*, 9 Okl. Cr. 1, 180 P. 816.

It is not prejudicial error, when necessary to secure additional jurors for the trial of a cause which is on call, for the court to order such additional jurors as it thinks proper to be drawn by the clerk and sheriff from the regular jury box of the county. *Harding v. State*, 16 Okl. Cr. 47, 180 P. 391.

Under Rev. Laws 1910, §§ 3692, 3693, it is within trial court's discretion to order an additional drawing of names from jury box, or to direct that an open venire issue to sheriff for number of jurors deemed necessary to be selected from body of county. *Allen v. State*, 16 Okl. Cr. 136, 180 P. 564; *Harding v. State*, 16 Okl. Cr. 47, 180 P. 391; *Webb v. Shelton*, 59 Okl. 224, 158 P. 1128; *Remer v. State*, 109 P. 247, 3 Okl. Cr. 706.

When there are not enough jurors of the regular panel present in court to constitute a jury, and either party to a case called for trial requests that the necessary additional number be drawn in the manner prescribed by law, it becomes the duty of the judge to cause the drawing to be made, and not to fill the panel with talesmen from among the bystanders. *State v. Simons*, 60 P. 1052, 61 Kan. 752.

⁷⁴ *State v. Kyne*, 62 P. 728, 10 Kan. App. 277.

⁷⁵ *State v. York*, 53 P. 838, 7 Kan. App. 291.

Gen. St. 1897, c. 94, § 17, exempting ministers of the gospel, school-district officers, and persons over 60 years of age from jury service, afforded the defendant no right to challenge jurors for cause on those grounds, and such challenges were properly overruled, since the exemption in such cases is a personal privilege. *State v. Tulp*, 60 P. 659, 9 Kan. App. 454.

⁷⁶ Sess. Laws 1919, p. 68, § 21.

ARTICLE IV

OATH, NUMBER, TERM, AND SUMMONING

Sections

- 1172. Oath.
- 1173. Number of jurors.
- 1174. Term of service.
- 1175. Selection and summoning.

§ 1172. Oath

"The jury shall be sworn to well and truly try the matters submitted to them in the case in hearing, and a true verdict give, according to the law and the evidence."⁷⁷

Where a party desires to avail himself of irregularity in administering the oath to the jury, the attention of the court should be called to it at the time the oath is taken. A party cannot sit silently by, and take the chances of acquittal, and subsequently, when convicted, make objections to irregularity in the form of the oath.⁷⁸

§ 1173. Number of jurors

Under the Constitution six men constitute a jury in the county court,⁷⁹ and twelve in district and superior courts.⁸⁰

⁷⁷ Rev. Laws 1910, § 5001.

Statements in the record that there came a jury, "who, being * * * sworn well and truly to try the issue joined herein," the trial proceeded, and that "a jury was impaneled and sworn to well and truly try the issues joined herein," are not attempts to give the form of oath administered, and do not show that the jury were not sworn "to well and truly try the matters submitted to them in the case in hearing, and a true verdict give according to the law and the evidence," as required by Comp. Laws Kan. c. 82, art. 11, § 208, and chapter 80, art. 15, § 274. *State v. Baldwin*, 12 P. 318, 36 Kan. 1. It is not the duty of the clerk to place on the record the formulary of words in which the oath administered to a jury is couched; and, where he enters the fact that the jury was duly sworn, the presumption is that the oath was correctly administered. *Id.*

⁷⁸ *State v. Baldwin*, 12 P. 318, 36 Kan. 1.

⁷⁹ *Muldrow v. State*, 111 P. 656, 4 Okl. Cr. 324.

⁸⁰ The superior courts created by Act March 6, 1909 (Laws 1909, c. 14, art. 7), are not "county courts," even when exercising jurisdiction concurrent with the county courts, within Const. art. 2, § 19, providing that a jury for the trial of civil and criminal cases in courts of record other than county courts shall consist of 12 men, but in county courts and courts not of record shall consist of 6 men, the term as used referring to the county courts created by Const. art. 7, § 11. *Hill v. State*, 109 P. 291, 3 Okl. Cr. 686. Under Const. art. 2, § 19, providing that a jury for the trial of civil and criminal cases in

§ 1174. Term of service

"No juror shall be allowed to serve more than two weeks at one term, unless, at the end of such period, he is upon a panel engaged in the consideration of a case, in which event he may be excused when such case is terminated: Provided, that if the judge is of the opinion that the jury business of a term of court may be concluded within six days, he may require a jury, or a juror, to remain until the termination of said jury service, by entering an order to that effect upon the court journal; and this provision shall apply to both the district and county courts."⁸¹

§ 1175. Selection and summoning

"The general mode of summoning the jury is such as is or may be provided by law."⁸²

A substantial compliance with the law as to the manner in which jurors are selected and summoned is all that is required;⁸³ the statutes relating thereto being directory rather than mandatory.⁸⁴

courts of record other than county courts shall consist of 12 men, but in county courts and courts not of record shall consist of 6 men, a jury for the trial of all civil and criminal cases in the superior courts created by Act March 6, 1909 (Laws 1909, c. 14, art. 7; Snyder's Comp. Laws, §§ 1965-1976), consists of 12 men, and that portion of Snyder's Comp. Laws, § 1970, providing for the trial of misdemeanors in the superior courts before a jury of 6 men, is unconstitutional. *Id.*

⁸¹ Rev. Laws 1910, § 3692.

⁸² Rev. Laws 1910, § 4906.

⁸³ *Wadsworth v. State*, 9 Okl. Cr. 84, 130 P. 808.

A substantial compliance with Rev. Laws 1910, § 3690, providing for selection of petit jurors, is sufficient. *Brown v. State*, 14 Okl. Cr. 609, 174 P. 1102.

⁸⁴ The laws governing the selection of jurors and the drawing of juries are directory, and a substantial compliance therewith is sufficient. *January v. State*, 16 Okl. Cr. 166, 181 P. 514; *Huntley v. Territory*, 54 P. 314, 7 Okl. 60; *Sharp v. United States*, 76 P. 177, 13 Okl. 522, judgment reversed 138 F. 878, 71 C. C. A. 258; *Maddox v. State*, 12 Okl. Cr. 462, 158 P. 883.

Notwithstanding Act Cong. Feb. 9, 1906, c. 155, § 1, 34 Stat. 11, provides that, after the names of the petit jurors have been selected, the clerk of the court shall record such list upon the journal of the court and certify the correctness thereof, and that as soon as such list is completed and recorded the clerk shall write each name upon a separate paper and place it in a box, such acts may be performed by the deputy clerk, as they do not require exercise of judicial powers, but are purely ministerial duties. *Reed v. Territory*, 98 P. 583, 1 Okl. Cr. 481, 129 Am. St. Rep. 861.

The statute providing that no elector's name shall be placed in the jury box by the jury commissioners who has served upon a regular panel within

The courts have power to resort to the common law to supply statutory defects.⁸⁵

It is essential to the fair administration of justice that the jury venire be summoned by an officer not disqualified by bias.⁸⁶ He should use his best effort to secure men of intelligence and good character, and should act with entire impartiality.⁸⁷ He can exercise his discretion in selecting those who are competent to serve, provided he do not exclude competent persons who are negroes solely on account of their race and color.⁸⁸

The mere expression of an opinion by the sheriff as to the guilt or innocence of accused is not ground for quashing a panel summoned by him.⁸⁹

A duly appointed, qualified, and acting deputy sheriff, having no

the 12 months last past is not mandatory, but directory, and a violation thereof will not vitiate the jury list. *Fooshee v. State*, 108 P. 554, 8 Okl. Cr. 666.

Where a panel of jurors is, in other respects, drawn according to the statutory provisions, the fact that three names which were drawn from the jury box were known to be, at the time of the drawing, nonresidents of the territory, and were for this reason destroyed, and three other names drawn from the box as a part of the same drawing, and in the manner prescribed by law, will not render the jury so drawn an illegal jury. *Harmon v. Territory*, 60 P. 115, 9 Okl. 313, affirming judgment 49 P. 55, 5 Okl. 368.

A challenge to the array of jurors, on the ground that the proper officer of one township in the county failed to return a list of names of persons suitable to act as jurors, and that no jurors from such township were included in the panel, the jurors constituting the panel having been legally returned, drawn, and summoned, was properly overruled. *State v. Frazier*, 39 P. 819, 54 Kan. 719.

Where a jury list is made up in conformity with the law in force at the time, and subsequently the law is changed, but with a provision that any jury box filled in accordance with the old law shall not be affected, a jury list previously made up is valid. *Saunders v. State*, 111 P. 965, 4 Okl. Cr. 264, Ann. Cas. 1912B, 766.

⁸⁵ In a criminal proceeding, when it is found that the provisions of the criminal procedure act relating to the drawing of a jury are inapplicable or ineffectual to meet the necessary requirements, the district courts, being courts of general common-law powers, may resort to the practice as it existed at common law to supply the statutory defects. *Goodson v. United States*, 54 P. 423, 7 Okl. 117.

⁸⁶ *Koontz v. State*, 139 P. 842, 10 Okl. Cr. 553, Ann. Cas. 1916A, 689.

⁸⁷ *Harjo v. United States*, 1 Okl. Cr. 590, 98 P. 1021, 20 L. R. A. (N. S.) 1013.

⁸⁸ *McIntosh v. State*, 128 P. 735, 8 Okl. Cr. 469; *Smith v. State*, 111 P. 990, 4 Okl. Cr. 328, 140 Am. St. Rep. 688.

⁸⁹ *State v. Tawney*, 112 P. 161, 83 Kan. 603.

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special personal disqualification, may serve a venire for jurors, and accused has no legal right to require that the sheriff serve the venire.⁹⁰

Where all the jurors regularly summoned do not appear, the trial judge may order other drawings, or an open venire commanding the sheriff to summon the necessary number of talesmen to complete the jury.⁹¹

The fact that, after a challenge to the panel had been sustained for bias of the sheriff whose deputies summoned the jurors, some persons composing it were summoned on a second venire by an unprejudiced officer, is no ground for challenge to the second panel.⁹² Likewise it is no ground of challenge to a juror when called from the bystanders by the sheriff, or summoned by the court on a special venire, that he was one of an array which had been successfully challenged as being irregularly drawn.⁹³ But on a motion to set aside a panel for bias of the officer who summoned the jurors and because the officer did not select the jurors from the body of the county, it is error to allow another officer at the suggestion of the officer who first summoned the panel to call the same jurors back into the jury box.⁹⁴

Statutes providing for selection of electors for jury service are not an essential element to the right of trial by jury, and the method of selection is within the control of the Legislature, provided the fundamental requisite of impartiality is not violated.⁹⁵

To make effectual the constitutional guaranty of right of trial by jury, the district court possesses inherent power to provide a jury, and, while the Legislature may aid and regulate the exercise of such power, the selection of jurors from the inhabitants is a court function and not administrative in origin, purpose, or character.⁹⁶

A resident district judge is authorized by law to appoint jury commissioners, and, when the appointment is made and it later develops that a portion or all of the commissioners appointed are

⁹⁰ *Saunders v. State*, 111 P. 965, 4 Okl. Cr. 264, Ann. Cas. 1912B, 766.

⁹¹ *Moore v. State*, 9 Okl. Cr. 9, 130 P. 517.

⁹² *Hisaw v. State*, 13 Okl. Cr. 484, 165 P. 636.

⁹³ *State v. Yordl*, 2 P. 161, 30 Kan. 221.

⁹⁴ *Shuford v. State*, 113 P. 211, 4 Okl. Cr. 513.

⁹⁵ *Brown v. State*, 14 Okl. Cr. 609, 174 P. 1102.

⁹⁶ *Moore v. Nation*, 103 P. 107, 80 Kan. 672, 23 L. R. A. (N. S.) 1115, 18 Ann. Cas. 397.

disqualified to serve, a subsequent appointment of three additional commissioners is proper.⁹⁷

Prejudice of the jury commissioners against a particular crime is no ground for a challenge to the panel or to the individual jurors.⁹⁸

Where the ballots drawn from the jury box were not folded so as to conceal the names therein written, as required by law, a challenge to the panel should have been sustained.⁹⁹

A defendant has no vested right to a particular juror, who has been summoned, until he has been accepted and sworn.¹

Where a member of the regular panel is absent from the courtroom when his name is called while the jury is being impaneled, the trial judge may send for him and have him brought into court and examined touching his qualifications as a juror in the case before the court.²

⁹⁷ *Munn v. State*, 114 P. 272, 5 Okl. Cr. 245.

⁹⁸ *Remer v. State*, 109 P. 247, 3 Okl. Cr. 706.

⁹⁹ *Grant v. State*, 11 Okl. Cr. 396, 146 P. 919.

¹ *Blankenship v. State*, 139 P. 840, 10 Okl. Cr. 551, L. R. A. 1916A, 812.

² *Beatty v. State*, 113 P. 237, 5 Okl. Cr. 105.

Sess. Laws 1907-08, c. 48, art. 3, § 6, relating to impaneling of special jury in county court, held only to apply to impaneling special jury after regular panel has been discharged. *White v. Oliver*, 122 P. 156, 32 Okl. 479.

ARTICLE V

CUSTODY, CONDUCT, AND DELIBERATIONS

Sections

- 1176. Admonition.
- 1177. Misconduct of others.
- 1178. View of premises.
- 1179. Taking papers and articles to jury room.
- 1180. Additional instructions.
- 1181. Information after retirement.
- 1182. Custody of jury during deliberations.
- 1183. Deliberations.
- 1184. Coercing verdict.
- 1185. Quotient verdict.
- 1186. Improper considerations.
- 1187. Matters considered—Evidence read—Personal knowledge of juror.
- 1188. Discharge of jury.
- 1189. Objections and exceptions.

§ 1176. Admonition

"If the jury are permitted to separate, either during the trial or after the case is submitted to them they shall be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person, on any subject of the trial, and that it is their duty not to form or express an opinion thereon, until the case is finally submitted to them."³

Where the jury, on submission of a civil case, are told that, if they do not reach a verdict within half an hour, they may separate for a definite period, and are cautioned as to their conduct during such separation, it is not necessary that the admonition be repeated before the separation actually occurs.⁴

§ 1177. Misconduct of others

That a witness held conversation with a juror will not vitiate the verdict unless such communication was calculated to corrupt or prejudice the juror against the losing party.⁵

§ 1178. View of premises

"Whenever, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation,

³ Rev. Laws 1910, § 5006.

⁴ *Fields v. Dewitt*, 81 P. 467, 71 Kan. 676, 6 Ann. Cas. 349.

⁵ *Chase v. Cable Co.* (Okl.) 170 P. 1172.

or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial."⁶

In an action for personal injury from collision of automobiles, refusal to permit the jury to inspect defendant's car to see if it bore marks of the collision occurring several months before trial was not an abuse of discretion, though the evidence showed that the car was in the same condition.⁷

Where the jury were allowed to inspect the premises under the charge of an officer, and the successful party talked with the jurors on the premises, and pointed out things in regard thereto, in violation of the statute and the warnings of the officer, a judgment for him will be reversed.⁸

§ 1179. Taking papers and articles to jury room

It is improper for counsel to hand any papers relating to the case to the jury to be taken to the jury room.⁹

Where the pleadings are easily understood, it is not error to permit them to be taken to the jury room.¹⁰

⁶ Rev. Laws 1910, § 5004.

Such a view is discretionary with the trial court, and this discretion extends to the time during the trial at which the jury is directed to make a view, and whether the order shall be made where there has been a change in the condition of the locus. *Spurrler Lumber Co. v. Dodson*, 30 Okl. 412, 120 P. 934.

To order that the jury shall be conducted in a body, under the charge of an officer, to the place, etc., does not require the administering to the officer selected to have charge of the jury any additional oath. *City of Emporia v. Juengling*, 96 P. 850, 78 Kan. 595, 19 L. R. A. (N. S.) 223.

An action to determine the value of land taken for railroad purposes is one of the cases contemplated by section 277 of the Code, in which the court could make an order to allow the jury to view the premises, and such an order is left by the statute to the discretion of the trial court. *Coughlen v. Chicago, I. & K. Ry. Co.*, 13 P. 813, 36 Kan. 422.

⁷ *Rudy v. Headley*, 103 Kan. 417, 173 P. 913.

⁸ *Pond v. Barton*, 56 P. 139, 8 Kan. App. 601.

⁹ *Dane v. Bennett*, 51 Okl. 684, 152 P. 347.

¹⁰ *Culbertson v. Sheridan*, 144 P. 268, 93 Kan. 268.

Where the pleadings are lengthy and complex, it is error for the court, without defining the issues, to send them with the jury for them to determine the

In the absence of any controlling statute or absolute rule of practice, it is discretionary with the trial court to permit the jury to take the written instructions with it on its retirement.¹¹

The court has the discretion to permit the jury to take articles to the jury room.¹²

§ 1180. Additional instructions

The court has a large discretion in the matter of additional instructions after the jury has retired, and may supplement the original charge whenever confident that the ends of justice will be subserved by so doing,¹³ but cannot change the tenor of the charge already given.¹⁴

The action of the court, in recalling the jury and giving a further full and complete instruction as to the weight of certain opinion evidence, and the right to disregard it, has been held error, since the jury should be instructed before the argument is concluded.¹⁵

§ 1181. Information after retirement

"After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court, where the information on the point of law shall be given in writing, and the court may give its recollections as to the testimony on the point in dispute, or cause the same to be read by the stenographer, in the presence of, or after notice to, the parties or their counsel."¹⁶

points in controversy between the parties. *Kansas City, Ft. S. & M. R. Co. v. Egan*, 67 P. 887, 64 Kan. 421.

In replevin, where the articles enumerated in the petition and in the return of the sheriff were numerous, it was not error for the court to allow the jury to take to their room the writ of replevin and the officer's return, with the instruction that the only purpose for which they could or should use them was in determining what goods the sheriff had found and taken thereunder, since it would be impossible for the jury to remember the various items. *Samuels v. Burnham*, 61 P. 755, 10 Kan. App. 574.

¹¹ *Lowenstein v. Holmes*, 40 Okl. 33, 135 P. 727.

¹² *Irby v. State* (Okl. Cr. App.) 197 P. 526.

¹³ *Carter v. Becker*, 77 P. 264, 69 Kan. 524.

The trial court can give additional instructions after the jury has deliberated on a case for two days. *Underwood v. Fosha*, 150 P. 571, 96 Kan. 240.

¹⁴ *Foster v. Turner*, 1 P. 145, 31 Kan. 58.

¹⁵ *St. Louis & S. F. Ry. Co. v. Vance*, 58 P. 233, 9 Kan. App. 565.

¹⁶ Rev. Laws 1910, § 5007.

It is error for the judge to go into the jury room, and in the absence of the defendant's counsel again read the instructions to the jury.¹⁷

§ 1182. Custody of jury during deliberations

"When the case is finally submitted to the jury, they may decide in court or retire for deliberation. If they retire, they must be kept together, in some convenient place, under charge of an officer, until they agree upon a verdict or be discharged by the court, subject to the discretion of the court to permit them to separate temporarily at night, and at their meals. The officer having them under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they are agreed upon their verdict, unless by order of the court; and he shall not, before their verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon."¹⁸

The law does not approve of a juror's telephone conversation with outside persons, or of the presence of the janitor in the jury room,¹⁹ or of like circumstances.

§ 1183. Deliberations

A verdict is the decision made by a jury and reported to the court on matters lawfully submitted to them in the course of the trial of a cause, and should be the result of sound judgment, dispassionate consideration, and conscientious reflection.²⁰

In answering special questions, the jury need not accept the testimony of any single witness, but may deduce the truth from the statements of all.²¹

The jury have the right to believe circumstantial evidence and disbelieve the direct evidence.²²

§ 1184. Coercing verdict

Remarks of the judge to the jury, urging an agreement and intimating that the jury might be kept in their room overnight, and

¹⁷ *Henderson v. State* (Okl. Cr. App.) 197 P. 720.

¹⁸ Rev. Laws 1910, § 5005.

¹⁹ *Smith v. State* (Okl. Cr. App.) 197 P. 514.

²⁰ *Williams v. Pressler*, 85 P. 934, 11 Okl. 122.

²¹ *Atchison, T. & S. F. R. Co. v. Green*, 47 P. 514, 57 Kan. 589.

²² *Bank of Wilbur v. Freeburg*, 114 P. 207, 84 Kan. 235.

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referring to the expense of another trial, were within the exercise of proper judicial discretion.²³

Without unusual circumstances, no error arises from the fact that the jury were kept to their task for 40 hours before they reached a verdict.²⁴

The court's instruction, on recalling the jury after they had been out for several hours, that he thought the jurors had failed to read the instructions as much as they should have done, and learned from them that when they could not decide in favor of the party who has the affirmative because the weight of the evidence is not that way, they should decide the other way, and that it was their duty to make a strenuous effort to come to an agreement on the doctrine that, when a party has the affirmative of an issue, if the evidence does not show him entitled to recover, the findings should be against him, is not open to the construction that, if the jury as a body could not agree that the plaintiff had shown a right to recover, then it was the duty of all to unite in a verdict for the plaintiff.²⁵

§ 1185. Quotient verdict

Where a verdict is shown beyond question to have been the result of a mathematical calculation, rather than the deliberate judgment of the jury, it cannot stand.²⁶ But where the sum named in a verdict was obtained by the quotient method by way of a straw vote, without any agreement to abide by the result, and other sums were thereafter voted on, and finally an agreement was reached to allow the amount named to stand, there was no error.²⁷

Likewise, where jurors each marked amount to which in his judgment plaintiff was entitled, and the verdict was for the average of the markings, the result could not be regarded as an objectionable quotient verdict, where no agreement was made in advance to be bound by markings.²⁸ A verdict will not be set aside because each juror set down his estimated damages, and total was divided

²³ *Sibley v. Kansas City Cotton Mills Co.*, 116 P. 889, 85 Kan. 256.

²⁴ *Brechelsen v. Clark*, 103 Kan. 662, 176 P. 137.

²⁵ *Karner v. Kansas City Elevated R. Co.*, 109 P. 676, 82 Kan. 842.

²⁶ *Clark v. Ford*, 62 P. 543, 10 Kan. App. 579.

²⁷ *Rambo v. Empire Dist. Electric Co.*, 133 P. 553, 90 Kan. 390.

²⁸ *Orendorff v. Brown Bed Mfg. Co.*, 173 P. 281, 103 Kan. 183.

by 12, where it did not appear that they agreed in advance that such result should be their finding, and adopted a different result.²⁹

§ 1186. Improper considerations

Litigants in a cause before a jury are entitled to the free, deliberate, unbiased, and conscientious judgment of the 12 jurors, and

²⁹ *Schaake v. Kansas City, K. V. & W. Ry. Co.*, 102 Kan. 470, 170 P. 804.

A verdict held not objectionable as a quotient verdict, though the jury had first arrived at the damages to be allowed, by taking a quotient of the estimates of the jurors, where a deduction was afterwards made therefrom. *Helms v. Southwest Missouri R. Co.*, 152 P. 632, 96 Kan. 568.

That the jurors each wrote the amount which he thought plaintiff should recover, and the amounts were added and the quotient found, held not to invalidate the verdict, where there was no agreement in advance that the quotient should be the verdict. *Sims v. Williamsburg Tp.*, 141 P. 581, 92 Kan. 636, rehearing denied 141 P. 1132, 92 Kan. 832.

That the jury resorted to the process of addition and division without any agreement that the result should be the verdict, held not to invalidate the verdict afterwards agreed upon. *Hamilton v. Atchison, T. & S. F. Ry. Co.*, 148 P. 648, 96 Kan. 353.

That the foreman of a jury, on the suggestion of a juror, found the quotient of the amount voted for by each juror held not to render the verdict, determined after several subsequent votes, invalid as a quotient verdict. *St. Louis & S. F. R. Co. v. Brown*, 45 Okl. 143, 144 P. 1075.

While a jury was deliberating on the verdict a ballot was taken, which showed that all the jurors were in favor of plaintiff. Thereupon each juror marked on a slip of paper the amount he believed the verdict should be, and such marking showed the lowest sum to be \$3,000 and the highest \$5,000, and it was then proposed by a part of the jury to aggregate such sums, and divide by 12, which was done, and the quotient found to be \$4,400. No agreement was made that such marking, aggregation, and division should determine their verdict, but afterwards such sum was agreed to, and returned as their verdict. Held, that having been approved by the trial court, it will not be disturbed. *City of Kinsley v. Morse*, 20 P. 222, 40 Kan. 588.

Where a jury agrees that each member shall submit a sum which he thinks one of the parties ought to receive, that the sum of these shall be divided by the number of jurors, and the quotient shall be their verdict, and this is done, and a nominal sum is added to the amount so found for the purpose of making the amount an even number, without further deliberation or consideration, such verdict should be set aside. *City of Ottawa v. Gilliland*, 65 P. 252, 63 Kan. 165, 88 Am. St. Rep. 232.

Plaintiff, a woman 23 years old at the time of being injured, while alighting from an elevated street car, was a stenographer earning \$8 a week, had never been treated by a physician, nor had anything the matter with her so far as she knew. She was taken to a hospital after the accident, where she remained three weeks, and was operated upon, the right ovary and appendix being removed and the left ovary removed in part. She suffered after the operation, and was in a very nervous state, unable to work except for a short time, after which she would break down, could not stand on her feet any length of time,

a verdict which has been brought about by any undue or improper influence or made to depend on any contingent result should not be permitted to stand.⁸⁰

Where the answers to special questions were dictated by only part of the jurors, which dictation the remainder promised to accept before they knew what it would be, there was not such a cool, deliberate judgment exercised by all the jurors as the law requires.⁸¹

When the evidence as to the amount due plaintiff is conflicting, a verdict for only part of the amount will not be deemed a compromise verdict and reversed.⁸²

§ 1187. Matters considered—Evidence read—Personal knowledge of juror

When the jury request the court to have the evidence of any witness read to them, it is proper for the court, in the presence of the

and suffered pain across her abdomen, and was almost compelled every week to go to bed a day or two, could not stand up in the street car on her way home without fainting, was unwell every other week, each period accompanied by pain, had tried bookkeeping and had broken down under the nervous strain, her condition being such that she had to go to the country and accept \$5 a week and board and room for taking care of a child in a private family. Held, that a recovery of \$10,983 did not show upon its face that it was the result of addition and division. *Van Vrankin v. Kansas City Elevated Ry. Co.*, 114 P. 202, 84 Kan. 287.

When, instead of discussing the merits of the case, each of the jurors marks down the amount he thinks the plaintiff should recover, and the amounts are added and the sum divided by 12, and an amount materially less than the quotient is thereafter unanimously agreed upon and returned, while such procedure is not to be commended, the verdict finally agreed upon is not shown to be a quotient verdict, requiring its setting aside. *Campbell v. Brown*, 117 P. 1010, 85 Kan. 527.

⁸⁰ *Williams v. Pressler*, 65 P. 934, 11 Okl. 122. A jury, after deliberation for a reasonable time, stood three for the defendant and nine for the plaintiff, and the three who were favorable to the defendant signed a written agreement to the effect that they would find for the plaintiff if the other nine would sign a written statement to the effect that they believed the defendant had willfully testified to a lie, and the other nine, in order to induce the three to agree with them, did prepare and sign a written statement wherein they stated that they believed that the defendant did willfully and knowingly swear falsely in the case then before them, and on this being done the jury returned a verdict for the plaintiff. Held, that such verdict was not the result of free, deliberate, and unbiased judgment, and should be set aside. *Id.*

⁸¹ *Curry v. J. V. Brinkman Co. Bank*, 54 P. 1, 7 Kan. App. 807.

⁸² *King v. Hamilton*, 52 Okl. 326, 152 P. 1072.

parties to the action, to direct the stenographer to read such evidence.³³

A jury may, in considering their verdict, take into consideration the view of the premises, when a view is permitted by the trial court, and the results of their observation, in connection with the evidence produced before them.³⁴

A jury may draw upon its own information without proof as to simple matters of common knowledge and experience, and do not need to be told that a jack, or other equally efficient device, is necessary to raise wheels of heavily loaded vehicle from a groove or rut.³⁵ However it is error for jury to consider facts, pertinent to the issues, volunteered by a juror in the jury room.³⁶ But where a probative fact is the subject of consideration and the existence of such fact is a matter of general knowledge, it is not reversible error for the trial court to direct the jury to determine the existence of such fact, without proof, if a usage or custom in performing the act sought to be established is so general and universal as to be a

³³ Cannon v. Griffith, 43 P. 829, 3 Kan. App. 506.

³⁴ Wellington Waterworks v. Brown, 50 P. 966, 6 Kan. App. 725.

³⁵ Rickel v. Atchison, T. & S. F. Ry. Co., 104 Kan. 453, 179 P. 550.

³⁶ Barber v. Emery, 101 Kan. 314, 167 P. 1044.

A jury cannot, of their own knowledge, independent of and disregarding the evidence, find in how short a distance a train can be stopped; and a judgment based on such finding will be reversed. Union Pac. Ry. Co. v. Shannon, 6 P. 564, 33 Kan. 446.

Where a motion for new trial for misconduct of jury is heard on affidavits and oral testimony, and overruled, and the misconduct consists of statements of matters not in evidence, made by the jurors while considering their verdict, to justify a reversal it must be shown that such statements were as to positive facts asserted to be within the knowledge of the juror making them, and not as mere expressions of opinion of the juror. Hulett v. Hancock, 72 P. 224, 66 Kan. 519.

In an action for injuries by collision with a street car, the jury may, without evidence, take notice in a general way of the character of traffic on the street on which the collision occurred. Metropolitan St. Ry. Co. v. Summers, 89 P. 652, 75 Kan. 342.

In an action against a street railway company for injuries received in a collision, the alleged negligence being the running of the train at too high speed, the statement of a juror that he had been a railroad man and knew how long it took to stop an engine and train and how far a train would run in stopping when running at a certain speed, advanced in argument to the other jurors, it not being shown what bearing the statement had on the controverted facts of the case, was not ground for reversal. Karner v. Kansas City Elevated R. Co., 109 P. 676, 82 Kan. 842.

part of the general knowledge and experience of persons of average intelligence and experience, for the reason that jurors may act upon matters of common observation within their general knowledge without any testimony on these matters.³⁷

§ 1188. Discharge of jury

"The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears to the court that there is no probability of their agreeing."³⁸

Where a jury is called and impaneled in a case where either party is entitled to trial by a jury as a matter of right, it cannot be discharged by the trial court except as prescribed by the statute.³⁹

The discovery and disclosure by the juror after trial was begun that he entertained a prejudice growing out of an incident that occurred in his father's family, revived in his mind by the testimony, which unfitted him to sit as an impartial juror, something which could not have been foreseen by the court, the parties, or the counsel, is an accident within the meaning of that term as used in the statute.⁴⁰

The fact that one of the jurors upon his examination testified that he was not acquainted with the plaintiff, but after the jury were impaneled the plaintiff came into the court room, and the juror then stated that he was acquainted with him, under a slightly different pronounciation of his name, is not sufficient to require the impaneling of a new jury.⁴¹

³⁷ *Waters-Pierce Oil Co. v. Deselms*, 89 P. 212, 18 Okl. 107, judgment affirmed 29 S. Ct. 270, 212 U. S. 159, 53 L. Ed. 453.

³⁸ Rev. Laws 1910, § 5008.

³⁹ *Wichita Falls & N. W. Ry. Co. v. Overstreet & Dockter*, 75 Okl. 173, 174, 182 P. 674, 675.

Civ. Code, § 281, provides that the jury may be discharged by the court on account of the sickness of a juror. Cr. Code, § 208, provides that the proceedings prescribed by law, in civil cases, in regard to impaneling jurors and keeping them together, shall be had in criminal cases. Held that the sickness of a juror, in a criminal case, occurring out of court during a separation of the jury, must be determined like any other fact in a court of justice, subject to the rules of evidence. *State v. Smith*, 24 P. 84, 44 Kan. 75, 21 Am. St. Rep. 266, 8 L. R. A. 774.

⁴⁰ *State v. Hansford*, 92 P. 551, 76 Kan. 678, 14 L. R. A. (N. S.) 548.

⁴¹ *City of Lawrence v. Littell*, 58 P. 495, 9 Kan. App. 130.

Where a juror is excused because of sickness after part of the evidence is in, a request to excuse the other jurors, because of having heard part of the evidence, is addressed to the discretion of the court.⁴²

On motion to withdraw a case from the jury for improper action of an officer summoning the same, and the matters in the affidavit are not denied under oath, they will be taken as confessed.⁴³

§ 1189. Objections and exceptions

Where a party failed to object until after verdict, though he knew the jurors had not been admonished before being permitted to mingle with other persons, he waived the irregularity.⁴⁴

An exception to an instruction, "You will receive with these instructions the pleadings," is a sufficient exception to the act of sending the pleadings to the jury.⁴⁵

Where a party to a suit, formerly cognizable only in equity, voluntarily accepts a trial by jury, he cannot thereafter insist on having the facts passed on by the court.⁴⁶

⁴² *Turner v. Territory*, 82 P. 650, 15 Okl. 557.

⁴³ *Harjo v. United States*, 98 P. 1021, 1 Okl. Cr. 590, 20 L. R. A. (N. S.) 1013.

⁴⁴ *Hopkins v. Settles*, 46 Okl. 801, 149 P. 890.

⁴⁵ *Kansas City, Ft. S. & M. R. Co. v. Eagan*, 67 P. 887, 64 Kan. 421.

⁴⁶ *Nowlin v. Melvin*, 47 Okl. 57, 147 P. 307.

ARTICLE VI.

VERDICT

Sections

- 1190. Definition, form, and reception.
- 1191. Number of jurors assenting.
- 1192. Signature.
- 1193. Polling of jurors.
- 1194. Parties—Designation.
- 1195. Severance—Variance.
- 1196. Several counts.
- 1197. Surplusage.
- 1198. Disregarding instructions.
- 1199. Amending and correcting verdict.
- 1200. Construction and operation.
- 1201. Impeachment of verdict.
- 1202. Objections and exceptions.
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§ 1190. Definition, form, and reception

"The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds facts only. It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented as that nothing remains to the court but to draw from them conclusions of law."⁴⁷

"When the jury have agreed upon their verdict they must be conducted into court, their names called by the clerk, and their verdict rendered by their foreman. When the verdict is announced, either party may require the jury to be polled, which is done by the clerk or the court asking each juror if it is his verdict. If any one (concurring in the verdict)⁴⁸ answers in the negative, the jury must again be sent out for further deliberation."⁴⁹

"The verdict shall be written, signed by the foreman and read by the clerk to the jury, and the inquiry made whether it is their verdict. If any juror disagrees, the jury must be sent out again; but

⁴⁷ Rev. Laws 1910, § 5012.

A "verdict" is a general finding of all facts. *Atchison, T. & S. F. Ry. Co. v. Osburn*, 100 P. 473, 79 Kan. 348.

⁴⁸ Const. Okl. art. 2, § 19, authorizes a three-fourths verdict.

⁴⁹ Rev. Laws 1910, § 5010.

if no disagreement be expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case. If, however, the verdict be defective in form only, the same may, with the assent of the jury, before they are discharged, be corrected by the court.⁵⁰

The trial judge is not required to prepare forms of verdict.⁵¹

The action of the jury in striking from the form of verdict submitted to them the letter "s" from the word "defendants," and the name of one defendant was in substantial compliance with the court's instructions authorizing a verdict against either or both defendants.⁵²

In a civil action, it is not error for a trial court to receive the verdict of the jury in the voluntary absence of the parties and their attorneys, while the court is in regular session.⁵³

Where the court, after a case had been submitted to the jury, announced a recess until the next morning, but that, if a verdict was agreed on that evening, he would receive it, there was no error in receiving the verdict that night, and discharging the jury, without giving notice to one of the parties.⁵⁴

By agreement of the litigants and with approval of the trial judge in open court, a verdict may be received by a designated attorney in the judge's absence.⁵⁵

Where a sealed verdict is left with the sheriff at night, and in the morning, when it should be returned into court, all the jury cannot

⁵⁰ Rev. Laws 1910, § 5011.

⁵¹ *Brown v. Tull* (Okl.) 164 P. 785.

⁵² *St. Louis & S. F. R. Co. v. Williams*, 55 Okl. 682, 155 P. 249.

⁵³ *Strowger v. Sample*, 24 P. 425, 44 Kan. 298.

It is the duty of counsel who are representing one of the litigants in a civil action to take notice of all the sessions of the court and all the proceedings, and it is not error for the court to receive the verdict in the absence of counsel. *Kuhl v. Supreme Lodge Select Knights and Ladies*, 89 P. 1126, 18 Okl. 383.

Where the jury have retired, and, by permission of the court, counsel for defendant leaves the courtroom with the understanding that he is to be sent for when the jury returns, but the judge fails to send for him, and receives the verdict in the absence of defendant and his counsel, such failure is not reversible error when the verdict is read aloud to the jury, and none of them dissent when asked if it is their verdict, though they are not polled. *Seaton v. Smith*, 25 P. 222, 45 Kan. 43.

⁵⁴ *McCormick Harvesting Mach. Co. v. Lauber*, 52 P. 577, 7 Kan. App. 730.

⁵⁵ *Wetmore State Bank v. Courter*, 155 P. 27, 97 Kan. 178.

be found, the reception of the verdict would be illegal, and cannot be compelled by mandamus.⁵⁶

The statute expressly authorizes the court to direct the jury to return a sealed verdict, and also provides that the jury may separate after they have found their verdict until such time as it is received in open court.⁵⁷

§ 1191. Number of jurors assenting

"In civil cases, and in criminal cases less than felonies, three-fourths of the whole number of jurors concurring shall have power to render a verdict. In all other cases the entire number of jurors must concur to render a verdict. In case a verdict is rendered by less than the whole number of jurors, the verdict shall be in writing and signed by each juror concurring therein."⁵⁸

Under this provision, five of the six jurors concurring may render a valid verdict in a civil case in the county court.⁵⁹ It is with the jury to say whether they will render a three-fourths verdict, and not for the court to peremptorily demand it.⁶⁰

In actions involving the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), state practice governs, and a unanimous verdict is not required.⁶¹

In civil actions pending in the district courts at the advent of statehood, the parties were entitled to the unanimous verdict of a jury of 12 men.⁶² But a verdict may be returned by three-fourths

⁵⁶ *Bishop v. Mugler*, 5 P. 756, 33 Kan. 145, rehearing denied 8 P. 103, 34 Kan. 254.

⁵⁷ *Kennon v. Territory*, 50 P. 172, 5 Okl. 685.

⁵⁸ Const. Okl. art. 2, § 19.

⁵⁹ *Olligschlager v. Stephenson*, 104 P. 345, 24 Okl. 760.

⁶⁰ *Curtis & Gartside Co. v. Pigg*, 39 Okl. 31, 134 P. 1125.

⁶¹ *Chicago, R. I. & P. Ry. Co. v. Hughes*, 64 Okl. 74, 166 P. 411.

Const. U. S. Amend. 7, relating to trial by jury, does not control state courts when enforcing rights under federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), and in actions thereunder they may give effect to local practice, permitting a less than unanimous verdict. *Chicago, R. I. & P. Ry. Co. v. Ward* (Okl.) 173 P. 212, certiorari granted 248 U. S. 535, 39 S. Ct. 10, 63 L. Ed. 419.

⁶² *McLeod v. Spencer*, 126 P. 753, 34 Okl. 647.

In an action brought prior to statehood, but tried since statehood, a unanimous verdict of the jury is required. *Gosnell v. Prince*, 129 P. 27, 36 Okl. 445.

Actions pending in the United States courts of the Indian Territory at the time of the creation of the state, and transferred to the district courts of the

of the jury in an action for negligence occurring prior to statehood, where suit is brought since statehood.⁶³

§ 1192. Signature

The requirements that the verdict be signed by the foreman, or by each of the jurors concurring, where less than the entire number concur, have already been treated herein.⁶⁴

Where, in an action in the county court, the parties agree to a trial by a jury of five jurors instead of six, and a unanimous verdict is returned, the verdict is not void, because not signed by all members of the jury concurring.⁶⁵

§ 1193. Polling of jurors

Where, by consent of parties, the jury, in a civil action, return a sealed verdict, into open court, but upon being polled it is found that the verdict is not agreed to by all or a sufficient number of the jury, it is not error for the court to again send the jury out to deliberate upon their verdict, where no objections are made by either party, and it is not shown that the jury has been permitted to separate or disband.⁶⁶

The agreement of the attorneys of the parties to a civil action that the jury may return a sealed verdict does not operate as a discharge of the jury, but the jury should assemble again when their sealed verdict is to be delivered in court, to the end that they may be polled, should either party desire it;⁶⁷ but a party has no right to have the jury polled respecting an instructed verdict.⁶⁸

state, by Const. Schedule, § 1, must be continued as if no change had been taken in the form of government, and a valid verdict must be by the unanimous concurrence of the entire jury. *Swift v. Coulter*, 115 P. 871, 28 Okl. 768; *Choctaw Electric Co. v. Clark*, 114 P. 730, 28 Okl. 399; *Pacific Mut. Life Ins. Co. v. Adams*, 112 P. 1026, 27 Okl. 496; *City of Guthrie v. Pearson*, 120 P. 266, 29 Okl. 813; *Northern Guaranty Loan & Trust Co. v. McCurtain*, 31 Okl. 192, 120 P. 663; *Spurrier Lumber Co. v. Dodson*, 30 Okl. 412, 120 P. 934; *Border v. Carrabine*, 30 Okl. 740, 120 P. 1087; *Missouri, K. & T. Ry. Co. v. Smith*, 123 P. 1063, 32 Okl. 841; *Metropolitan Ry. Co. v. Fonville*, 125 P. 1125, 36 Okl. 76; *Kerfoot-Bell Co. v. Kerfoot*, 30 Okl. 19, 118 P. 367.

⁶³ *St. Louis & S. F. R. Co. v. Ramsey*, 132 P. 478, 37 Okl. 448.

⁶⁴ As to requirement that verdict be signed by foreman, see ante, § 1190; as to requirement that verdict be signed by each juror concurring, where less than whole number concur, see ante, § 1191.

⁶⁵ *Rudolph v. Jurgensen*, 31 Okl. 32, 119 P. 640.

⁶⁶ *Morgan v. Bell*, 21 P. 255, 41 Kan. 345.

⁶⁷ *Rigg v. Bias*, 24 P. 56, 44 Kan. 148.

⁶⁸ *Winn v. Neville*, 98 P. 272, 79 Kan. 29.

Where, upon polling, one of the jurors answers that he has consented to the verdict in order to prevent the hanging of the jury, but that he was not entirely satisfied that the successful party had established his case, it is error to overrule a motion to return the jury for further deliberation.⁶⁹

§ 1194. Parties—Designation

A verdict of a jury entitled in the name of the plaintiff against one of the defendants by name, and designating numerous other defendants as "et al." is good against all those shown by the record to be the codefendants of the one specifically named in the verdict.⁷⁰

The exemption of one defendant from liability by a verdict in favor of another is limited to the cases in which the doctrine of respondeat superior applies.⁷¹

Under the federal Employers' Liability Act (U. S. Comp. St. §§

⁶⁹ Frick v. Reynolds, 52 P. 391, 6 Okl. 638.

In an action triable by jury only, all the material facts being uncontroverted, and plaintiff being entitled to a verdict, the court directed a verdict for plaintiff, and prepared a proper form thereof, which was signed under its direction by the foreman of the jury. Upon a poll of the jury, however, two of the jurors announced that such was not their verdict. Held error to receive such verdict and render judgment for plaintiff. Bowman v. Wheaton, 44 P. 750, 2 Kan. App. 581.

After the jury had returned their verdict they were polled, and each juror, with one exception, answered that the verdict was his verdict. One juror answered that he "consented to it under protest"; and again he answered: "I did consent under protest." The court then said: "Is this your verdict?" and the juror answered: "It is; but I consented to it under protest." The court then discharged the jury. After the discharge, plaintiff objected to the receiving of the verdict. It was not error to overrule the objection. Wyley v. Bull, 20 P. 855, 41 Kan. 206.

⁷⁰ Knox v. Gregorious, 22 P. 981, 43 Kan. 26.

A general verdict in replevin mentioning one of two defendants was sufficiently definite in favor of defendant not mentioned, where by special finding facts were found acquitting such defendant. In replevin against two defendants, a general verdict was found for plaintiff against one defendant, without mentioning the other. Held, that this was a general verdict for defendant not mentioned, sufficiently definite, in the absence of objection by plaintiff, to satisfy Civ. Code, § 286, requiring a general verdict in all cases. Lawson v. Robinson, 75 P. 1012, 68 Kan. 737.

⁷¹ Rogers v. City of Coffeyville, 147 P. 816, 95 Kan. 171.

Where railroad is joined as codefendant with employé on theory of respondeat superior, and verdict is rendered for employé, verdict against railroad on same issue cannot stand. Chicago, R. I. & P. Ry. Co. v. Brooks, 57 Okl. 163, 156 P. 362.

8657-8665) the jury may return a general verdict for the personal representative, without apportioning the damages among the beneficiaries.⁷²

§ 1195. — Severance—Variance

In an action for death of an engine wiper from alleged negligence in failing to give notice of insufficient clearance, the finding of a jury that the negligence consisted in maintaining such insufficient clearance is not a material variance.⁷³

Where an action upon a contract for the sale and warranty of a horse was brought against two persons jointly, and the verdict upon the evidence was against only one, there is not such a variance between the pleading and the verdict as to require the setting aside of the verdict.⁷⁴

§ 1196. Several counts

Where two causes of action are submitted together, a general verdict for plaintiff should not be returned, but there should be separate findings on each cause.⁷⁵

§ 1197. Surplusage

Mere surplusage will not invalidate a verdict. Thus the addition of the words "not guilty" to a verdict finding for defendants in an action for assault does not vitiate the verdict.⁷⁶

§ 1198. Disregarding instructions

Ordinarily a verdict is "contrary to law" when it is returned in disobedience or disregard of the court's instructions.⁷⁷

⁷² St. Louis & S. F. Ry. Co. v. Clappitt, 55 Okl. 686, 154 P. 40.

⁷³ Forbes v. Atchison, T. & S. F. Ry. Co., 101 Kan. 477, 168 P. 314.

⁷⁴ Schee v. Shore, 50 P. 903, 6 Kan. App. 136.

⁷⁵ St. Louis & S. F. R. Co. v. Farmers' Union Gin Co., 125 P. 894, 34 Okl. 270.

Where, in an action against a railroad for killing stock, the evidence was undisputed as to the extent of the defendant's liability under each of the three counts of the petition, and the verdict was for the total amount as shown by such evidence, failure of the jury to return a separate finding upon each count was not error. Midland Valley R. Co. v. Hardesty, 38 Okl. 559, 134 P. 400.

⁷⁶ Hanson v. Kendt, 146 P. 1190, 94 Kan. 310.

⁷⁷ Norman v. Lambert, 64 Okl. 238, 167 P. 213; Myers v. Hubbard, 80 Okl. 97, 194 P. 433.

Where special questions are submitted to the jury under instructions that (1134)

Jurors must accept and follow the law as expounded by the court, and a verdict in violation of the instructions will be set aside.⁷⁸

§ 1199. Amending and correcting verdict

The verdict must respond to the issues as raised by the pleadings and the evidence.⁷⁹

If certain facts are found defendant is not liable, and the jury find those facts but find against defendant, instructions will be regarded as the law of the case, and the court should set aside the general verdict and render judgment for defendant on the special findings. *Colwell v. Parker*, 105 P. 524, 81 Kan. 295.

Where, from the special findings and the general verdict, it appears that the jury disregarded an instruction given by the trial court concerning a material matter in issue, the judgment based on such verdict must be reversed. *Frankhouser v. Neally*, 57 P. 980, 8 Kan. App. 822.

⁷⁸ *Dodson v. Moran*, 101 Kan. 592, 168 P. 841.

It is the duty of a jury to accept the instructions of the court as the law of the case, and a failure to do this is ground for reversal. *Ryan v. Tudor*, 2 P. 797, 31 Kan. 366.

A general verdict in favor of a person claiming land by adverse possession, made in disregard of an erroneous instruction as to the time when the statute of limitations began to run, does not constitute reversible error, upon the theory that such instruction, though erroneous, is the law of the case to the jury, where all the facts in regard to possession and other matters material to the rights of the parties were either admitted, proved by uncontradicted documentary evidence, or were specially found by the jury, and where judgment can be entered according to the right of the case upon such facts without prejudice from the erroneous instruction. *Davis v. Threlkeld*, 51 P. 226, 58 Kan. 763.

Where an instruction was in conformity with plaintiff's theory of the cause of his personal injury by the alleged negligence of defendant railroad company, as such theory was indicated by the petition, by plaintiff's statement of his case to the jury, and by the testimony offered in support of his cause of action, and the instruction so given was not excepted to by plaintiff, the same became the law of the case, binding upon plaintiff in the trial court and in the appellate court, and a verdict for plaintiff in disregard of such theory and instruction should be set aside. *Wichita & W. Ry. Co. v. Kennedy*, 54 P. 289, 8 Kan. App. 541.

If the instructions were wholly disregarded upon a material question of law, the verdict cannot be the foundation for a judgment. *Union Pac. Ry. Co. v. Hutchinson*, 19 P. 312, 40 Kan. 51; *Kansas City, Ft. S. & M. Ry. Co. v. Furst*, 45 P. 128, 3 Kan. App. 265.

Where an action for trespass was tried on the theory that plaintiffs were entitled to recover the rental value of the buildings on the lots, and not the value of the buildings, and the court instructed the jury that the measure of damages, other than those to personal property and profits of business, was

⁷⁹ *Myers v. Hubbard*, 80 Okl. 97, 194 P. 433.

It is a court's function to see that the trial is properly conducted and that verdicts are returned in accordance with its instructions, and it is not bound to receive a verdict based on an obvious misapprehension thereof.⁸⁰

The determination of a jury, although formally stated in a verdict, and signed and sealed, is not final, but remains within the control of the jury, and is subject to any alteration or amendment by the jurors until it is actually returned into court and recorded; and up to that time any member of the jury is at liberty to withdraw his consent from a verdict previously agreed upon.⁸¹

After the jury, in occupying claimant proceedings, have made their assessments with regard to damages and improvements, have made return to the clerk, and have dispersed, no change can be made in such return with the consent of all the jury and one of the parties, but without the consent of the other.⁸²

Where a verdict finds the amount of recovery against a party, and also finds, upon questions which devolve upon the court alone, that certain instruments should be canceled, the court may direct the jury to retire and bring in a verdict in accordance with certain instructions and in proper form.⁸³

the rental value of the premises, the general verdict cannot include the amount which the jury allowed for the conversion of the buildings, to augment the amounts allowed in their special findings for rent. *City of Oklahoma City v. Hill*, 50 P. 242, 6 Okl. 114.

Where, in an action for injuries received by a servant, the court without objection instructed the jury to accept the statements of an exhibit attached to the petition by plaintiff as true, the instruction was the law of the case, and a verdict in violation thereof is not a legal ground for a judgment. *Atchison, T. & S. F. Ry. Co. v. Schroll*, 92 P. 596, 76 Kan. 572.

⁸⁰ *Abmeyer v. German-American State Bank*, 103 Kan. 356, 179 P. 368.

⁸¹ *Bishop v. Mugler*, 5 P. 756, 33 Kan. 145, rehearing denied 8 P. 103, 34 Kan. 254.

⁸² *Bradley v. Rogers*, 5 P. 374, 33 Kan. 120.

⁸³ *Circle v. Potter*, 111 P. 479, 83 Kan. 363.

It is reversible error to charge a jury bringing in a general verdict and special findings that they should make them harmonize, and to send them out for that purpose; 2 Gen. St. 1897, c. 95, § 294, authorizing the court to correct a verdict only where defective in form. *Southwestern Mineral Ry. Co. v. Kennedy*, 55 P. 516, 8 Kan. App. 490.

Where a jury arrived at a verdict during recess of the court, sealed their verdict under permission of the court and separated, the verdict being for plaintiff, but dividing the costs over which the jury had no jurisdiction, the

Where the jury fails to allow the 10 per cent. attorneys' fee provided for in the note sued on, the trial court should allow same.⁸⁴

§ 1200. Construction and operation

In construing a general verdict, consideration may be given to the allegations in the petition and to the testimony and instructions.⁸⁵

A general jury finding or verdict in a party's favor includes a

trial court, in the absence of misconduct of the jury in arriving at the verdict, could remand the jury to their room to correct the verdict as to costs, since that portion of the verdict might have been treated as surplusage, and judgment rendered for plaintiff and for his costs upon the original verdict, under Wilson's Rev. & Ann. St. 1903, § 4781, providing that, except as otherwise provided, the costs shall be allowed of course to plaintiff upon a judgment in his favor in actions for recovery of specific personal property. *Jantzen v. Emanuel German Baptist Church*, 112 P. 1127, 27 Okl. 473, Ann. Cas. 1912C, 859.

An attempted equal division by the jury of the costs between the parties is not a ground for new trial, such part of the verdict being properly set aside by the court. *Nation v. Lättler*, 52 P. 96, 59 Kan. 773.

⁸⁴ *Continental Gin Co. v. Sullivan*, 48 Okl. 332, 150 P. 209.

An item of damage allowed for an injury, neither proved nor found, should be deducted from the amount of the verdict. *Barker v. Kansas City, M. & O. Ry. Co.*, 129 P. 1151, 88 Kan. 767, 43 L. R. A. (N. S.) 1121.

In an action on an appeal bond in forcible detainer, the court charged that the only issue was the rental value of the property between two certain dates, to be doubled by the jury, together with interest for the time specified, with costs of the detainer action. The verdict was for plaintiff, and against the defendants, and each of them, "and assess the amount of his recovery at \$42.50 per mo. (\$696.00) dollars." Held that, where it was apparent that the jury erred in calculating interest, allowing \$9 too much, the court did not err in entering judgment for an amount less the excess. *Gould v. Hartwig*, 80 P. 976, 71 Kan. 438.

Where the verdict in an action for bodily injuries is excessive, and not sustained by the evidence, and such excess is not due to a misapprehension of the facts or an error in computation by the jury, the court has no authority to order that the excess be remitted, but must order a new trial. *Ft. Scott, W. & W. Ry. Co. v. Kinney*, 53 P. 880, 7 Kan. App. 650.

Where the evidence did not show that plaintiff had received any permanent injuries, the amount of damages awarded by the verdict for permanent injuries should be deducted therefrom. *Williams v. Withington*, 129 P. 1148, 88 Kan. 809.

⁸⁵ *Foltz v. Buck*, 131 P. 587, 89 Kan. 381.

Where, in an action for \$1,700 as the value of a horse, the only testimony of value is that of the owner that the horse was worth \$1,500, a verdict for "the sum of (\$12.00) twelve hundred" will be construed to be a verdict for \$1,200.00. *St. Louis & S. F. R. Co. v. Mounts*, 44 Okl. 359, 144 P. 1036.

finding for him on all the material issues,⁸⁶ where such general finding is not contradicted by special findings.⁸⁷

In an action upon notes given by the buyer of articles to be used as premiums in a voting contest, a verdict and judgment for plaintiff for less than the face value of the note, though for a wrong amount, is an adjudication of the question submitted.⁸⁸

In an action against a bank for the amount due on account of the

⁸⁶ *Walters Nat. Bank v. Bantock*, 137 P. 717, 41 Okl. 153, L. R. A. 1915C. 531; *Seigel, Welch & Clawson Live Stock Commission Co. v. Johnson*, 44 P. 206, 4 Okl. 99.

A general verdict for defendant is a finding for him on each of several defenses pleaded. *Farmers' State Bank of Ames v. Harp*, 54 Okl. 326, 153 P. 863; *Cook v. Leavenworth Terminal Ry. & Bridge Co.*, 165 P. 803, 101 Kan. 103, rehearing denied 166 P. 498, 101 Kan. 437.

A general verdict for the seller for the full price determines that there was no breach of warranty. *People's Ice & Fuel Co. v. Serat*, 46 Okl. 762, 149 P. 870.

A general verdict for plaintiff imports a finding in his favor upon all issues not inconsistent with the special findings. *Morrow v. Bonebrake*, 115 P. 585, 84 Kan. 724, 34 L. R. A. (N. S.) 1147.

Whether there was an agency on the part of plaintiff in the transaction which defendants set up as releasing them from liability to plaintiff under his purported cause of action, being the substantial issue, the general finding in favor of defendants was equivalent to a finding that the alleged agency did not exist. *Frayar v. Holtom*, 54 P. 918, 8 Kan. App. 718.

Where a railroad and a conductor are sued for an injury to a passenger, from the alleged negligence of the conductor, a verdict exonerating the conductor must necessarily exonerate the carrier. *Chicago, R. I. & P. Ry. Co. v. Reinhart*, 61 Okl. 72, 160 P. 51.

In servant's suit against corporation and its servants, charging negligent acts causing injury, where master, if liable was liable only on principle of respondeat superior, judgment on verdict against it and in favor of its servants was error, as responsibility of servants committing acts was primary. *St. Louis & S. F. R. Co. v. Dancey* (Okl.) 176 P. 209.

⁸⁷ A general verdict and consistent findings of fact dispose of all controverted issues of fact, when based upon substantial, though conflicting, testimony. *Kelly v. Central Union Fire Ins. Co.*, 165 P. 806, 101 Kan. 91, L. R. A. 1918C, 1170.

Where the question whether plaintiff was guilty of contributory negligence was for the jury, and there were no special questions submitted, the general verdict for plaintiff inferentially acquitted him of such negligence. *Delmore v. Kansas City Hardwood Flooring Co.*, 138 P. 151, 90 Kan. 29, 47 L. R. A. (N. S.) 1220.

In the absence of special findings, a general verdict for the plaintiff is a finding of all the material facts alleged in the petition necessary to support it. *Barrett v. Dessy*, 97 P. 786, 78 Kan. 642.

⁸⁸ *Loveland v. Kibbey*, 103 Kan. 292, 173 P. 976.

collection made for plaintiff, a general verdict for plaintiff did not imply that she had authorized her husband to have the proceeds of draft placed to his credit, where, under the instructions, the verdict was authorized upon other grounds.⁸⁹

On evidence showing that defendant's false representations, relied upon by plaintiff, had resulted in a substantial loss, a verdict for plaintiff for \$1 was not a finding in favor of defendant.⁹⁰

§ 1201. Impeachment of verdict

Jurors cannot ordinarily be heard to impeach their verdict,⁹¹ and the fact that the juror making an affidavit did not concur in the verdict returned does not change this rule.⁹² Thus alleged irregularities in the verdict could not be shown by a juror's affidavit, stating facts showing it to be a quotient verdict.⁹³ Nor can jurors impeach or explain their verdict by showing on what grounds it was rendered, or that they made a mistake, or misunderstood the law, or the result of their finding.⁹⁴ Likewise, a juror's affidavit that he was misled by the language of the court in instructions given on recalling the jury was not competent to impeach the verdict.⁹⁵

⁸⁹ Reynolds v. National Bank of Commerce of Wichita, 104 Kan. 215, 178 P. 605.

⁹⁰ Cincinnati Discount Co. v. Asher, 101 Kan. 253, 166 P. 476.

⁹¹ Kremer v. Stephens, 55 Okl. 568, 155 P. 585.

Thus affidavits or testimony of jurors will not be received to impeach their verdict. Egan v. First Nat. Bank of Tulsa (Okl.) 169 P. 621, L. R. A. 1918C, 145; Baker v. Dorsson (Okl.) 169 P. 1071.

⁹² Egan v. First Nat. Bank of Tulsa (Okl.) 169 P. 621, L. R. A. 1918C, 145.

⁹³ Glockner v. Jacobs, 140 P. 142, 40 Okl. 641.

⁹⁴ St. Louis & S. F. R. Co. v. Brown, 45 Okl. 143, 144 P. 1075.

⁹⁵ Karner v. Kansas City Elevated R. Co., 109 P. 676, 82 Kan. 842.

Defendant, who was sued on an account for his father's board, lodging, etc., claimed that one item of the account, for nursing, had been paid by plaintiff's check, which, instead of being cashed, had been indorsed to defendant's father, on the latter's settlement of the item by a cash payment. After judgment defendant moved to set off the amount of this item against the judgment, and offered affidavits of the jurors to show that he had not been allowed therefor in their verdict. Held, that such evidence was properly rejected, and the motion overruled, since jurors will not be permitted to impeach their verdict. Colcord v. Conger, 62 P. 276, 10 Okl. 453. Upon grounds of public policy, jurors will not be heard by affidavit, deposition, or other sworn statement to impeach or explain their verdict, or show on what ground it was rendered, or that they made a mistake or misunderstood the law or the result of their finding, or to show what items entered into the verdict, or how they arrived at the amount. Jurors will only be heard in support of their verdict or conduct when same is attempted to be impeached. *Id.*

While a juror may testify as to what transpires in the jury room, he cannot tell what considerations induced him to agree to verdict nor give his reasons therefor.⁹⁶

§ 1202. Objections and exceptions

Failure to render separate verdicts,⁹⁷ and formal defects and omissions in verdicts,⁹⁸ and in the reception thereof,⁹⁹ are waived by failure to make timely objection.

⁹⁶ *Ohlson v. Central Kansas Power Co.*, 105 Kan. 252, 182 P. 393.

⁹⁷ Where the defendant insurance companies, in four actions consolidated by agreement, failed to request separate verdicts, they waived their right to object to a general verdict for the full amount of the loss, which amount the court apportioned among them. *Manhattan Wholesale Grocery Co. v. Westchester Fire Ins. Co.*, 140 P. 853, 92 Kan. 336.

Where several actions against different insurance companies are consolidated by stipulation, without demand for separate findings, and a gross verdict is returned, and the judgment is apportioned among the different defendants, it is too late to object to the judgment because of the gross verdict, and because some of the policies insured property not covered by others. *Bee-Hive Mercantile Co. v. Insurance Co. of North America*, 140 P. 854, 92 Kan. 341.

⁹⁸ A defect in the form of a verdict received in the voluntary absence of counsel will be deemed waived, where it does not appear that counsel objected to the form of verdict until filing of motion for new trial. *First Nat. Bank v. Brown*, 62 Okl. 112, 162 P. 454.

In replevin where the only issue was plaintiff's ownership and the jury found against him, awarding the property to defendant, objections that the verdict did not fix the value are not timely when not raised until several days thereafter in the motion for new trial. *Crisp v. Gillespey*, 50 Okl. 541, 151 P. 196.

Where no timely objection was made that one juror signing a majority verdict rendered under Const. art. 12, § 19, signed by mark, and that the person signing the juror's name did not sign his name thereto as a witness, held, that the irregularity was waived. *Harris v. Hart*, 49 Okl. 143, 151 P. 1038.

Where no objections are made to receiving the general verdict of a jury without requiring them to answer special questions submitted, where no request is made for the jury to be required to make more specific or definite answers before their discharge, the right to have such questions answered will be deemed waived, and this court will not review such action of the trial court. *Kuhl v. Supreme Lodge Select Knights and Ladies*, 89 P. 1126, 18 Okl. 383.

⁹⁹ A case was tried before a judge pro tem., because of the disqualification of the regular judge; but, in his absence, the regular judge received and announced the verdict and findings of the jury, without objection, and, upon motion of the defeated party, caused the jury to correct some of their answers. Afterwards, before the judge pro tem., the defeated party moved for judgment upon the special findings. Held, that said party was estopped from complaining of the action of the regular judge in receiving and announcing the verdict and findings of the jury. *List v. Jockheck*, 52 P. 420, 59 Kan. 143.

Where trial judge prepares forms of verdict, a party aggrieved must except to the form prepared at the time in order to avail himself of any error therein.¹

§ 1203. Form

GENERAL VERDICT

(Caption.)

We, the jury impaneled and sworn in the above entitled case, do on our oaths find for the plaintiff (or defendant) in the sum of \$_____.

_____, Foreman.

We concur in verdict: _____,
 _____,
 _____,
 _____,
 _____,
 _____,
 _____,
 _____,
 _____,

Jurors.

¹ Brown v. Tull (Okl.) 164 P. 785.

ARTICLE VII

SPECIAL INTERROGATORIES AND FINDINGS

Sections

- 1204. Special verdict and findings.
- 1205. Power to require.
- 1206. Interrogatories.
- 1207. Preparation and form.
- 1208. Withdrawal.
- 1209. Special findings.
- 1210. Requisites and sufficiency.
- 1211. Responsiveness.
- 1212. Inconsistency.
- 1213. Defects and amendments.
- 1214. Construction.
- 1215. Objections and exceptions.
- 1216. Form.

§ 1204. Special verdict and findings

The verdict not being limited, by express terms of the Code, to a general verdict, the jury may find upon particular questions of fact, and on such findings the court may render judgment which is practically, if not technically, rendered upon the verdict of the jury, and thereby findings of fact are taken into the record.²

Special findings accompanying a verdict rendered on direction of the court are immaterial.³

§ 1205. — Power to require

"In all cases the jury shall render a general verdict, and the court may in any case at the request or the parties thereto, or either of them, in addition to the general verdict direct the jury to find upon particular questions of fact, to be stated in writing by the party or parties requesting the same,"⁴ but under Const. art. 7, § 21, it is within the trial court's discretion to refuse to submit special interrogatories.⁵

² Severy v. Chicago, R. I. & P. Ry. Co., 50 P. 162, 6 Okl. 153.

³ Missouri, K. & T. R. Co. v. L. A. Watkins Merchandise Co., 92 P. 1102, 76 Kan. 813.

⁴ Rev. Laws 1910, § 5013.

⁵ Cox v. Kirkwood, 59 Okl. 183, 158 P. 930.

Under Const. art. 7, § 21, a defendant is not entitled to have special interrogatories submitted to the jury in addition to the general verdict. St. Louis & S. F. Ry. Co. v. Clappitt, 55 Okl. 686, 154 P. 40.

§ 1206. Interrogatories

It is not ordinarily error to submit special interrogatories within the issues raised by the pleadings⁶ and evidence;⁷ but a special interrogatory that is immaterial or confusing should be refused.⁸

Special interrogatories should be refused which call for mere evidentiary matters,⁹ rather than for ultimate facts.¹⁰

Special questions, requiring the jury to speculate as to what might have happened in a certain contingency, should not be submitted.¹¹

A request for special findings after the court had announced its findings, overruled the motion for new trial, and entered final judgment, came too late.¹²

⁶ There was no error in submitting a special question within the issues raised by the pleadings. *Long v. Kansas City, M. & O. R. Co.*, 164 P. 175, 100 Kan. 361.

⁷ Special questions submitted are not outside the testimony, if, though there is no direct testimony, inferences may be drawn to uphold them. *Griffith v. Atchison, T. & S. F. Ry. Co.*, 102 Kan. 23, 169 P. 546.

⁸ *City of Weir v. Herbert*, 51 P. 582, 6 Kan. App. 596; *Root & Morgan v. Coyle*, 82 P. 648, 15 Okl. 574; *Drumm-Flato Commission Co. v. Edmisson*, 87 P. 311, 17 Okl. 344, affirmed 28 S. Ct. 367, 208 U. S. 534, 52 L. Ed. 606.

It is proper to refuse to submit to the jury special questions which are immaterial, either because they do not relate to the issues raised, or because they are uncontradicted, and would necessarily be included in the general verdict. *Atchison, T. & S. F. R. Co. v. Dickerson*, 45 P. 975, 4 Kan. App. 345; *Missouri Pac. Ry. Co. v. Brown*, 47 P. 553, 5 Kan. App. 890.

Where the questions asked to be submitted are frivolous, immaterial, repetitious, and run to the minor and subdivided facts, into which the principal fact may be resolved, and cannot be fully and fairly answered without confusing the jury, it is the duty of the trial court to refuse to submit them. *Burr v. Honeywell*, 51 P. 235, 6 Kan. App. 783.

⁹ A court is not warranted in submitting questions which require the itemizing of the ultimate facts or call for mere evidentiary matters on which such facts were based. *Madison v. Kansas City, M. & O. Ry. Co.*, 129 P. 1157, 88 Kan. 784.

A party may not have questions submitted to the jury their answers to which will involve a recitation of a large part of the testimony. *Jenkins v. Beachy*, 80 P. 947, 71 Kan. 857.

¹⁰ Only single ultimate facts are to be submitted in any special interrogatory. *Foltz v. Buck*, 131 P. 587, 89 Kan. 381.

Special interrogatories should be refused which ask the jury to pass on the evidentiary, and not ultimate, facts. *Riley v. Wolfey*, 55 P. 461, 60 Kan. 855.

¹¹ *Atchison, T. & S. F. R. Co. v. Lannigan*, 42 P. 343, 56 Kan. 109.

¹² *Kansas City v. King*, 68 P. 1093, 65 Kan. 64.

§ 1207. — Preparation and form

Questions presented for special findings, which assume as true material facts in issue, are properly excluded.¹³

In submitting special questions to the jury, it is within the discretion of the trial court to determine how general or how special the questions should be.¹⁴

A court may make reasonable rules as to the submission of special interrogatories, and they should be presented to the court early enough to enable it to revise and the opposing party to examine them before the jury is charged or the argument is begun.¹⁵

It is proper to refuse all questions to the jury propounded in a negative, confusing or leading form.¹⁶

It is the duty of the court to revise the questions presented for special findings, striking out all which are mere repetitions, or touch immaterial facts, and changing and arranging the others in natural order.¹⁷

¹³ Elliott v. Reynolds, 16 P. 698, 38 Kan. 274.

¹⁴ Southern Kan. Ry. Co. v. Walsh, 26 P. 45, 45 Kan. 653.

¹⁵ Lehen v. E. J. Hines & Co., 127 P. 612, 88 Kan. 58, 42 L. R. A. (N. S.) 830.

¹⁶ Atchison, T. & S. F. R. Co. v. Butler, 43 P. 767, 56 Kan. 433; Chicago, R. I. & P. Ry. Co. v. Lost Springs Lodge, No. 494, I. O. O. F., 85 P. 803, 74 Kan. 847.

In a broker's action for commission, a special interrogatory inquiring, "Is it not a fact that E. W. B. only talked to plaintiff as a friend?" being negative and leading in form, was properly refused. McClintick v. Pyle, 187 P. 788, 91 Kan. 393.

In asking submission of special interrogatories, counsel should frame each question so as to present only a single, direct, and material fact, within the issues. Atchison, T. & S. F. R. Co. v. Aderhold, 49 P. 83, 58 Kan. 293; Hashman v. Wyandotte Gas Co., 111 P. 468, 83 Kan. 328.

Where a special question of fact is submitted to a jury, the wording of the interrogatory should be clear and concise, and of such a form that they can give a direct answer thereto. City of Guthrie v. Shaffer, 54 P. 698, 7 Okl. 459.

Where a special interrogatory is submitted to the jury it should be clearly stated, so that a direct answer may be given thereto. Drumm-Flato Commission Co. v. Edmisson, 87 P. 311, 17 Okl. 344, affirmed 28 S. Ct. 367, 208 U. S. 534, 52 L. Ed. 606.

Interrogatories that are calculated to mislead, confuse, or harass the jury should not be submitted. City of Lawton v. McAdams, 83 P. 429, 15 Okl. 412.

It was never required that the jury answer a special interrogatory, which

¹⁷ Missouri Pac. Ry. Co. v. Holley, 1 P. 130, 30 Kan. 465, rehearing denied 1 P. 554, 30 Kan. 474.

§ 1208. — Withdrawal

Permitting the withdrawal by plaintiffs of a list of special questions of fact, after their submission to the jury, is not prejudicial error, where the special questions submitted by defendant were not framed with reference to those withdrawn by plaintiffs, and it does not appear that defendant was otherwise prejudiced by the withdrawal.¹⁸

A failure to compel an answer is, in effect, a withdrawal of the question, and is the same as though the court had refused to submit it in the first instance.¹⁹ However, the refusal to require the jury to answer a special question already answered, "We do not know," does not constitute or amount to a withdrawal of such question.²⁰

Where a great many special findings of fact are submitted to a jury, the court may withdraw from its consideration some of such special findings after they have been submitted, where the same findings are embodied in such special findings as have already been found by the jury.²¹

§ 1209. Special findings

"In all jury trials, the jury shall return a general verdict, and no law in force, nor any law hereafter enacted, shall require the court to direct the jury to make findings on particular questions of fact; but the court may, in its discretion, direct such special findings."²²

§ 1210. — Requisites and sufficiency

The answers to special interrogatories submitted to a jury should be direct and positive.²³

A finding of probative facts is sufficient, if the ultimate facts necessarily result therefrom.²⁴

not only inquired into a nonessential fact, but which was undefined and uncertain as to time. *Drumm-Flato Commission Co. v. Edmisson*, 208 U. S. 534, 28 S. Ct. 367, 52 L. Ed. 606, affirming 17 Okl. 344, 87 P. 311.

¹⁸ *Missouri Pac. Ry. Co. v. Moffatt*, 55 P. 837, 60 Kan. 113, 72 Am. St. Rep. 343.

¹⁹ *Burr v. Honeywell*, 51 P. 235, 6 Kan. App. 783.

²⁰ *Smart v. Mayer*, 103 Kan. 366, 175 P. 159.

²¹ *Smith v. Wilson*, 48 P. 436, 5 Kan. App. 379.

²² Const. Okl. art. 7, § 21.

²³ *Winfield Nat. Bank v. McWilliams*, 60 P. 229, 9 Okl. 493.

²⁴ *Severy v. Chicago, R. I. & P. Ry. Co.*, 50 P. 162, 6 Okl. 153.

Jury's findings that person killed at public crossing could have seen ap-

An answer to a special question "We do not know," is equivalent to "No."²⁵

When a jury return evasive and unsatisfactory answers to certain special questions submitted to them, and to others make answers that are not supported by any evidence, and persist in such a course, after objection is made to such answers by counsel, and after admonition by the court, it is a good and sufficient cause for a reversal of the case and the granting of a new trial.²⁶

The answers must be signed by the jury or the foreman in the same manner as a general verdict.²⁷

§ 1211. — Responsiveness

Answers to special questions should be directly responsive,²⁸ and not evasive or contrary to the evidence.²⁹

proaching interurban car in time to warn driver of vehicle in which she was riding at 132 feet, and at 82 feet, and as to her range of vision at lesser distances, answering, "Can't say," and "Doubtful," did not establish contributory negligence as matter of law. *Schaefer v. Arkansas Valley Interurban Ry. Co.*, 104 Kan. 394, 179 P. 323.

A finding that a wife had authorized husband to have proceeds of draft placed to his credit was qualified by a further finding that such authority had been conferred by the delivery to him of the draft, which was made payable to collecting bank, and hence to amount to a mere conclusion of law. *Reynolds v. National Bank of Commerce of Wichita*, 104 Kan. 215, 178 P. 605.

Where petition alleged that fire resulted from negligence in operating engine and in not providing sufficient spark arresters, and jury found fire due to careless handling of engine or defective condition of smokestack, as required by evidence, it was not necessary to support verdict that jury agree as to which act of negligence caused fire. *Smith v. Bush*, 102 Kan. 150, 169 P. 217.

In buyer's action for breach of contract for shipment of wheat, special findings as to whether contract terms were fully agreed upon, and whether seller objected to buyer's indicated time of shipment, held not to show passion or prejudice. *Wallingford Bros. v. McCray*, 101 Kan. 146, 165 P. 813.

²⁵ *Iowa City State Bank v. Claypool*, 137 P. 949, 91 Kan. 248.

²⁶ *St. Louis, Ft. S. & W. R. Co. v. Willis*, 16 P. 728, 38 Kan. 330.

²⁷ Where answers to several interrogatories are not signed by the jury or by their foreman, they constitute no part of the verdict. *City of Kingfisher v. Altizer*, 74 P. 107, 13 Okl. 121.

²⁸ It is court's duty on request of either party to require an answer to a special question to be made directly responsive to the question. *Smart v. Mayer*, 103 Kan. 366, 175 P. 159.

In action against city for injuries received by reason of defective sidewalk, answer to interrogatory as to how plaintiff received her injury held sufficiently responsive. *Evans v. City of Hutchinson*, 162 P. 342, 99 Kan. 477.

²⁹ *Anders v. Atchison, T. & S. F. Ry. Co.*, 137 P. 966, 91 Kan. 378.

The proof and findings of the jury as a basis for their general verdict should correspond with the averments in the pleadings.³⁰

§ 1212. — Inconsistency

"When the special finding of facts is inconsistent with the general verdict, the former controls the latter and the court may give judgment accordingly."³¹

A verdict not in accordance with special findings by jury will be set aside,³² unless the conflict lies in a special finding of no con-

³⁰ *Atchison, T. & S. F. R. Co. v. Owens*, 50 P. 962, 6 Kan. App. 515.

A special finding which clearly shows that the jury must have based their verdict on a theory of the case radically different from that contended for by the prevailing party, and not involved in the issues submitted for their determination, will authorize a reversal of the judgment. *Aultman & Taylor Machinery Co. v. Wier*, 74 P. 227, 87 Kan. 674.

Allegations in an action for injury to a passenger that the carrier allowed the spikes to become loose in the ties, and for that reason the rails were not held firmly in place, and that the carrier failed to employ the best known methods of keeping its track in a safe condition, thus causing the train to leave the track, are sustained by findings of the jury that the spikes were loose in the ties, and that in making use of soft wood ties not sufficient to hold the spikes the carrier failed to use the best methods of keeping its track and roadbed in a safe and proper condition. *Chicago, R. L. & P. Ry. Co. v. Brandon*, 95 P. 573, 77 Kan. 612.

³¹ *Rev. Laws 1910*, § 5014.

³² *Missouri, K. & T. Ry. Co. v. Bussey*, 71 P. 261, 66 Kan. 735; *Chase v. Bank of Horton*, 59 P. 39, 9 Kan. App. 186.

Where a jury, in answer to special questions, makes certain general findings which are contradicted by other special findings of fact in detail, the general findings are controlled by the special findings. *Chicago, B. & Q. Ry. Co. v. Laughlin*, 87 P. 749, 74 Kan. 567.

Special findings of fact, where inconsistent with the general verdict, control, and the general verdict should be set aside. *Stanley v. Atchison, T. & S. F. Ry. Co.*, 96 P. 34, 78 Kan. 87. Where in an action against a railroad for damages for the partial tearing down of a fence and leaving it in an unsafe condition, in consequence of which cattle escaped, the jury found a general verdict for plaintiff, but in answer to a special question found that both plaintiff and defendant were guilty of negligence, in answer to other special questions that plaintiff was not guilty of contributory negligence and in answer to another question that he was guilty of contributory negligence, the court properly set aside the general verdict, but erred in rendering judgment for defendant, and should have granted a new trial. *Id.*

When the evidence and findings of the jury show that the defendant has wholly failed to establish his counterclaim for damages against a cause of action confessed in favor of the plaintiff, the latter is entitled to judgment, notwithstanding a general verdict for the defendant. *Heyman v. Simmons*, 45 P. 728, 4 Kan. App. 1.

Special findings of jury control their verdict, and although a finding is

trolling importance,³³ or comes within the rule that where the general verdict and the special findings can be harmonized by construing the same liberally, it is the duty of the court so to do, and can only disturb the general verdict where there is no reasonable hypothesis under which they can be harmonized.³⁴

set aside, because without support in the evidence, the court, under Code Civ. Proc. § 294 (Gen. St. 1915, § 7194), may render judgment on remaining special findings notwithstanding the verdict, where the discarded finding does not conflict with, or impair, the force of other findings which of themselves settle substantial issues. *Hurt v. Stout*, 105 Kan. 54, 181 P. 623. The filing of a motion for a new trial within three days after the verdict is returned, following the filing of a motion for judgment on the special findings, which remains undetermined, does not operate as a waiver, of the motion for judgment on the findings. *Id.*

Upon an appeal from the award of commissioners in a condemnation proceeding, where the special findings of fact of the jury, stating the damages allowed to the landowner, are inconsistent with the general verdict, the former control. *St. Louis, Ft. S. & W. R. Co. v. McAuliff*, 23 P. 102, 43 Kan. 185.

In order to separate water and other foreign substances from natural gas flowing through its pipe, a company maintained a drip pipe into which the gas from the conveying pipe could be released by a valve. A boy playing with the appliance, a wrench having been left on the valve, turned the valve, and the force of the gas killed him. The father who recovered damages for his death was found to have known that escaping gas was dangerous to persons inhaling the same, and to have known the use of the pipes and appliances. Held not sufficiently inconsistent with the general verdict to warrant a judgment notwithstanding the verdict. *Lewellen v. Kansas Natural Gas Co.*, 116 P. 221, 85 Kan. 117.

A general verdict for plaintiff, based on testimony that defendants in the exercise of reasonable diligence should have known of a defect which caused the injury, is not overthrown by a special finding to the effect that defendants had no actual knowledge of the defect. *Atchison, T. & S. F. Ry. Co. v. Allen*, 88 P. 966, 75 Kan. 190, 10 L. R. A. (N. S.) 576.

Where the special findings of the jury are inconsistent with the general verdict the court should either render judgment in accordance with them, or set both findings and verdict aside. *Rouse v. Youard*, 41 P. 426, 1 Kan. App. 270.

³³ The general verdict cannot be affected by an answer to a special interrogatory of no controlling importance. *City of Topeka v. Noble*, 58 P. 1015, 9 Kan. App. 171.

³⁴ *St. Louis & S. F. Ry. Co. v. Bryan*, 119 P. 581, 29 Okl. 825.

Where the general verdict of a jury, and their special findings of fact, can be harmonized and made to agree by taking into consideration the entire record of the case, and construing the same liberally for that purpose, it is the duty of the court to so harmonize them. *Bevins v. Smith*, 21 P. 1064, 42 Kan. 250.

Special findings are to be construed, wherever possible, to harmonize with the general verdict. *Needles v. Wichita Park Amusement Co.*, 104 Kan. 716, 180 P. 768; *St. Louis & S. F. Ry. Co. v. Ritz*, 6 P. 533, 33 Kan. 404; *Solomon*

A judgment will be reversed where important findings of fact are inconsistent with each other and with the general verdict;⁸⁵ but

R. Co. v. Jones, 8 P. 730, 34 Kan. 443; *MacElree v. Wolfersberger*, 52 P. 69, 59 Kan. 105; *Missouri, K. & T. Ry. Co. v. Bussey*, 71 P. 261, 66 Kan. 735.

A general verdict will not be set aside on account of special questions, where the answers thereto are not contradictory to the general verdict, but are consistent therewith. *Winans v. Chapman*, 104 Kan. 664, 180 P. 266.

The general verdict must stand where the answers to special questions, when properly interpreted so as to support that verdict, are consistent therewith and do not contradict each other. *Burzio v. Joplin & P. Ry. Co.*, 171 P. 351, 102 Kan. 287, 562, L. R. A. 1918C, 997.

In an action on a note which is on its face barred by the statute of limitations, a special verdict that the amount of the note in suit, with interest, is a certain sum, is not inconsistent with a general verdict for defendant, and it is not error to enter judgment on the general verdict. *Smith v. Beeler*, 29 P. 1087, 48 Kan. 669.

An order admitting a will to probate, even if erroneous, is not rendered void by reason of an incorrect determination by the court of the domicile of deceased. *Dunsmuir v. Coffey*, 82 P. 682, 148 Cal. 137.

A general verdict for defendant in an action on a note brought in 1887 is not in conflict with special findings that defendant executed the note in 1861, that the amount due at the time of the verdict is a sum named, but that no payment has ever been made on the note; for under the findings the note is barred by limitation. *Lemon v. Dryden*, 23 P. 641, 43 Kan. 477.

Findings in an action for injuries from a collision between plaintiff's buggy and defendant's automobile held consistent with each other and with the general verdict. *Hoffman v. Charlett*, 155 P. 953, 97 Kan. 553.

Where special findings in husband's action for fatal injury to wife at inter-urban railway crossing did not establish wife's contributory negligence, as matter of law, a general verdict consistent therewith must stand. *Schaefer v. Arkansas Valley Interurban Ry. Co.*, 194 Kan. 394, 179 P. 323.

⁸⁵ *Cole v. Atchison, T. & S. F. Ry. Co.*, 139 P. 1177, 92 Kan. 132; *Hauck v. Valley Falls Mercantile Co.*, 163 P. 457, 99 Kan. 790.

Where special findings are inconsistent with one another, one showing a right to a verdict and the other showing the contrary, the judgment will be reversed. *Willis v. Skinner*, 130 P. 673, 89 Kan. 145.

Where a jury, in an important special finding, disregard all of the testimony introduced, and make a finding upon a subject calling for particular knowledge or experience, without any evidence to support it, such finding not only affects the other special findings, but may also affect the correctness of the general verdict, when the evidence in the case is conflicting. *Union Pac. Ry. Co. v. Shannon*, 6 P. 564, 33 Kan. 446.

Where, in an action for assault, no punitive damages were found, findings allowing \$100 for actual damages, \$1,000 for pain and suffering, and \$2,700 for permanent injury were inconsistent where the "actual" damages included expenses for attorney's fees, which the instructions did not allow unless exemplary damages were allowed. *Eckerd v. Weve*, 118 P. 870, 85 Kan. 752, 38 L. R. A. (N. S.) 516.

In an action for malicious prosecution of a civil action, the jury returned a general verdict for plaintiff, and answered in the affirmative that before

mere inconsistency between the special findings themselves is not necessarily fatal to the general verdict,³⁶ unless the findings are wholly inconsistent,³⁷ or destructive of the prevailing party's right to recover;³⁸ nor do special findings control the general verdict,

action brought defendant had stated the facts fully to an attorney, who advised him to sue, and the action was brought on such advice. One of the jurors stated that such was not his answer to the question, and refused to stand by it. Thereupon the jury was discharged, and judgment rendered for plaintiff. Held, that the judgment should be set aside. *Emory v. Egan*, 88 P. 740, 75 Kan. 82.

³⁶ *McCook v. Kemp*, 59 P. 1100, 10 Kan. App. 381.

Though there are inconsistent answers to special findings, the supreme court will not disturb the general verdict, where the trial court sustained it. *Missouri Pac. R. Co. v. Holley*, 1 P. 130, 30 Kan. 465, rehearing denied 1 P. 554, 30 Kan. 474.

In one finding the jury found the several amounts of the items of counterclaim set up in defendant's answer; in another, the aggregate amount allowed him thereon. This aggregate exceeded the sum of the items. Held, that the court, in rendering judgment on the special findings, properly gave defendant the benefit of the larger amount. *Gill v. Buckingham*, 52 P. 897, 7 Kan. App. 227.

An immaterial special finding of fact on a question not at issue, inconsistent with all the other findings, is not an obstacle to the rendition of such judgment as is warranted by the findings upon the issues joined. *Bank of Topeka v. Miller*, 51 P. 964, 7 Kan. App. 55, judgment reversed 54 P. 1070, 59 Kan. 743.

On the contest of a will, where the tribunal found against the contestants on all the issues raised by them, the fact that it also found upon an issue not embraced in the pleadings of the contest, or that in such case there was no finding declaring the will valid as holographic, will not affect the validity of the probate of the will. In *re Learned's Estate*, 11 P. 587, 70 Cal. 140.

³⁷ Where findings are wholly inconsistent a judgment on the verdict cannot stand. *Morse v. Ryland*, 57 P. 104, 60 Kan. 859; *Waterman v. Smith*, 54 P. 506, 8 Kan. App. 464; *Dickerson v. Waldo*, 74 P. 505, 13 Okl. 189.

A judgment cannot be rendered on inconsistent findings of the jury. A new trial must be had. *Shoemaker v. St. Louis & S. F. Ry. Co.*, 2 P. 517, 30 Kan. 359; *Ellsworth, M. N. & S. E. Ry. Co. v. Maxwell*, 18 P. 819, 39 Kan. 651.

Where the material findings of a jury are contradictory, and insufficient to sustain the general verdict, the judgment, based thereon, will be reversed. *Latshaw v. Moore*, 36 P. 342, 53 Kan. 234.

³⁸ Where the special findings are inconsistent with each other, and destructive of plaintiff's right of recovery, the court should enter judgment thereon for the defendant. *Missouri, K. & T. Ry. Co. v. Bussey*, 71 P. 261, 66 Kan. 735.

Judgment may not be rendered contrary to the general verdict sustaining several defenses to an action, on special findings of fact, unless the special findings defeat each defense. *First Nat. Bank of Garden City v. Stroup*, 164 P. 1054, 100 Kan. 17, 444.

unless the inconsistency between the two compels such result.³⁹ However, when the special findings of fact are inconsistent with the general verdict, the former control the latter, and the court may give judgment accordingly.⁴⁰

Where the special findings are contrary to the evidence, evasive and inconsistent, unfair and partial, the general verdict will be set aside, though approved by the trial court.⁴¹

Where a question of inconsistency arises between findings made in answer to special questions and a general verdict, nothing will be

³⁹ *Tarin v. Atchison, T. & S. F. Ry. Co.*, 158 P. 874, 98 Kan. 605.

Special findings will not control general verdict, unless so inconsistent as to show that the jury gave no intelligent attention to evidence or questions, or that there was a mistrial. *Missouri Pac. Ry. Co. v. Holley*, 1 P. 130, 30 Kan. 465, rehearing denied 1 P. 554, 30 Kan. 474.

In an action to recover damages for personal injuries, a special finding of fact by the jury that the plaintiff was damaged "by reason of her incapacity to perform labor in the sum of three hundred dollars" is not inconsistent with the general verdict of \$500, inasmuch as the capacity to perform labor is but one of the elements which the jury was entitled to consider in assessing damages for the plaintiff. *City of Guthrie v. Thistle*, 49 P. 1003, 5 Okl. 517.

⁴⁰ *Gripton v. Thompson*, 4 P. 698, 32 Kan. 367; *Clark v. Missouri Pac. Ry. Co.*, 11 P. 134, 35 Kan. 350; *Atchison, T. & S. F. R. Co. v. Morgan*, 22 P. 995, 43 Kan. 1; *Leavenworth, N. & S. Ry. Co. v. Wilkins*, 26 P. 16, 45 Kan. 674; *Phelps & Bigelow Windmill Co. v. Buchanan*, 26 P. 708, 46 Kan. 314; *School Dist. No. 46 of Lyon County v. Lund*, 33 P. 595, 51 Kan. 731; *Garth v. Board of Com'rs of Edwards County*, 66 P. 999, 63 Kan. 755; *Beech v. Missouri, K. & T. Ry. Co.*, 116 P. 213, 85 Kan. 90; *Choctaw, O. & W. R. Co. v. Castanien*, 102 P. 88, 23 Okl. 735.

Where the jury returned in their special findings that the actual damages of the plaintiff by reason of her injuries were \$300, and it was not claimed that the plaintiff was entitled to exemplary damages, a general verdict of \$700 cannot be sustained; it not appearing with any certainty what the amount in the excess of the \$300 was given for. *Atchison, T. & S. F. R. Co. v. Harvey*, 3 P. 568, 31 Kan. 750.

In an action to foreclose a lien, and recover the value of a windmill erected by plaintiff on land of defendant, the value of the improvement was expressly fixed, in an order admitted to have been executed by defendant, at \$221.29. Such order required plaintiff, on notice of the failure of the mill to work well, to make it so work. The jury found specially that the mill was constructed according to the contract, and that, while it did not work well at first, plaintiff upon notice remedied the defects; and they found a general verdict for plaintiff for \$98.44. Held, that on the special findings plaintiff was entitled to judgment for the full amount fixed by the order. *Phelps & Bigelow Windmill Co. v. Buchanan*, 26 P. 708, 46 Kan. 314.

⁴¹ *Atchison, T. & S. F. R. Co. v. Brown*, 7 P. 571, 33 Kan. 757; *Kansas Pac. Ry. Co. v. Peavey*, 8 P. 780, 34 Kan. 472; *Chicago, I. & K. R. Co. v. Townsadin*, 15 P. 889, 38 Kan. 78.

presumed in aid of the special findings, while every reasonable presumption will be indulged in favor of the general verdict.⁴²

Special findings do not form the basis for a judgment, unless inconsistent with the general verdict and consistent with one another,⁴³ and sufficient of themselves to establish or defeat the right of recovery.⁴⁴

The answers to special interrogatories override the general verdict only when both cannot stand; the conflict being such as to be beyond the possibility of being removed by any evidence admissible under the issues.⁴⁵

§ 1213. — Defects and amendments

It is not error to refuse to require a jury to make its answers to certain special findings of fact more specific, when such answers, if so made, would not differ in effect from those already made.⁴⁶

When special findings on material questions are contrary to the evidence, the general verdict based thereon should be set aside.⁴⁷

⁴² *Samson v. Zimmerman*, 85 P. 757, 73 Kan. 654; *Morrow v. Bonebrake*, 115 P. 585, 84 Kan. 724, 34 L. R. A. (N. S.) 1147.

⁴³ *Wisconsin Engine Co. v. Altoona Portland Cement Co.*, 126 P. 1076, 87 Kan. 806.

Answers to special questions are not a sufficient basis for a judgment non obstante, unless clearly inconsistent with the general verdict. *Lewellen v. Kansas Natural Gas Co.*, 116 P. 221, 85 Kan. 117.

A judgment on special findings which are not inconsistent with the general verdict cannot be ordered. *Sipult v. Wilson Land & Grain Co.*, 146 P. 329, 94 Kan. 224.

⁴⁴ *Seeds v. American Bridge Co.*, 75 P. 480, 68 Kan. 522.

⁴⁵ *Osburn v. Atchison, T. & S. F. Ry. Co.*, 90 P. 289, 75 Kan. 746; *Moeser v. Lewis*, 75 P. 512, 68 Kan. 485; *Atchison, T. & S. F. R. Co. v. Guinane*, 51 P. 782, 6 Kan. App. 922; *White v. Madison*, 83 P. 798, 16 Okl. 212.

Where no motion for new trial is made but the party moves for judgment, notwithstanding the general verdict, the question is whether, after every reasonable inference in favor of the general verdict, the special verdict was so irreconcilable and complete as to warrant judgment thereon. *McClain v. Chicago, R. I. & P. Ry. Co.*, 130 P. 646, 89 Kan. 24, Ann. Cas. 1914C, 699.

⁴⁶ *Electric Ry. Light & Ice Co. v. Brickell*, 85 P. 297, 73 Kan. 274.

⁴⁷ *Chicago, K. & N. Ry. Co. v. Muncie*, 42 P. 710, 56 Kan. 210.

In an action for causing death by the alleged negligent sale to decedent of wood alcohol, there was no error in refusing to set aside a finding that the deceased purchased no other liquor on the occasion in question, though the finding was contrary to the undisputed evidence of the only witness who testified on that point, since the jury were the judges of the credibility of the witness, and were not required to believe him. *Campbell v. Brown*, 117 P. 1010, 85 Kan. 527.

Art. 7) SPECIAL INTERROGATORIES AND FINDINGS §§ 1213-1214

Where there was an inconsistency in the amounts in the verdict and special findings, apparently due to a mistake in computation, it was not error to call the jury's attention to the matter and send them out for further deliberation.⁴⁸

When the jury returns unresponsive answers to special questions submitted, they should be required to retire and answer the same.⁴⁹

§ 1214. — Construction

Special findings are to be considered together, and, if possible, so construed as to harmonize them, and uphold the general verdict.⁵⁰ They should be given a reasonable rather than a technical construction. For example, in action for death of one killed when automobile was struck by train, the word "plaintiff," in a finding in answer to defendant's interrogatory, that defendant was more negligent in running at an excessive speed than plaintiff in not observing the ordinary precautions, necessarily referred to deceased.⁵¹

Where the jury is properly instructed as to negligence and reasonable and ordinary care, the answers to special questions depending for their interpretation on the definition of those terms, state facts and not conclusions of law.⁵²

In a personal injury case, in which defendant's negligence and plaintiff's contributory negligence were in issue, jury's answer that injury would have been avoided if plaintiff had exercised due care amounted to special finding for defendant on both issues.⁵³

In construing a jury's answer to a special question whether a belt got into gear automatically, it will be presumed that the jury understood the word "automatically" to mean having inherent pow-

⁴⁸ *Tatlow v. Bacon*, 149 P. 745, 85 Kan. 695.

⁴⁹ *Garvin v. Garvin*, 123 P. 717, 87 Kan. 97.

⁵⁰ *City of Kansas City v. Slangstrom*, 36 P. 706, 53 Kan. 431.

Special findings should, if possible, be construed together to uphold the verdict. *Cole v. Atchison, T. & S. F. Ry. Co.*, 155 P. 949, 97 Kan. 461.

If the findings of the jury will fairly admit of an interpretation which will make them harmonious with each other and with the general verdict, that interpretation should be given. *Jackson v. Linnington*, 28 P. 173, 47 Kan. 396, 27 Am. St. Rep. 300.

⁵¹ *Kirkland v. Atchison, T. & S. F. Ry. Co.*, 104 Kan. 388, 179 P. 362.

⁵² *Burzio v. Joplin & P. Ry. Co.*, 171 P. 351, 102 Kan. 287, 562, L. R. A. 1918C, 997.

⁵³ *Jones v. City of Kingman*, 101 Kan. 625, 168 P. 1099.

er of action or motion; self-acting or self-regulating; not voluntary; not depending on the will; mechanical.⁵⁴

In an action to recover for assault and battery, where defendant seeks to justify his conduct on the ground that he had reason to believe it was necessary to save his father from injury, a finding that the danger was not such as would induce a person exercising reasonable and proper judgment to interfere to prevent such danger is open to construction giving the word "danger" the force of apparent danger, justifying a verdict for plaintiff.⁵⁵

A jury answer, "We don't know," to a question as to how long a certain condition had existed, did not mean that such condition did not exist at all, or for any certain time, but that the evidence failed to show the duration of such existence;⁵⁶ it is a finding of failure to make proof.⁵⁷

That the jury's answer to a question as to how defendant was negligent referred only to a single matter did not preclude another form of negligence, the existence of which was specifically found, from being relied on to support the verdict.⁵⁸

Where the jury in answer to an interrogatory whether it was the intention that the mortgagor should remain in possession, selling the goods as he saw fit, replied, "Yes; to carry on in regular way," such reply meant that the intention was that the mortgagor was to sell the goods in the usual way, though such construction resulted in the conflict between the finding and general verdict.⁵⁹

Where a special question was submitted to a jury, as to whether a certain person delivered certain cattle to a bank in payment of a debt, an answer that such person did so deliver the property "to the agent of the bank" was an answer in the affirmative.⁶⁰

A finding in an action for death of a freight conductor, killed between two cars while switching them, that there was no evidence that the conductor was familiar with the condition of the

⁵⁴ *Estes v. Edgar Zinc Co.*, 136 P. 910, 91 Kan. 138.

⁵⁵ *Sloan v. Pierce*, 85 P. 812, 74 Kan. 65.

⁵⁶ *Hinze v. City of Iola*, 142 P. 947, 92 Kan. 779, Ann. Cas. 1916B, 281.

⁵⁷ *Martin v. City of Columbus*, 143 P. 421, 93 Kan. 79.

⁵⁸ *Springer v. Chicago Great Western R. Co.*, 143 P. 611, 95 Kan. 408.

⁵⁹ *First Nat. Bank of Smith Center v. Hardman*, 131 P. 602, 89 Kan. 212.

⁶⁰ *Guernsey v. Fulmer*, 71 P. 578, 66 Kan. 767.

track, is to be construed as meaning that under all the evidence the jury was not satisfied that such was the case.⁶¹

In an action triable to a jury as a matter of right, the court cannot disregard the verdict, and proceed to make findings of his own upon which to base a judgment.⁶²

Where main issue in action to recover price of corporate stock from plaintiff's agent was as to agent's fraud in procuring outstanding stock instead of treasury stock, answer by jury that he told plaintiff he could purchase stock of corporation at \$100 per share does not show adoption of contention that he was authorized to purchase outstanding stock.⁶³

A finding that the consideration of a deed was not "adequate" was not equivalent to a finding that it was not legally sufficient.⁶⁴

§ 1215. — Objections and exceptions

A failure to object to the return of special findings of fact, and to permit the jury to be discharged without specifically answering certain inquiries, is a waiver of the right to an answer, and it is too late to object to it after the jury is discharged.⁶⁵

Where objections are made to all of the special questions submitted to the jury, but no specific objection is made to any separate question, and some of them are proper, the objection should be overruled.⁶⁶

A general exception to a refusal to submit to the jury a number of special interrogatories is insufficient, if one of them be improper.⁶⁷

Where the jury were required to make a more definite answer to a question which had been submitted to them, but the second answer was no more specific than the first, it is not to be presumed that a better result would have been obtained by other efforts, nor did defendant waive its right to object to the finding by failing to request the court to have the effort repeated.⁶⁸

⁶¹ *Burks v. Atchison, T. & S. F. Ry. Co.*, 109 P. 1087, 83 Kan. 144.

⁶² *Hill v. Ellis*, 48 P. 204, 5 Kan. App. 532.

⁶³ *Gillies v. Linscott*, 157 P. 423, 98 Kan. 78, judgment affirmed on rehearing 160 P. 213, 99 Kan. 215.

⁶⁴ *Hays v. Patterson*, 155 P. 932, 97 Kan. 478.

⁶⁵ *City of Guthrie v. Thistle*, 49 P. 1003, 5 Okl. 517.

⁶⁶ *Hartman v. Hosmer*, 70 P. 598, 65 Kan. 595.

⁶⁷ *Coffeyville Vitriified Brick & Tile Co. v. Shanks*, 76 P. 856, 69 Kan. 306.

⁶⁸ *Missouri Pac. Ry. Co. v. Dorr*, 85 P. 533, 73 Kan. 486.

Where a party moves for judgment on a special verdict, no motion for a new trial, or to set aside such findings having been made, and excepts to the action of the court, he admits that the special findings state the facts fully and correctly. The jury having returned their answers to the specific questions submitted, and no motion for a new trial having been filed for a re-examination of the facts, or to set aside such findings, the only question for the trial court is whether to render judgment on the facts as found.⁶⁹

A change in special question, at plaintiff's request, without notice to defendant, must be assumed to have been observed when the answers to the special questions were returned, and, not being then objected to, to have been waived.⁷⁰

§ 1216. Form

SPECIAL INTERROGATORIES AND FINDINGS

(Caption.)

We, the jury impaneled and sworn in the above entitled case, do on our oaths find the following facts in answer to the following questions submitted:

1. For what injuries, if any, do you allow plaintiff damages, and how much for each injury?

Ans. For all injuries received. \$—— for side, \$—— for collar bone, \$—— for head.

2. To what part or parts of plaintiff's body did he sustain injuries, if any?

Ans. Left side, collar bone and head.

(Etc.)

——, Foreman.

⁶⁹ Standard v. Sampson, 99 P. 796, 23 Okl. 13.

⁷⁰ Missouri Pac. Ry. Co. v. Johnson, 53 P. 129, 59 Kan. 776.

CHAPTER XVII

INSTRUCTIONS

Sections

- 1217. Definition.
- 1218. Province of court.
- 1219. Defining words and terms.
- 1220. Verdict—Findings—Deliberations and determination of jury—Argument of counsel.
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- 1222. Written instructions—Request.
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- 1227. Formal requisites and sufficiency.
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- 1230. Illustrations.
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- 1234. Positive and negative evidence.
- 1235. Limiting effect of evidence.
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- 1237a. Objections and exceptions.
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§ 1217. Definition

“Instructions” are directions in reference to the law of the case, enabling the jury to better understand their duty, and prevent them from arriving at erroneous and wrong conclusions.¹

§ 1218. Province of court

It is the province of the court to determine and define the issues, and the duty of the jury to accept the interpretation of the pleadings made by the court and follow its directions.²

While the court may not comment on the weight of evidence, nor assume the existence or nonexistence of controverted facts, it may

¹ Leavitt v. Delchmann, 30 Okl. 423, 120 P. 983; Butler v. Gill, 127 P. 439, 34 Okl. 814; Hanson v. Kent & Purdy Paint Co., 129 P. 7, 36 Okl. 583.

² Stevens v. Maxwell, 70 P. 873, 65 Kan. 835.

refer to parts of evidence or lines of evidence offered by the respective parties, and make concrete applications of the law to them.³

The court should clearly state all the law necessary to explain fully a point of vital importance in the case, and not submit to the jury any of the legal questions involved.⁴

The existence of a statute is a question of law to be determined by the court.⁵

The interpretation of a written contract is for the court, and the relation of the parties as well as their obligations under it should be determined by the court and embodied in the charge to the jury.⁶

³ Haines v. Goodlander, 84 P. 986, 73 Kan. 183.

⁴ Atchison, T. & S. F. Ry. Co. v. Woodson, 100 P. 633, 79 Kan. 567.

In an action for injuries received while alighting from a moving train, held error to instruct that the question of negligence is one for the jury alone, and that they are the sole judges of that question, and that the law takes that out of the province of the court. Midland Valley R. Co. v. Bailey, 124 P. 987, 34 Okl. 193. It is the duty of the court to advise the jury of the duties which the law imposes, and, where there is a conflict in the evidence, it is the function of the jury to determine whether these duties have been violated. Id.

Where, under a contract, one telephone company places wires on the poles of another, and an employé of the former is killed while stripping the wires of the owning company from a defective pole belonging to the lessor company, the duty of the owning company to the leasing company and its employés as to maintaining the poles in a safe condition for the employés of the leasing company and its liabilities for injuries to such employé is a matter of law for the court, and it is error to leave the same to the jury. Aaron v. Missouri & Kansas Telephone Co., 114 P. 211, 84 Kan. 117.

Where the nature and extent of a railroad company's liability, if any, depended largely upon the construction of the terms of an ordinance of a city of the second class, granting the defendant's lessor the right to build and maintain its tracks over and along certain streets of said city, it was error for the trial court to leave the construction of the ordinance entirely to the jury, without giving them any guidance as to the interpretation thereof. Atchison, T. & S. F. R. Co. v. Anderson, 50 P. 603, 6 Kan. App. 923.

It is not error to refuse an instruction that a railroad corporation is entitled to the same protection under the law as individual litigants, where it does not appear that there was any reason to distrust the integrity of the jury or impute partiality or prejudice to them. Central Branch U. P. R. Co. v. Andrews, 21 P. 276, 41 Kan. 370.

It was prejudicial error, in submitting special questions by request, to state, "I want the jury to understand that these questions are got up to befuddle and mislead the jury, so that there will be error in the trial of this case, so that the verdict may be set aside." Cone v. Citizens' Bank, 46 P. 414, 4 Kan. App. 470.

⁵ Johnson v. Grady County, 50 Okl. 188, 150 P. 497.

⁶ Aaron v. Missouri & Kansas Telephone Co., 114 P. 211, 84 Kan. 117.

Instruction as to rights of seller on breach of contract by purchaser held not

§ 1219. Defining words and terms

Technical words used in an instruction need not be defined, if the same as used are made definite and intelligible to the jury.⁷

Unless the jury are properly instructed as to the meaning of the term "reasonable," it is error to charge that they may consider reasonableness as a basis for setting aside a deed.⁸

It is error to submit the question of residence without some definition of the term where that is the controlling question, and it is left in grave doubt by the evidence, and the attention of the court has been drawn to such necessity.⁹

Where it becomes necessary for the jury to determine whether an act conceded to be wrongful was justified by probable cause, the definition of that term and the rules by which it must be ascertained should be fully stated to the jury.¹⁰

It was error in a personal injury suit, for the court to refuse to define the term "ordinary care."¹¹

The jury are to decide what weight, if any, shall be given to the opinion or evidence of an expert, and it is error for the court to instruct them as to the weight of such evidence.¹²

If the facts pleaded and found amount to undue influence, it is not error to define undue influence, though not expressly pleaded as a defense to the contract sued on.¹³

subject to complaint that it left to the jury a question of law. *Capper v. Manufacturers' Paper Co.*, 121 P. 519, 86 Kan. 355.

⁷ *White v. Madison*, 83 P. 798, 16 Okl. 212.

The word "intoxicated" as used in application for life policy must be understood in its ordinary sense, and it is unnecessary that it be defined in instructions to jury. *Mutual Life Ins. Co. v. Johnson*, 64 Okl. 222, 166 P. 1074.

⁸ *Coblentz v. Puttifer*, 125 P. 30, 87 Kan. 719, 42 L. R. A. (N. S.) 298.

⁹ *Murray v. Geiser Mfg. Co.*, 99 P. 589, 79 Kan. 326.

¹⁰ *Atchison, T. & S. F. Ry. Co. v. Woodson*, 100 P. 633, 79 Kan. 567.

¹¹ *City of Junction City v. Blades*, 41 P. 677, 1 Kan. App. 85.

¹² *Kansas City, W. & N. W. R. Co. v. Ryan*, 30 P. 108, 49 Kan. 1.

Instructions that "in all cases" expert testimony "should be received and weighed with caution" are erroneous. *Atchison, T. & S. F. R. Co. v. Thul*, 4 P. 352, 32 Kan. 255, 49 Am. Rep. 484.

Where expert testimony is admitted, and the court thereon instructs the jury as follows: "It is your own opinion upon the matter, and the conclusions you draw from the facts proven, that should determine your verdict, and not what any other person says or thinks"—held, that such instruction is erroneous and misleading, and in effect excludes from the consideration of the jury such expert testimony. *Ball v. Hardesty*, 16 P. 808, 38 Kan. 540.

¹³ *Snyder v. Rosenbaum*, 215 U. S. 261, 30 S. Ct. 73, 54 L. Ed. 186, affirming *Snyder v. Stribling*, 18 Okl. 168, 89 P. 222.

§ 1220. Verdict—Findings—Deliberations and determination of jury—Argument of counsel

It is not error to refuse general instructions covering the law of the whole case, when particular questions of fact are submitted to the jury, and they are not required to render a general verdict.¹⁴

Where special questions are submitted, it is error to charge the jury to make their special findings conform to their general verdict.¹⁵

It is error to instruct a jury that their answers to particular questions of fact submitted should be consistent with their general verdict.¹⁶

The refusal of the court to charge that each juror must ultimately act on his individual judgment, where it does not appear that there is any special necessity for such an instruction, or that any prejudice resulted therefrom, is not reversible error.¹⁷

Although a court may be justified in refusing to set aside a verdict in condemnation proceedings, rendered by the jury on the "average theory," yet the trial court ought not to suggest to the jury, if the witnesses differ as to values, that they ascertain what the average of the estimates are first, and then afterwards decide whether such an average is fair or full value.¹⁸

The court cannot be required to instruct the jury on the province of counsel in arguing the cause in advance of the argument.¹⁹

¹⁴ *Warden v. Reser*, 16 P. 60, 38 Kan. 86.

¹⁵ *Kilpatrick-Koch Dry Goods Co. v. Kahn*, 36 P. 327, 53 Kan. 274.

¹⁶ *Coffeyville Vitrified Brick Co. v. Zimmerman*, 60 P. 1064, 61 Kan. 750.

¹⁷ *Central Branch U. P. R. Co. v. Andrews*, 21 P. 276, 41 Kan. 370.

¹⁸ *Kansas City, W. & N. W. R. Co. v. Ryan*, 30 P. 108, 49 Kan. 1.

¹⁹ *Parrish v. Parrish*, 72 P. 844, 67 Kan. 323.

Since defense of negligence is at all times a question for the jury, under Const. art. 23, § 6, it is error for court to instruct that certain stated facts or circumstances constitute contributory negligence. *Sweet v. Henderson* (Okl.) 178 P. 666.

Under Const. art. 23, § 6, held that the court properly refused to instruct that if the jury found certain facts to exist such facts as a matter of law would constitute contributory negligence and the jury should so find. *Pioneer Hardwood Co. v. Thompson*, 49 Okl. 502, 153 P. 137.

An instruction that if trapdoor in floor of vestibule was open while train was in motion and by the utmost diligence the carrier could have had it closed, and plaintiff without negligence fell through, it is sufficient to raise a presumption of negligence of the carrier and does not invade the province of the jury. *Chicago, R. I. & P. Ry. Co. v. Disney*, 61 Okl. 176, 160 P. 880.

The court may instruct what the amount of recovery shall be if plaintiff re-

§ 1221. Province of jury

An instruction that in determining the credibility of defendant, and the weight to be given his testimony, the jury should consider the fact that he is the defendant, and the interest he has in the result of the trial, and that the weight and credit to be given his testimony should be determined from a consideration of the other evidence in the case, does not invade the province of the jury.²⁰ Nor does an instruction naming certain facts which the jury may consider with the other facts, but making no comment as to their weight or the credibility of the witnesses, does not invade the province of the jury.²¹

Where plaintiff testifies to a given state of facts and is contradicted by a number of witnesses, it is not error to instruct that the testimony of one witness may be entitled to more weight than the testimony of many others, if the jury believe that such other witnesses have knowingly testified untruthfully and are not corroborated.²²

An instruction invades the province of the jury where it states that a party producing a witness at the trial of a cause thereby vouches for his veracity,²³ assumes the truth of controverted facts,²⁴ or assumes as a fact a material matter which is not proven.²⁵

A judge, in his charge to the jury, should not express an opinion

cover, where there is no controversy over the amount, provided the jury first find the controverted issues for plaintiff. *Jones v. S. H. Kress & Co.*, 54 Okl. 194, 153 P. 655.

²⁰ *Rhea v. United States*, 50 P. 992, 6 Okl. 249.

²¹ *Missouri, O. & G. Ry. Co. v. Collins*, 47 Okl. 761, 150 P. 142.

²² *Strickler v. Gitchel*, 78 P. 94, 14 Okl. 523.

²³ *Folsom-Morris Coal Mining Co. v. Dillon* (Okl.) 162 P. 696.

²⁴ *Baughman v. Penn.*, 6 P. 890, 33 Kan. 504; *Metropolitan St. Ry. Co. v. McClure*, 48 P. 566, 58 Kan. 109; *Gallick v. Bordeaux*, 78 P. 583, 31 Mont. 323; *Archer v. United States*, 60 P. 268, 9 Okl. 569; *Chicago, R. I. & P. Ry. Co. v. Stibbs*, 87 P. 293, 17 Okl. 97; *Barker v. Kansas City, M. & O. Ry. Co.*, 129 P. 1151, 88 Kan. 767, 43 L. R. A. (N. S.) 1121.

Where plaintiff relied on defendant's negligence in placing coal too near the track, an instruction assuming that plaintiff relied on the act of defendant in unloading the coal was properly refused. *Missouri, O. & G. Ry. Co. v. Miller*, 45 Okl. 173, 145 P. 367.

Where there was evidence tending to show that a servant of a restaurant keeper was acting within the scope of his authority in assaulting a guest, an instruction that he went without the scope of his authority was properly re-

²⁵ See note 25 on following page.

upon the evidence²⁶ nor should he call attention to particular facts in evidence in such a manner as to amount to an intimation of his opinion as to the weight of the evidence.²⁷

It is error for the court to instruct the jury on the weight of evidence or as to what the evidence shows upon a question of fact for their determination.²⁸

refused, as it would have invaded the province of the jury. *Goodwin v. Greenwood*, 85 P. 1115, 16 Okl. 489.

In action on fire policy instruction that plaintiff had made out a sufficient proof of loss was not erroneous where record showed that insurer was estopped to attack proof of loss. *Continental Ins. Co. v. Norman* (Okl.) 176 P. 211.

In action against administratrix of an alleged partner for price of goods sold the partnership, the refusal of instructions assuming the partnership was proper, where its existence was a disputed fact. *Peters Branch of International Shoe Co. v. Blake* (Okl.) 176 P. 892.

Where the evidence was conflicting as to whether plaintiff had first assaulted defendant, it was error to give an instruction referring to "the assault made or attempted to be made on him by the plaintiff." *Busalt v. Doidge*, 136 P. 904, 91 Kan. 37.

²⁵ *McWilliams v. Piper*, 53 P. 837, 7 Kan. App. 289; *Waldock v. First Nat. Bank of Idabel*, 143 P. 53, 43 Okl. 348.

An instruction that the verdict should be for plaintiff unless defendant was induced to sign the contract sued on by fraud or trickery, or unless he signed the same thinking he was signing a blank paper, and when he could not, by reasonable diligence, have ascertained what he was signing, held erroneous as taking from the jury the right to determine whether the contract was completely executed and delivered. *Rutherford v. Holbert*, 142 P. 1099, 42 Okl. 735, L. R. A. 1915B, 221.

Instruction that jury should take into consideration any notice decedent had of dangerous condition of electric wires is not objectionable as assuming that wires were in dangerous condition, where it is conceded that they were dangerous to any person coming in contact with them. *Wade v. Empire Dist. Electric Co.*, 158 P. 28, 98 Kan. 366, rehearing denied 158 P. 1110.

The expression, "the claim in dispute," taken in connection with other instructions, does not, when used by the court in one instruction, amount to a charge that the claim in litigation is actually in dispute, and thereby to an invasion of the province of the jury. *Baugh v. Fist*, 115 P. 551, 84 Kan. 740.

An instruction assuming that the result of negligence is itself the act of negligence is properly refused. *Thompson v. Aultman & Taylor Mach. Co.*, 146 P. 1188, 94 Kan. 453.

²⁶ *Heithecker v. Fitzhugh*, 20 P. 465, 41 Kan. 50.

²⁷ *Bilby v. Owen* (Okl.) 181 P. 724; *Cavender v. Roberson*, 7 P. 152, 33 Kan. 626; *Root v. Cudahy Packing Co.*, 147 P. 69, 94 Kan. 339.

²⁸ *Littlefield Loan & Investment Co. v. Walkley & Chambers* (Okl.) 166 P. 90.

Where defendant denied speaking slanderous words charged, and pleaded and proved words spoken of plaintiff which were not slanderous, an instruc-

Where there is an issue as to certain facts and evidence affirming and denying their existence, it is error to instruct that the evidence tends to prove such facts,²⁹ but, on request the court should eliminate all questions on which there is a failure of evidence.³⁰

tion that evidence of speaking of nondefamatory words was admissible to show whether defendant used the words charged, and in determining the issues invaded jury's province, and was reversible error. *Miskovsky v. Vrba* (Okl.) 177 P. 614.

An instruction in effect that there was no evidence tending to prove that the matter charged as defamatory was true held erroneous, as on the weight of the evidence. *Smith v. Gillis*, 51 Okl. 134, 151 P. 869.

Instruction that mere fact that a deed was carried and placed in bank by parties would not of itself be evidence whether it was placed in escrow or delivered to grantees invaded province of jury. *Grayson v. Damme*, 59 Okl. 214, 158 P. 387.

In an action by a passenger, who signed a release, for personal injuries, special instruction on the connection of a physician with carrier, held properly refused as a charge on the evidence. *Chicago, R. I. & P. Ry. Co. v. Cotton*, 62 Okl. 168, 162 P. 763.

An instruction that under certain circumstances "defendant would be liable, and you should so find from the evidence," held erroneous as charging on the weight of evidence. *Waldock v. First Nat. Bank of Idabel*, 143 P. 53, 43 Okl. 348.

An instruction charging directly on the weight of evidence held properly refused. *Missouri, O. & G. Ry. Co. v. Miller*, 45 Okl. 173, 145 P. 367.

Where the testimony was conflicting as to what amount was due plaintiff, an instruction that if the jury find for plaintiff he was entitled to recover a given sum was an invasion of the jury's province. *Midland Valley R. Co. v. Featherstone*, 123 P. 1123, 32 Okl. 837.

In an action for fire caused by the operation of a railroad, an instruction that evidence on the part of the defendant that its engines and appliances were in perfect condition, and that the engine was handled in a careful and skillful manner by a competent engineer and fireman, overcome the evidence of the plaintiff, and that in order to entitle the plaintiff to recover he must show by affirmative evidence that defendant was negligent, was erroneous as an invasion of the province of the jury. *Tuttle v. Missouri Pac. Ry. Co.*, 119 P. 370, 86 Kan. 28.

Defendant submitted to the jury, in an action for damages caused plaintiff by the bite of a vicious dog belonging to defendant, an interrogatory whether plaintiff, after he was bitten, said to defendant: "Don't worry about it; it don't amount to anything; it was my own fault." And the jury replied, "Not proven." The court refused an instruction as to the weight to be given affirmative and negative testimony. Held, not error. *Ayers v. Macoughtry*, 117 P. 1088, 29 Okl. 399, 37 L. R. A. (N. S.) 865.

²⁹ *St. Louis & S. F. R. Co. v. Wilson*, 124 P. 326, 32 Okl. 752.

Where in an action for rent the evidence was conflicting as to when notice was given by defendant to the landlord of the existence of a gambling establishment over the place of business rented by defendant, it was error to instruct

³⁰ *Humphrey v. Morgan*, 30 Okl. 343, 120 P. 577.

An instruction, assuming as true facts established by uncontroverted evidence, is not erroneous.⁸¹

When on a trial it is necessary to introduce in evidence proof of the existence of facts which are evidentiary, it is not error to in-

as to the time when such notice was given. *Clarke v. Uihlein*, 52 Okl. 48, 152 P. 589.

An instruction to find the amount due, "if any," under the contract sued on, held not erroneous, where the evidence was conflicting as to whether plaintiff was entitled to recover any amount. *Midland Savings & Loan Co. v. Cheves*, 59 Okl. 85, 158 P. 362.

An instruction which charges, as matter of law, that a certain transaction was a completed sale, the question being one of fact, affords ground for reversal. *Caywood v. Timmons*, 2 P. 566, 31 Kan. 394.

Where the evidence was in irreconcilable conflict as to whether or not there had been any agreement between plaintiff and defendant as to fees sued for, an instruction that, where no specific agreement is made, the plaintiff will be entitled to recover what his services are reasonably worth was error, being in effect a peremptory instruction to find for the plaintiff that no agreement had been made between the parties; and that therefore the jury should fix the amount of his recovery at such sum as his services were reasonably worth. *Leavitt v. Deichmann*, 80 Okl. 423, 120 P. 983.

⁸¹ *Byers v. Ingraham*, 51 Okl. 440, 151 P. 1061.

Where facts are conclusively established or admitted by parties, it is not improper to so instruct, where the jury is directed to consider evidence to establish such facts. *Murray v. Empire Dist. Electric Co.*, 162 P. 1145, 99 Kan. 507.

The giving of an instruction which assumes a fact conclusively shown by undisputed evidence is not ground for reversal. *Bleecker v. Miller*, 138 P. 809, 40 Okl. 374.

An instruction, in a passenger's action for injuries while riding as a care-taker of stock, to find for plaintiff if defendant was negligent, held not erroneous as assuming that plaintiff was rightfully in the stock car, where the evidence showed that he had a right to be there. *St. Louis & S. F. R. Co. v. Kerns*, 136 P. 169, 41 Okl. 167.

Where the court in its instructions gives a correct interpretation and exposition of the law as it relates to the admitted or uncontroverted facts, there is no ground for complaint. *Choctaw, O. & G. R. Co. v. Burgess*, 97 P. 271, 21 Okl. 653.

Where American Mortality Tables were admitted, and there was no other testimony showing female plaintiff's expectancy to be different from that shown by tables, it was not error for trial court to assume that expectancy was as shown by such tables. *Chicago, R. I. & P. Ry. Co. v. Johnson* (Okl.) 175 P. 494.

In an action for injuries to domestic animals, where the allegation of value is denied by the answer, and the only evidence is that of plaintiff, who states that he is a farmer, and gives his opinion as to the value of the animals, it is error to assume that the value is that testified to by him. *Choctaw, O. & G. R. Co. v. Deperade*, 71 P. 629, 12 Okl. 367.

Where, on a trial, both parties testify substantially alike as to a material

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struct the jury as to the effect the establishment of such fact has on the rights of the parties.³²

§ 1222. Written instructions—Request

Under the statute providing that, when the evidence is concluded and either party desires special instructions, they shall be reduced to writing, numbered, and signed by the party or his attorney asking them, and that the court shall give general instructions to the jury, which shall be in writing and numbered if required by either party, it is not error for the court to omit to number the instructions unless requested by the parties to do so.³³ But the court must instruct the jury in writing if requested by either party.³⁴

It was not a sufficient compliance with a request for written instructions, under the statute, for the court, after refusing to instruct

fact, the court, in instructing the jury, may assume that such fact is established. *Douglass v. Geller*, 4 P. 1039, 32 Kan. 490.

Where material fact testified to by one witness in civil action is not denied and is not inherently improbable, court in its instruction may assume such fact to be established. *Powelson v. State (Okl.)* 169 P. 1093.

³² *City of Guthrie v. Finch*, 75 P. 288, 13 Okl. 496.

An instruction on assumption of risk held not objectionable as a comment on the weight of the evidence. *St. Louis & S. F. R. Co. v. Brown*, 45 Okl. 143, 144 P. 1075.

An instruction defining the damages recoverable and concluding, "Provided such damages do not exceed * * * the sum sued for," held not equivalent to saying that such sum was reasonable damages. *Seay v. Plunkett*, 44 Okl. 794, 145 P. 496.

When uncontroverted evidence showed certain facts to be true, it is not error to so instruct. *Wichita Falls & N. W. Ry. Co. v. Woodman (Okl.)* 168 P. 209.

³³ *McIver v. Williamson-Halsell-Frazier Co.*, 92 P. 170, 19 Okl. 454, 13 L. R. A. (N. S.) 696; *Rev. Laws 1910*, § 5002, subd. 5.

³⁴ *Wheat v. Brown*, 43 P. 807, 3 Kan. App. 431; *Rich v. Lappin*, 23 P. 1038, 43 Kan. 666, and authorities there cited; *Scruton v. Hall*, 50 P. 964, 6 Kan. App. 714.

Where a verdict for the recovery of specific personal property is rightly directed, and the jury are told to find the value of the property at the time it was taken from the possession of the successful party, and add interest from the date of the taking to the rendition of the verdict, and no further or different instruction is asked, and it does not appear that counsel trying the case, or the jury, could have misunderstood the direction given, or that it was erroneous in any particular, the judgment will not be reversed merely because the instruction was not reduced to writing. *Deets v. National Bank of Pittsburg*, 46 P. 306, 57 Kan. 288.

in writing, to instruct the jury orally, and require the instructions to be taken by the court stenographer, and reduced to writing.³⁵

Where the court is not requested to instruct the jury in writing and to number and sign the instructions, he may charge the jury orally.³⁶

Where the instructions are reduced to writing, and clearly and concisely state the law, the mere failure to number them does not constitute reversible error.³⁷

Statements made by the court to the jury will be regarded as instructions within the statute requiring instructions from the court to the jury to be in writing only when they amount to a positive direction as to the law of the case.³⁸

§ 1223. — Time of making request

Where there is no rule of court fixing the time, a request made for written instructions, when the evidence is concluded, is sufficient to require the trial court to instruct the jury in writing.³⁹

Where a request for written instructions was not made until within a few minutes of the close of the evidence, at a time when the granting of the request would necessarily detain the business of the court, it was properly refused.⁴⁰

§ 1224. Time of giving instructions

The rule that the jury must be charged before the conclusion of the arguments is to be observed, unless the concluding argument itself, or some other happening, require remark.⁴¹

³⁵ Rich v. Lappin, 23 P. 1038, 43 Kan. 666; Wheat v. Brown, 43 P. 807, 3 Kan. App. 431.

³⁶ Bucher v. Showalter, 44 Okl. 690, 145 P. 1143; Ferrero v. State, 64 Okl. 44, 166 P. 101; Hopkins v. Dipert, 69 P. 883, 11 Okl. 630.

³⁷ Atchison, T. & S. F. Ry. Co. v. Calhoun, 89 P. 207, 18 Okl. 75, 11 Ann. Cas. 681, judgment reversed 29 S. Ct. 321, 213 U. S. 1, 53 L. Ed. 671.

³⁸ Boggs v. United States, 63 P. 969, 10 Okl. 424; Id., 65 P. 927, 10 Okl. 424, 11 Okl. 139.

³⁹ St. Louis & S. F. Ry. Co. v. Dawson, 53 P. 892, 7 Kan. App. 466.

Where a request for written instructions was made when the court was about to instruct the jury orally, and the instructions as given were transcribed by the official stenographer, and delivered to counsel and the jury, the refusal to give written instructions was not error. Union St. Ry. Co. v. Stone, 37 P. 1012, 54 Kan. 83.

⁴⁰ Connor v. Wilkle, 41 P. 71, 1 Kan. App. 492.

⁴¹ Foster v. Turner, 1 P. 145, 31 Kan. 58.

§ 1225. Accuracy

It is not error to refuse an instruction which does not correctly state the law.⁴²

Where the evidence is sharply conflicting, the instructions must be accurate in all material particulars;⁴³ but harmless error will be disregarded.⁴⁴

Any vagueness, in an instruction as to negligence authorizing a verdict for plaintiff, is cured by other instructions stating explicitly the only basis of a verdict for him.⁴⁵

§ 1226. Misleading instructions

Misleading charges are properly refused.⁴⁶ It is not error to refuse to give an instruction which is long, verbose, and uncertain as to its meaning, and which will tend to mislead and bewilder the jury.⁴⁷

It is often necessary for the court to speak of important fea-

⁴² *Ft. Smith & W. R. Co. v. Green*, 56 Okl. 585, 156 P. 349.

⁴³ *Chickasha Cotton Oil Co. v. Brown*, 39 Okl. 245, 134 P. 850; *Farris v. Hodges*, 59 Okl. 87, 158 P. 909.

⁴⁴ An instruction that if the plaintiff employé was negligent the jury should reduce his damages in proportion to his negligence held not open to the objection that the word "shall" instead of "should," should have been used. *St. Louis & S. F. R. Co. v. Brown*, 45 Okl. 143, 144 P. 1075.

⁴⁵ *Muskogee Electric Traction Co. v. Rye*, 47 Okl. 142, 148 P. 100.

⁴⁶ *Estrella Vineyard Co. v. Butler*, 57 P. 980, 125 Cal. 232; *Gregg v. Garverick*, 5 P. 751, 33 Kan. 190; *Irvin v. Missouri Pac. Ry. Co.*, 106 P. 1063, 81 Kan. 649, 26 L. R. A. (N. S.) 739; *Friedman v. Weisz*, 58 P. 613, 8 Okl. 392.

In action for injury while alighting from a street car, an instruction on contributory negligence held not a pronouncement of the discarded doctrine of comparative negligence or otherwise misleading. *Matassarín v. Wichita R. & Light Co.*, 163 P. 796, 100 Kan. 119.

In an action for the recovery of money, the answer was a general denial. The court charged that each of three specified propositions set forth in the petition must be found in favor of plaintiff, to entitle him to recover, and in the next instruction stated that, if the jury found against plaintiff as to each of said propositions, they should find for defendant. Held not misleading, but to place the burden on plaintiff of proving each of such propositions. *John V. Farwell Co. v. Thomas*, 56 P. 151, 8 Kan. App. 614.

In an employé's action for injuries before statehood a requested instruction that certain chapters of Arkansas laws were applicable to the case held misleading and confusing and properly refused. *Frisco Lumber Co. v. Spivey*, 140 P. 157, 40 Okl. 633.

The only part of a crop in question being the landlord's portion, and this being understood by the jury, an instruction that a sale of land without any reservation as to growing crops carries with it crops is not misleading,

⁴⁷ *Friedman v. Weisz*, 58 P. 613, 8 Okl. 392.

tures in the evidence and advise the jury as to the rule of law applicable to such facts; but it should not mislead the jury by singling out a particular fact in the case or unduly emphasize the contentions of either party.⁴⁸

though at the time of sale the land was occupied by a tenant. *Abbott v. Abbott*, 75 P. 1040, 68 Kan. 822.

In replevin for possession of certain grain on which plaintiff claimed to have a chattel mortgage for the purchase price of a machine, the court instructed that if plaintiff, at the time of the execution of the note and mortgage, agreed that it would remedy any defects in the machine and make it do good work, and failed to perform such agreement and remedy such defects, it could not recover, and, further, that if the jury believed the agreement between plaintiff and defendant was that the latter was not to keep the machine, unless it complied with all the conditions of the sale, and that defendant was to have the privilege of returning the machine if it did not comply with the conditions, then, if defendant was not satisfied with the machine, it was his duty to return it in a reasonable time, and, if he did not do so, he will be held to have elected to keep it and pay the price. Held, that such further instruction was prejudicial to defendant, as it was contradictory to the prior instruction, and was calculated to mislead the jury. *Payne v. McCormick Harvesting Mach. Co.*, 66 P. 287, 11 Okl. 318.

The court in its instructions may present the various phases of the case suggested by the evidence, or the contentions of the parties, though they are inconsistent with each other; and it is not error so to do when from the instructions as a whole the jury could not have been misled. *Votaw v. McKeever*, 92 P. 1120, 76 Kan. 870.

⁴⁸ *Haines v. Goodlander*, 84 P. 986, 73 Kan. 183.

An instruction singling out a particular circumstance, and telling the jury to take it as evidence, and stating its weight and effect under certain considerations, was properly refused. *Smart v. Missouri Pac. Ry. Co.*, 102 P. 253, 80 Kan. 438.

Where the evidence is circumstantial and conflicting, it is not error to refuse an instruction giving undue prominence to certain evidence, to the exclusion of other evidence equally material. *Kerr v. Coberly*, 105 P. 520, 81 Kan. 376.

Where it is necessary to consider the entire evidence to determine a question of fact, it is error to direct jury's attention to a portion of the evidence and direct a finding for plaintiff if such facts are sustained by the evidence. *Schick v. Warren Mortg. Co.*, 107 P. 536, 82 Kan. 90.

An instruction grouping the facts supposed to bear on the question of contributory negligence is calculated to mislead the jury, and does not harmonize with the recognized distinction between the functions of the court and jury in the determination of questions of fact. *Peterson v. Baker*, 97 P. 373, 78 Kan. 337.

An instruction is erroneous which singles out and gives improper prominence to particular facts or evidence. *Honick v. Metropolitan St. R. Co.*, 71 P. 265, 66 Kan. 124.

In a suit for breach of warranty, when the evidence as to the warranty and any breach thereof is conflicting, it is the duty of the court to instruct the

An instruction specifically referring the jury to a statute may be reversible error.⁴⁹

In a case where the validity of a contract has been denied and its execution is claimed to have been abandoned, the court should not give instructions which assume that the contract is in force.⁵⁰

§ 1227. Formal requisites and sufficiency

Instructions should clearly set forth the law applicable to the issues and the evidence without being conflicting;⁵¹ but where a jury are correctly instructed on the law of a case, and the court, in addition, gives a slightly contradictory instruction which clearly appears, from the special findings of the jury, not to have misled them, the additional instruction will not entitle the defeated party to a new trial.⁵²

The entire law of the case need not be stated in a single instruction, and it is not improper to state the law as applicable to partic-

jury as to the burden of proof, the preponderance of evidence, and the inevitable result to plaintiff, if the evidence is equally balanced; and the statement of these rules is not such a repetition, or effort to make them prominent, as to prejudice the minds of the jurors against plaintiff. *Simpson v. Baxter*, 21 P. 634, 41 Kan. 540.

An instruction that the jury might consider the adequacy of the amount paid for a release in determining the competency of plaintiff held erroneous as giving undue prominence to that fact. *Robinson v. Chicago, R. I. & P. Ry. Co.*, 150 P. 636, 96 Kan. 137.

⁴⁹ *Butler v. Gill*, 127 P. 439, 34 Okl. 814.

⁵⁰ *Snyder v. Rosenbaum*, 215 U. S. 261, 30 S. Ct. 73, 54 L. Ed. 186 affirming *Snyder v. Stribling*, 18 Okl. 168, 89 P. 222.

⁵¹ *Kansas City, M. & O. Ry. Co. v. Roe*, 50 Okl. 105, 150 P. 1035.

Instruction that burden is on plaintiff to establish by preponderance of evidence each material allegation of petition, and that burden is on defendant to establish by preponderance of evidence each material allegation of his answer, part of which was general denial, is conflicting and erroneous. *Firebaugh v. Du Bois*, 59 Okl. 236, 158 P. 924.

An instruction that all persons engaged in the same work are fellow servants, though one may be a foreman, and an instruction that where a man has power to control men, whether called a superintendent or foreman, for whose negligence the master is liable, are erroneous for inconsistency. *Petroleum Iron Works Co. v. Bullington*, 61 Okl. 311, 161 P. 538.

In action for overflow caused by railway embankment, instructions, presenting defenses that injury was occasioned by act of God, are not inconsistent with instructions, submitting contention of plaintiff that negligence of defendant was proximate cause. *Chicago, R. I. & P. Ry. Co. v. Morton*, 57 Okl. 711, 157 P. 917.

⁵² *Bigelow v. Wygal*, 35 P. 200, 52 Kan. 619.

ular questions in separate instructions, if there is no conflict in the law as so stated.⁵³

The theories of both parties need not, and generally should not, be stated in a single instruction.⁵⁴

The want of orderly and logical arrangement of the propositions of law involved in the charge of the court is not cause for reversal, if all of the propositions of law fairly applicable to the case are given by the court in such manner as to fairly inform the jury of the rules by which they are to be guided.⁵⁵

It is not error for instructions to repeatedly state material facts, where undue prominence is not given them and the issues cannot be properly submitted without repetition.⁵⁶

An instruction may be lengthy and involve all conditions of the right of a party to recover, and may set out those conditions in detail;⁵⁷ but instructions covering 20 pages of the record, where the issues are few and simple, are objectionable as being too long and vague, since an instruction should be plain, simple, concise, unambiguous, and consistent.⁵⁸

Instructions, if fairly and reasonably presenting the issues raised, are sufficient.⁵⁹

⁵³ *Grant v. Milam*, 95 P. 424, 20 Okl. 672.

It is not necessary to state all the law of case in one instruction, and single instruction cannot be excised from context and interpreted to govern controversy without regard to other instructions given. *Gillies v. Linscott*, 157 P. 423, 98 Kan. 78, judgment affirmed on rehearing 160 P. 213, 99 Kan. 215.

⁵⁴ *Chicago, R. I. & P. Ry. Co. v. Groves*, 44 P. 628, 56 Kan. 601.

⁵⁵ *Atchison, T. & S. F. R. Co. v. Calvert*, 34 P. 976, 52 Kan. 547.

⁵⁶ *Murray v. Empire Dist. Electric Co.*, 162 P. 1145, 99 Kan. 507; *Lawder v. Hinderson*, 14 P. 164, 36 Kan. 754.

⁵⁷ *Park View Hospital Co. v. Randolph Lodge*, No. 216, I. O. O. F., 162 P. 302, 99 Kan. 488.

⁵⁸ *Hanson v. Kent & Purdy Paint Co.*, 129 P. 7, 36 Okl. 583.

⁵⁹ *McMaster v. City Nat. Bank of Lawton*, 101 P. 1103, 23 Okl. 550, 138 Am. St. Rep. 831.

An instruction, which impressed upon the jury the importance of making true findings of fact from the evidence, held not erroneous, though it also stated that a mistake of law may be corrected by the court while a mistake in a finding of fact cannot be corrected. *Reynolds v. New Century Mining Co.*, 133 P. 844, 90 Kan. 208.

An instruction, in a brakeman's action for injuries, that the jury could bring to their assistance their good judgment, common sense, observation, and experience in life held proper. *Smith v. St. L. & S. F. R. Co.*, 148 P. 759, 95 Kan. 451.

In action for balance due for services as salesman selling on commission,

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Instructions which clearly and substantially state the law applicable to the facts are not objectionable for mentioning unnecessary matters as incumbent on defendants.⁶⁰

It is error for the court to instruct the jury that their answers to particular questions of fact submitted should be consistent each with the other, since it is the jury's duty to answer each question in accordance with the preponderance of the evidence bearing thereon.⁶¹

The fact that the converse of an instruction strongly in a party's favor would be erroneous, as to him, does not necessarily disclose error in the giving of the instruction.⁶²

It is error to instruct a jury, afterwards authorized to return a general verdict, that it had been impaneled only for the purpose of answering certain special questions of fact.⁶³

An instruction complained of must be read in connection with the whole charge,⁶⁴ and if they are correct when so read they are not erroneous.⁶⁵

held, in view of evidence, that instruction that plaintiff contended that he had procured orders to certain amount, which were approved by defendant, was proper. *Orendorff v. Brown Bed Mfg. Co.*, 173 P. 281, 103 Kan. 183.

⁶⁰ *Russell v. Watts*, 150 P. 600, 96 Kan. 275.

⁶¹ *St. Louis & S. F. R. Co. v. Burrows*, 61 P. 439, 62 Kan. 89.

⁶² *City of Wichita v. Stallings*, 54 P. 689, 59 Kan. 779.

⁶³ *Matthewson v. Caldwell*, 52 P. 104, 59 Kan. 126.

⁶⁴ *Michellod v. Oregon-Washington R. & Nav. Co.*, 85 Or. 329, 168 P. 620; *Ponca City Ice Co. v. Robertson* (Okl.) 169 P. 1111; *Allison v. Bryan*, 50 Okl. 677, 151 P. 610; *Chicago, R. I. & P. Ry. Co. v. Johnson* (Okl.) 175 P. 494; *Newton v. Allen* (Okl.) 168 P. 1009; *Chicago, R. I. & P. Ry. Co. v. Brandon*, 95 P. 573, 77 Kan. 612; *Central Branch U. P. R. Co. v. Andrews*, 21 P. 276, 41 Kan. 370; *John V. Farwell Co. v. Thomas*, 56 P. 151, 8 Kan. App. 614; *Weathers v. Kansas City Bridge Co.*, 162 P. 957, 99 Kan. 632; *Madey v. Swift & Co.*, 168 P. 1105, 101 Kan. 771; *Murphy v. Ludowici Gas & Oil Co.*, 150 P. 581, 96 Kan. 321; *Drysdale v. Wetz*, 171 P. 653, 102 Kan. 680.

⁶⁵ *Howell v. Iola Portland Cement Co.*, 120 P. 350, 86 Kan. 283; *Missouri, K. & T. Ry. Co. v. Horton*, 119 P. 233, 28 Okl. 815; *Slick Oil Co. v. Coffey* (Okl.) 177 P. 915; *First Nat. Bank v. Ingle*, 132 P. 895, 37 Okl. 276; *Gulf, C. & S. F. Ry. Co. v. Taylor*, 130 P. 574, 37 Okl. 99; *Missouri, O. & G. Ry. Co. v. Collins*, 47 Okl. 761, 150 P. 142; *Chickasha St. Ry. Co. v. Marshall*, 141 P. 1172, 43 Okl. 192; *Curtis & Gartside Co. v. Pigg*, 39 Okl. 31, 134 P. 1125; *Weller v. Dusky*, 51 Okl. 77, 151 P. 606; *Great Western Mfg. Co. v. Davidson Mill & Elevator Co.*, 110 P. 1096, 26 Okl. 626; *St. Louis & S. F. R. Co. v. Akard*, 60 Okl. 4, 159 P. 344; *Nutt v. State*, 123 P. 165, 3 Okl. Cr. 266; *Chase v. Cable Co.* (Okl.) 170 P. 1172; *Zuspann v. Roy*, 170 P. 387, 102 Kan. 188; *State v. Miller*, 10 P. 865, 35 Kan. 328; *Lawder v. Hinderson*, 14 P. 164, 36

§ 1228. Instructions and pleadings

It is not error to summarize in the instructions the allegations in the pleadings;⁶⁶ nor is it necessarily error to refer the jury to the pleadings.⁶⁷

Kan. 754; *Atchison, T. & S. F. R. Co. v. Sadler*, 16 P. 46, 38 Kan. 123, 5 Am. St. Rep. 729; *Sweeney v. Merrill*, 16 P. 454, 38 Kan. 216, 5 Am. St. Rep. 734; *Hays v. Farwell*, 35 P. 794, 53 Kan. 78; *Gilmore v. Gilmore*, 50 P. 97, 6 Kan. App. 453; *City of Kansas City v. Smith*, 54 P. 329, 8 Kan. App. 82; *City of Atchison v. Acheson*, 57 P. 243, 9 Kan. App. 33.

The incorporation of the petition and answer in the court's instructions is not prejudicial error, where in other portions of the instructions the issues are clearly stated. *Newton v. Allen* (Okl.) 168 P. 1009.

Where paragraphs of a charge are uncertain as to whom the burden of proof is placed upon, yet, if they are followed by a clear instruction as to the burden of proof, the judgment will not be reversed unless appellants have been prejudiced thereby. *Love v. Reynolds*, 128 P. 242, 36 Okl. 297.

It is not reversible error, though technically wrong, to instruct that the master must furnish suitable appliances, where his duty is otherwise correctly stated. *Great Western Coal & Coke Co. v. Serbantas*, 50 Okl. 118, 150 P. 1042.

Giving of instruction which ignored the issue of contributory negligence held not cured by another instruction. *Oklahoma Ry. Co. v. Milam*, 45 Okl. 742, 147 P. 314.

Failure of an instruction, which sets forth a hypothetical statement of facts entitling plaintiff to recover for injuries at crossing, to mention contributory negligence, held not cured by another instruction, which dealt with con-

⁶⁶ *Chicago, R. I. & G. Ry. Co. v. Bentley*, 143 P. 179, 43 Okl. 469.

Where instructions fairly and reasonably present issues joined by pleadings and presented by evidence, they are sufficient. *Wichita Falls & N. W. Ry. Co. v. Puckett*, 53 Okl. 463, 157 P. 112. Where defendant railroad denied plaintiff was injured while in its employment and there was no allegation that it was engaged in interstate commerce, court did not err in failing to mention allegation in answer that plaintiff's right to recover was regulated by federal Employers' Liability Act. *Id.* It is not error in instructions to tell jury substance of what is alleged in petition and answer. *Id.*

It is not reversible error for the court, in its instruction, after reciting the nature of the cause of action and the issues to be determined by the jury, and what it is necessary for plaintiff to prove thereunder to recover, to add: "The grounds of negligence claimed by the plaintiff are more fully set forth in the petition, to which you are referred." *Union Pac. Ry. Co. v. Sternberger*, 54 P. 1101, 8 Kan. App. 131.

⁶⁷ The court referred the jury to the petition for the terms of a contract alleged to have been violated, and for certain statements alleged to have been made by the defendant, designating where each might be found in the petition by pencil marks, but the construction of the pleadings and the determination of the issues were not left to the jury. Held, that there was no prejudicial error. *Myer v. Moon*, 26 P. 40, 45 Kan. 580.

The practice of sending the jury to the pleadings for the matter of controversy is erroneous, and where the pleadings contain im-

tributory negligence. *Chicago, R. I. & P. Ry. Co. v. Clark*, 46 Okl. 382, 148 P. 998.

Instruction given on measure of damages in a shipper's action for damages to a shipment of sheep from delay in furnishing a car held not erroneous, in view of the entire charge. *Midland Valley R. Co. v. Larson*, 138 P. 173, 41 Okl. 360.

In railway mail clerk's action for personal injury, instruction that if he was guilty of contributory negligence he could not recover, construed with other instructions given, held not to eliminate that question from jury. *St. Louis & S. F. R. Co. v. McClain*, 63 Okl. 75, 162 P. 751.

Instructions in action for price, construed together, held not objectionable as authorizing recovery against two of the defendants on the ground of use alone. *Harn v. Patterson*, 58 Okl. 694, 160 P. 924.

In servant's personal injury action, an instruction that the servant was entitled to such sum as would compensate him for any loss sustained from his injuries, together with a previous instruction denying recovery unless he had been injured, held not erroneous in assuming the fact of injury. *Chicago, R. I. & P. Ry. Co. v. Penix*, 61 Okl. 4, 159 P. 1141.

That in servant's action where contributory negligence was relied on, an instruction allowing jury to find for plaintiff did not require them to find him free from contributory negligence will not warrant reversal, where next instruction, beginning, "But, on the other hand," correctly stated rule as to contributory negligence. *Sulzberger & Sons Co. of Oklahoma v. Strickland*, 60 Okl. 158, 159 P. 833.

In action by interstate shipper for loss of goods, refusal of instruction held not erroneous, in view of instructions given. *St. Louis & S. F. R. Co. v. Akard*, 60 Okl. 4, 159 P. 344.

In action for overflow caused by railway embankment, instruction that fact that embankment of another railway contributed to injury did not relieve defendant of liability if defendant contributed to injury, in connection with instructions as to proximate cause and effect of other embankment, held not error. *Chicago, R. I. & P. Ry. Co. v. Morton*, 57 Okl. 711, 157 P. 917.

Where court purports to state substance of allegations in petition and answer and fails to mention defense of contributory negligence, subsequent giving of instructions embodying such defenses cured any error in such omission. *Wichita Falls & N. W. Ry. Co. v. Puckett*, 53 Okl. 463, 157 P. 112. Where court purports to state substance of allegations in petition and answer and fails to mention defense of assumed risk subsequent giving of instructions embodying such defenses cured any error in such omission. *Id.*

An instruction that the presumption of negligence arising from the happening of an accident might be rebutted by the carrier's showing to the satisfaction of the jurors, etc., is not reversible error where the court also charged that no particular degree of proof was required. *Muskogee Electric Traction Co. v. Eaton*, 49 Okl. 344, 152 P. 1109.

An instruction using the language, "provided you find that plaintiff has established all the other material allegations of this petition," held harmless, where the material issues were so clearly stated in the other instructions that

portant and intricate averments, for some of which no proof was offered, it was material error.⁶⁸

the jury could know same without reference to the petition. *Curtis & Gartside Co. v. Pigg*, 39 Okl. 31, 134 P. 1125.

An instruction on the damages recoverable in an employé's action for injuries held not prejudicial, when considered together with an instruction on negligence and the right of recovery. *Curtis & Gartside Co. v. Pribyl*, 38 Okl. 511, 134 P. 71. Instructions on contributory negligence, in an employé's action for injuries, held not prejudicial when considered together. *Id.*

In action for assault in forcibly attempting to have carnal intercourse, an instruction on defense of blackmail and extortion on account of malice that if there was no assault plaintiff could not recover was not objectionable as requiring defendant to show that he was not guilty, in view of other instructions placing burden of proof on plaintiff. *Weber v. Weber* (Okl.) 179 P. 31.

In railroad servant's action for personal injury, instructions excepted to by defendant, considered with all the instructions given, held to state the applicable law with substantial accuracy. *St. Louis, I. M. & S. Ry. Co. v. True* (Okl.) 176 P. 758.

An imperfect statement of the issues pleaded is cured if the trial judge fully and clearly charges on all the issues. *Henryetta Coal & Mining Co. v. O'Hara*, 50 Okl. 159, 150 P. 1114.

In action on open account, instruction, considered with other instructions given, held to fairly state law applicable to theory of case when it was commenced and tried. *Lonsdale v. Schlegel* (Okl.) 171 P. 330.

Instructions must be considered together, and while an instruction, standing alone, may be open to criticism, yet if the instructions, when taken together, fairly submit the issue to the jury, there is no reversible error. *Missouri, K. & T. Ry. Co. v. Zuber*, 76 Okl. 146, 184 P. 452, 7 A. L. R. 840; *Lonsdale v. Schlegel* (Okl.) 171 P. 330; *Ft. Smith & W. R. Co. v. Holcombe*, 59 Okl. 54, 158 P. 633, L. R. A. 1916F, 1237; *Casteel v. Brooks*, 46 Okl. 189, 148 P. 158; *Chicago, R. I. & P. Ry. Co. v. Johnson*, 107 P. 662, 25 Okl. 760, 27 L. R. A. (N. S.) 879; *Corley v. Atchison, T. & S. F. Ry. Co.*, 147 P. 842, 95 Kan. 124, Ann. Cas. 1916B, 163; *Litsch v. Kansas Gas & Electric Co.*, 148 P. 632, 95 Kan. 496.

A master's duty is performed when he furnishes for his servants machines that are reasonably and adequately safe; and it is error for a court to instruct the jury that it is his duty to provide safe machinery; but when the correct rule is clearly and plainly stated in the same instruction, and in almost the immediate connection, and it appears from the findings of fact that the machine inquired about was defective and out of repair, it is not such error as would necessitate a reversal and retrial of the action, when it further appears that it was tried upon the theory that such machine was not perfectly safe. *Atchison, T. & S. F. R. Co. v. McKee*, 15 P. 484, 37 Kan. 592.

An instruction that "it does not discredit a witness if he should voluntarily

⁶⁸ *Stevens v. Maxwell*, 70 P. 873, 65 Kan. 835.

Where a petition is voluminous, covering six pages of typewritten matter, failure of the court to state the issues to the jury, and sending the pleadings with them to ascertain the issues, is reversible error. *Kansas City, Ft. S. & M. R. Co. v. Dalton*, 72 P. 209, 66 Kan. 799.

§ 1229. Instructions and evidence

An instruction that "the jury are not bound to take the testimony of any witness as absolutely true," should be qualified by adding,

appear without a subpoena" is not error, where the jury are also told that they may take into consideration any interest which the witness might appear to have, or any bias, prejudice, or unfairness manifested by him. *State v. Keys*, 37 P. 167, 53 Kan. 674.

In an action for damage from fires along defendant's right of way, though an instruction was proper, under the evidence, that the company's negligence might be inferred from the occurrence of a series of fires without direct evidence of negligence, its refusal was not reversible error, where, after instructing as to the effect of the statute making the mere setting out of the fire prima facie evidence of negligence, the court instructed that, after the company had introduced testimony to rebut the presumption of negligence, it was a question of fact for the jury from all the evidence whether the fire was caused by defendant's negligence or was accidental. *Lillard v. Chicago, R. I. & P. Ry. Co.*, 98 P. 213, 79 Kan. 25.

Where evidence was offered tending to support but one of three charges of negligence alleged, and the court in charging read the petition to the jury, but in a separate charge stated clearly the matters which plaintiff was required to prove to make out a cause of action, and specified therein only the particular charge of negligence which was supported by evidence, and no request was made to otherwise eliminate or withdraw from the jury the other charges, there was no prejudicial error in the instruction. *Every v. Rains*, 115 P. 114, 84 Kan. 560.

The giving of an inapplicable instruction is not ground for reversal, where the court subsequently gave such clear and proper instructions that the jurors, as reasonable men, ought not to have been influenced by the error, and nothing appears from which it can be inferred that they were in fact misled. *St. Louis & S. F. Ry. Co. v. Sullivan*, 48 P. 945, 5 Kan. App. 882, 7 Kan. App. 527.

Where it was clear from the evidence that the jury were not misled by a general statement in an instruction as to the amount of damages which might be awarded, and that they were guided in that regard by another instruction, correctly stating the proposition of law applicable, there was no error in giving the first instruction. *Gardner v. Cooper*, 60 P. 540, 9 Kan. App. 587, affirming judgment 58 P. 230, 9 Kan. App. 587.

Refusal of an instruction that fraud in procurement of the note was not to be considered on the question of bona fide holder held not error, where the jury were told that if such fraud was shown the burden of proving want of notice was on plaintiff. *Leavens v. Hoover*, 145 P. 877, 93 Kan. 661.

Failure of the instructions to distinguish between contributory negligence and assumed risk, held harmless, where the court defined contributory negligence in other instructions. *Miller v. Foundation Co.*, 143 P. 493, 93 Kan. 38.

Where, in an action for damages for fraud, the court instructed that plaintiff must prove his case by a preponderance of the evidence, a further instruction to return a verdict for defendant if the evidence was evenly balanced, or preponderated "to the slightest extent" in his favor, was harmless.

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"if there is reason to believe it false or mistaken," or words of similar import.⁶⁶

A general instruction that plaintiff has the burden of proving a

Hewey v. Fouts, 139 P. 407, 91 Kan. 680, rehearing denied 140 P. 894, 92 Kan. 268.

Instruction that if defendant should reasonably have anticipated that persons using public highway might come in contact with electric wires, and it failed to use highest care to insulate them, it was negligent, held not to impose too high duty when considered with other instructions. *Wade v. Empire Dist. Electric Co.*, 158 P. 28, 98 Kan. 366, rehearing denied 158 P. 1110.

In action for damages for dispossession of farm land, instructions as to rights of sublessee were not prejudicial, where plaintiff relied upon a lease from the owner through defendant, as her agent, and in view of instructions on that theory. *Lamb v. Lemon*, 103 Kan. 607, 177 P. 4.

In action for death of plaintiff's son from contact of loose wire with electric wire, instruction which, taken alone, might indicate that, as matter of law, company was bound to anticipate such result, held not prejudicial, because of other explicit instructions thereon. *Storm v. Leavenworth Light, Heat & Power Co.*, 102 Kan. 40, 169 P. 556.

In an action for relief on the ground of fraud, an instruction, that plaintiff can recover if he has proved his allegations by a bare preponderance of evidence, will not require setting aside the verdict for plaintiff, in the absence of anything to show that the jury were misled, where they were also told that unusual matters can be established only by evidence of a reliable character. *Herrald v. Paris*, 89 Kan. 131, 130 P. 684.

Instruction, which placed upon the plaintiffs the burden of proving that the defendant, their sales agent, "wrongfully" took uncollectible notes, held not erroneous in view of prior instructions given. *Singmaster v. Beckett*, 121 P. 339, 86 Kan. 494.

In action for personal injury when struck by defendant's automobile, instruction that burden of proof as to contributory negligence rested on defendant, without permitting plaintiff's evidence to be looked to, was not error, when read with another instruction on contributory negligence. *Cusick v. Miller*, 171 P. 599, 102 Kan. 663, L. R. A. 1918D, 1086.

A judgment will not be reversed because part of an instruction is subject to criticism, where that part is controlled and governed by another part of the same instruction correctly stating the law. *Murray v. Empire Dist. Electric Co.*, 162 P. 1145, 99 Kan. 507.

Where numerous instructions are given, one or more of which contain clauses which may be misleading to the jury, if the instructions as a whole make it apparent that doubtful instructions should be so construed as to properly direct the jury, the case will not be reversed. *Meyer v. City of Rosedale*, 113 P. 1043, 84 Kan. 302.

Where the instructions taken together, stated the law with substantial ac-

⁶⁶ *Chicago, R. I. & P. Ry. Co. v. Groves*, 44 P. 628, 56 Kan. 601.

An instruction that, if the jury believe from the evidence that any one has testified "willfully false" to a material fact, they may disregard "the entire evidence," is erroneous. *City of Hiawatha v. Warren*, 55 P. 484, 8 Kan. App. 209.

right to recover is not objectionable, though some issues are involved as to which the burden is on defendant.⁷⁰

An instruction that, after plaintiff had adduced evidence establishing his case, the verdict must be for him, unless defendant adduces a preponderance of evidence against same, is erroneous.⁷¹

An instruction on questions of law, not applicable to the issues or evidence, is error, though abstractly correct.⁷²

Proof of fraud must be clear, strong, and convincing; and hence it was error to instruct that a slight preponderance of evidence would sustain the burden of proof as to fraud.⁷³

Where improper evidence is received at the instigation of the complaining party, it is not error for the court to eliminate the same from the consideration of the jury.⁷⁴

§ 1230. — Illustrations

An instruction that the jury should consider, in connection with all the testimony and circumstances, all testimony on every point including that of medical experts, is not erroneous.⁷⁵

An instruction that the jury must look to the evidence so far as it is "clear and unambiguous," in order to determine the contract in which the loan sued for is made, is misleading, as implying that if it was not clear and unambiguous it need not be considered.⁷⁶

curacy and no special instruction was asked, reversible error could not be predicated on an instruction not inherently misleading, if it was supported, amplified, and explained by the other instructions. *Grimes v. Emery*, 146 P. 1135, 94 Kan. 701, affirming judgment 141 P. 1002, 92 Kan. 911.

Incorporation of the plain language of the pleadings into the instructions held not error, where the issues were fairly presented by the instructions as a whole. *Williamson v. Prairie Oil & Gas Co.*, 146 P. 316, 94 Kan. 238.

⁷⁰ *Kansas State Mut. Hail Ass'n v. Title Guaranty & Surety Co.*, 155 P. 13, 97 Kan. 271, rehearing denied 156 P. 715, 97 Kan. 651.

In an action by a broker for commission, defendant pleaded fraud in the procurement of the contract by the insertion therein of terms not in accordance with the agreement of the parties, an instruction that if the jury believed, "from a preponderance of the testimony, that there was a contract which expressed the purpose and intention of the plaintiff and defendant" was not erroneous in imposing on plaintiff the burden of proving the validity of the contract. *L. L. Tyler & Son v. Wheeler*, 41 Okl. 335, 135 P. 351.

⁷¹ *City of Woodward v. Bowder*, 46 Okl. 505, 149 P. 138.

⁷² *Holmes v. Halstid*, 76 Okl. 31, 183 P. 969.

⁷³ *St. Louis & S. F. R. Co. v. Bruner*, 56 Okl. 682, 156 P. 649.

⁷⁴ *Creek Coal Mining Co. v. Paprotta* (Okl.) 175 P. 235.

⁷⁵ *Yard v. Gibbons*, 149 P. 422, 95 Kan. 802.

⁷⁶ *Coles v. Nikirk*, 57 P. 41, 8 Kan. App. 857.

Instructions permitting jury to consider facts and circumstances in evidence, "or," in the disjunctive, other facts and circumstances observed during trial, were not erroneous as permitting jury to consider facts and circumstances observed during trial outside of those in evidence.⁷⁷

In an action for a money judgment and equitable relief, an instruction that part of the evidence was admitted on matters to be decided by the court, but that the jury might consider any of it throwing light on the matters submitted to them, was not erroneous.⁷⁸

A judgment will be reversed where the jury, being unable to agree, question the court, and he authorizes them to consider the fact that certain evidence was not produced in the justice's court, when in fact the case went by default in that court, and no evidence was offered.⁷⁹

An instruction that the burden of proof was on defendant to establish the defense of contributory negligence is not open to the objection that the jury might have been misled when none of the evidence tends to prove contributory negligence.⁸⁰

In an action to recover for injuries sustained by a fireman by reason of the defective apron of a coal chute, where there is evidence that the apron was out of repair six months before the accident and that the chute had been in daily use during this period, the court, in applying the rule that a condition once shown to exist is presumed to continue until the contrary is shown, should inform the jury that such presumption is one of fact which may be rebutted by circumstantial as well as direct evidence.⁸¹

Where petition avers wrong in pursuance of conspiracy, it is error to instruct to find for defendants if conspiracy is not shown, if there is any evidence against any of defendants of wrong alleged.⁸²

In an action to foreclose a chattel mortgage on a threshing outfit, it was error to instruct that the defendant mortgagors were entitled to recover the value of the property, when plaintiff took pos-

⁷⁷ *Potter v. Womach*, 63 Okl. 107, 162 P. 801.

⁷⁸ *Delgarno v. Middle West Portland Cement Co.*, 145 P. 823, 93 Kan. 654.

⁷⁹ *Heithecker v. Fitzhugh*, 20 P. 465, 41 Kan. 50.

⁸⁰ *St. Louis & S. F. R. Co. v. Johnson*, 86 P. 156, 74 Kan. 83.

⁸¹ *Atchison, T. & S. F. Ry. Co. v. Lloyd*, 75 P. 478, 68 Kan. 369.

⁸² *Harblson v. White*, 56 Okl. 566, 156 P. 335.

session under its mortgage, authorizing it to do so on the mortgagors' default, where the taking did not constitute a conversion.⁸³

Where, in an executor's action against an attorney for money collected for the estate and not paid over, defendant testified to collecting \$620, \$220 of which was due him for fees, and that he had the balance, it was not error to instruct the jury to find for plaintiff in a sum not less than \$400.⁸⁴

§ 1231. Withdrawal of instructions

Where certain instructions are given in favor of the defendant over the objection of plaintiff, and after the jury have retired and before a verdict is reached, the court, on reflection, concludes that the instructions were wrong, and calls the jury into open court and by written instruction withdraws them, if they were contrary to the law, the action of the court in withdrawing was not reversible error.⁸⁵

§ 1232. Instructions on issues

The court should instruct as to the law applicable to the issues of fact raised by the evidence.⁸⁶ He should submit to the jury and give instructions upon any issue, theory, or defense which the evidence tends to support, although there is countervailing testimony.⁸⁷

⁸³ *J. I. Case Threshing Mach. Co. v. Barney*, 54 Okl. 686, 154 P. 674.

⁸⁴ *Baker v. Tate*, 138 P. 171, 41 Okl. 353.

⁸⁵ *Long v. Kendall*, 87 P. 670, 17 Okl. 70.

⁸⁶ *Missouri, O. & G. Ry. Co. v. Davis*, 54 Okl. 672, 154 P. 503.

Refusal to give an instruction applicable to facts in evidence not covered by other instructions is error. *St. Louis & S. F. Ry. Co. v. Boyce*, 48 P. 949, 5 Kan. App. 678.

It is the duty of the trial court to instruct the jury upon all questions upon which there is a conflict of testimony. *National Bank of Paola v. Hampson*, 45 P. 970, 4 Kan. App. 217.

⁸⁷ *Spurrer Lumber Co. v. Dodson*, 30 Okl. 412, 120 P. 934; *Menten v. Richards*, 54 Okl. 418, 153 P. 1177; *Henryetta Coal & Mining Co. v. O'Hara*, 50 Okl. 159, 150 P. 1114; *Binkley v. Dewart*, 58 P. 1028, 9 Kan. App. 891.

It is duty of court to submit by proper instructions, theory of defense supported by evidence. *Mountcastle v. Miller* (Okl.) 166 P. 1057.

The court when duly requested must submit by instructions any material issue, theory, or defense which is supported by evidence. *Holmboe v. Neale* (Okl.) 171 P. 334. The right on request to have any material issue, theory, or defense submitted to the jury, if supported by evidence, is not affected by the fact that there is evidence to the contrary. *Id.*

In case tried to a jury court must submit plaintiff's theory where there is

It is not necessary that each separate instruction embody every element essential to sustain or defeat an action, or cover the entire case.⁸⁸

evidence reasonably tending to support it, and a failure to give requested instructions which are correct and applicable, either in language requested or substantially so, is reversible error. *Bristow v. Central State Bank* (Okla.) 173 P. 221.

Where defendant was induced to enter into contract by reason of tricks, dissembling, etc., constituting fraud within Rev. Laws 1910, § 903, it was error to refuse its request to so instruct jury. *Choctaw Cotton Oil Co. v. Williams* (Okla.) 168 P. 792.

A requested charge as to the construction by the parties of a written contract which was construed by the court held properly refused as immaterial. *McKnight v. Strasburger Bldg. Co.*, 150 P. 542, 96 Kan. 118.

It was not error to instruct on the nature of the pleading, so that jury might determine whether allegations were supported by proof. *Shawnee-Tecumseh Traction Co. v. Newcome*, 59 Okla. 271, 158 P. 1193.

Instructions which fairly recite the claims and contentions of the parties are not rendered erroneous by reading to the jury the contracts involved in the action. *Wisconsin Engine Co. v. Altoona Portland Cement Co.*, 126 P. 1076, 87 Kan. 806.

Damages.—Where derailment of a train is alleged to be due to the negligence of defendant in certain specified particulars, and the railroad offers evidence of facts which it claims caused the accident, and which would relieve it from responsibility, the court should present both theories to the jury. *St. Louis & S. F. R. Co. v. Posten*, 124 P. 2, 31 Okla. 821.

Where plaintiff sues as sole owner for damages to property, and the evidence tends to show a joint ownership with another, it is error to refuse to submit the issue thus raised to the jury. *St. Louis & S. F. R. Co. v. Webb*, 128 P. 252, 36 Okla. 235.

In an action against a railroad company to recover for property destroyed by fire set by sparks escaping from a locomotive, the giving or refusal of an instruction predicated on the theory that the engine was properly constructed, in good order, and skillfully managed, could not be prejudicial, where the jury failed to find the facts on which the instruction was predicated. *Atchison, T. & S. F. R. Co. v. Huitt*, 41 P. 1049, 1 Kan. App. 781.

Where judgment creditor acting in good faith, refused to satisfy judgment, and there is evidence in judgment debtor's action for damages tending to support such defense, it was duty of court to give an instruction correctly stating the law applicable to such issue. *First State Bank v. Carr* (Okla.) 180 P. 856.

In an action against a driver of automobile for killing a boy, the refusal of an instruction that children of tender age are required to exercise such care as persons of their age, experience, and intelligence are ordinarily expected to exercise under like circumstances was erroneous, where instructions given did not cover that phase of case. *Eames v. Clark*, 104 Kan. 65, 177 P. 540.

In an action for damages to interstate shipment of live stock, where de-

⁸⁸ *Chickasaw Compress Co. v. Bow*, 47 Okla. 576, 149 P. 1166.

Where it is evident plaintiff has introduced testimony in support of his theory of the case, it is not error for the court, after stating plaintiff's theory, to charge that he has introduced evidence in support of it.⁸⁹

It is not error to refuse an instruction on an immaterial matter.⁹⁰

§ 1233. — Applicability to pleadings and evidence

The court should give instructions that are fairly correct and state the law applicable to the case, and do not state mere abstract principles.⁹¹

Instructions are properly refused which, though abstractly correct, are not applicable to facts pleaded.⁹²

The scope of an instruction is not to be determined alone by the

defendant offered a contract making notice of a claim a condition precedent to recovery, failure to give requested instruction on such provision was error. *St. Louis & S. F. R. Co. v. Whitefield* (Okl.) 172 P. 637.

Where railroad company is charged with failing to use ordinary care in several particulars, it cannot split the charges into the items mentioned, and ask for ruling as to each, but the general question of negligence was to be determined. *Dickinson v. Granbery* (Okl.) 174 P. 776.

⁸⁹ *Missouri, O. & G. Ry. Co. v. Parker*, 50 Okl. 491, 151 P. 325.

Evidence in a drawbridge employé's action for injuries received in the operation of a drawspan held to authorize an instruction on dangerous employment. *Heavey v. Leavenworth Terminal Ry. & Bridge Co.*, 156 P. 699, 97 Kan. 737.

⁹⁰ *Minneapolis Steel & Machinery Co. v. Schalansky*, 165 P. 289, 100 Kan. 562.

Refusal of instruction that plaintiff had lien for work and materials held not error. *Redus v. Mattison*, 121 P. 253, 30 Okl. 720.

⁹¹ *Chickasaw Compress Co. v. Bow*, 47 Okl. 576, 149 P. 1166.

Instructions embracing abstract statements of law, and which are misleading as applied to the issues, are properly refused. *Meyer v. Reimer*, 70 P. 869, 65 Kan. 822.

It is not error to refuse instructions which, though abstractly correct, are not applicable to the facts. *Fowler v. Fowler*, 61 Okl. 280, 161 P. 227, L. R. A. 1917C, 89.

An instruction which although abstractly correct, is inapplicable to any inquiry which is legitimately before the jury, and might mislead them, is erroneous. *Union Pac. Ry. Co. v. Fray*, 3 P. 550, 31 Kan. 739; *Atchison, T. & S. F. R. Co. v. Harvey*, 3 P. 568, 31 Kan. 750.

⁹² *Williams v. Arends*, 57 Okl. 556, 157 P. 313.

Refusal of requested instruction which was inapplicable to the issues held not error, though it correctly stated an abstract rule of law. *Grosshart v. Shaffer*, 52 Okl. 204, 152 P. 441.

Refusal of an abstractly correct instruction inapplicable to the facts held not error. *St. Louis & S. F. Ry. Co. v. Henry*, 46 Okl. 526, 149 P. 132.

pleadings, but also by the evidence in support of the issues.⁹³ It follows that, the giving of an instruction not applicable to any facts in evidence, and which in connection with other instructions might confuse the jury, is reversible error, even though such instruction is abstractly correct.⁹⁴

⁹³ *Missouri, K. & T. Ry. Co. v. Taylor* (Okl.) 170 P. 1148.

⁹⁴ *Continental Supply Co. v. Patrick* (Okl.) 168 P. 996.

The trial court is not warranted in submitting an issue to the jury which there is no evidence to support. *Bliby v. Owen* (Okl.) 181 P. 724; *Muskogee Electric Traction Co. v. Staggs*, 125 P. 481, 34 Okl. 161; *White v. Oliver*, 122 P. 156, 32 Okl. 479.

An instruction not based on the evidence is erroneous, and should not be given. *St. Louis, W. & W. Ry. Co. v. Ritz*, 1 P. 27, 30 Kan. 30; *Bigelow v. Henniger*, 6 P. 593, 33 Kan. 362; *Dowell v. Williams*, 6 P. 600, 33 Kan. 319; *Feineman v. Sachs*, 7 P. 222, 33 Kan. 821, 52 Am. Rep. 547; *Ransom v. Getty*, 14 P. 487, 37 Kan. 75; *Honick v. Metropolitan St. Ry. Co.*, 71 P. 265, 66 Kan. 124; *American Surety Co. of New York v. Ashmore*, 86 P. 453, 74 Kan. 325; *Grubel v. Busche*, 91 P. 73, 75 Kan. 820; *Long Island Ins. Co. of Brooklyn v. Hall*, 4 Kan. App. 641, 46 P. 47; *City of Kansas City v. Smith*, 54 P. 329, 8 Kan. App. 82.

Where there was no evidence of misrepresentation by principal creditor, or of collusion between principal debtor and creditor or knowledge of misrepresentation by principal debtor to creditor, instruction as to fraud by creditor was error. *Citizens' State Bank of Okeene v. Cressler* (Okl.) 170 P. 230.

In a suit on original oral promise to pay money furnished to another at defendant's request, wherein the only issue made by the evidence was as to whether any promise was made, and where there was no evidence that such promise, if made, was to answer for the debt, default, or miscarriage of another, the statute of frauds was not involved, and court should not instruct as to such statute. *Bliby v. Owen* (Okl.) 181 P. 724.

In an action for fraud and deceit, held error to instruct that if defendant S. acted as the agent of defendant H. in the transaction with plaintiff, H. was bound to the same extent as if he had personally made the false representations complained of, regardless of whether S. was employed to so act, or known by H. to have so acted, where the doctrine of implied ratification was inapplicable under the facts of the case. *Swanson v. Peel*, 60 Okl. 124, 158 P. 564.

An instruction that, even though the insured, while he claimed to be totally and continuously disabled, performed some trivial services, that would not prevent him from recovering for all of the time, and that the test is not whether plaintiff performed any services of any character, but whether he was able to perform services of any sort or character, held justified by the evidence. *Continental Casualty Co. v. Wynne*, 129 P. 16, 36 Okl. 325.

In an action for breach of warranty of an electric motor, instruction that, if the motor would run at the time of the sale, the jury should find for defendant, held error, as not sustained by the evidence. *Hurst v. Hill*, 122 P. 513, 32 Okl. 532.

In an action for the unlawful conversion of certain live stock, where de-

fendant justifies the taking under a claim of right, based on a chattel mortgage given to him by plaintiff, which mortgage plaintiff charges defendant with having materially altered after execution, it is error to submit, as a material question in the case, the issue as to the alteration of such mortgage, when no evidence whatever tending to show such alteration by the defendant, or by his agent, has been introduced. *Willard v. Ostrander*, 32 P. 1092, 51 Kan. 481, 37 Am. St. Rep. 294.

In action on benefit certificate, instruction that, if insured did not understand that shot by which he killed himself was likely to result in death, plaintiff might recover, held not sustained by any evidence. *Power v. Modern Brotherhood of America*, 158 P. 870, 98 Kan. 487, 701.

In will contest, instruction that if testator had insane delusion that his children had not treated him kindly, causing him to make the will as he did, it could not stand, was objectionable, where its application to the facts shown did not clearly appear. *De Crow v. Harkness*, 163 P. 630, 100 Kan. 144.

Evidence held not to warrant an instruction on the theory that a physician held himself out as a specialist, or that the degree of skill and care required of him should be higher than is required of an ordinary physician and surgeon. *Sly v. Powell*, 87 Kan. 142, 123 P. 881.

In suit for consideration provided by oil and gas lease on its sale, instructions as to damages and character of proof held erroneous as not based on the evidence. *Moherman v. Anthony*, 103 Kan. 500, 175 P. 676.

In action by mortgagee for conversion of mortgaged chattels, where only evidence of tender of payment was mortgagor's offer to deliver to mortgagee purchaser's check, charge that if jury found actual payment, mortgagee could not recover held erroneous. *Morrison v. Montgomery*, 101 Kan. 670, 168 P. 674.

Negligence and damages.—Where there was no evidence reasonably tending to prove that deceased, prior to the shots which he knew were about to be fired, had an opportunity to leave the mine, an instruction predicated on that theory was properly refused. *Great Western Coal & Coke Co. v. Cunningham*, 143 P. 26, 43 Okl. 417.

Where, in a passenger's action for injuries from falling over a "skid" on a station platform, there was evidence that it was a moonlight night, and a person exercising ordinary care could have seen the skid, it was error to instruct that the leaving of a skid upon a platform not lighted, so that passengers could distinguish the skid, would be negligence. *Missouri, O. & G. Ry. Co. v. Flanagan*, 139 P. 696, 40 Okl. 502.

Evidence held not to warrant submission to the jury as an element of damage plaintiff's subsequent miscarriage. *St. Louis & S. F. R. Co. v. Criner*, 137 P. 705, 41 Okl. 256.

In an action for an offset of damages by a mortgage debtor against his creditor for the premature institution of a foreclosure suit, and for refusal to release parts of the property from the mortgage lien, where the mortgage contract, together with other collateral and contemporaneous written agreements, are plain and unambiguous in their terms, it is error to instruct that the jury may take into account what was "contemplated" or "expected" by the parties as to the way and means by which the debtor was to realize money with which to discharge the mortgage debt. *Carbondale Inv. Co. v. Burdick*, 50 P. 442, 58 Kan. 517.

Where, in an action for damages from an error in a telegram, resulting in

It is error to instruct on a question not involved in the issues as made by the pleadings or warranted by the evidence.*⁵

the plaintiff real estate brokers selling property at a sum which left them no commission, there was no evidence that plaintiffs acted as agents for both the vendor and purchaser, it was error to instruct on a broker's lack of right to commission, where he acts for both parties. *Levy Bros. v. Western Union Tel. Co.*, 39 Okl. 416, 135 P. 423.

It is error to submit to the jury the question of negligence, where there is no evidence reasonably tending to show negligence. *Chicago, R. I. & P. R. Co. v. Duran*, 38 Okl. 719, 184 P. 876.

Where in a personal injury action the evidence does not show the value of medical services, it is error to instruct to consider medical care received so far as shown by the evidence. *Shawnee Gas & Electric Co. v. Hunt*, 122 P. 673, 32 Okl. 368.

It is error in an action for personal injuries to charge as to the liability of defendant in case the jury find that the injury was the result of defendant's gross negligence, in the absence of evidence of such negligence. *Atchison, T. & S. F. R. Co. v. Winston*, 43 P. 777, 56 Kan. 456.

Where defendant in a personal injury case relied on a release and there was no element of fraud or duress proven, it was error to instruct on such matters. *St. Louis & S. F. R. Co. v. Bruner*, 56 Okl. 682, 156 P. 649.

Where plaintiff boarded next to last car and passed through it en route to rear car and sustained injury on platform between coaches, it is error to submit to jury question of negligence of carrier in holding train long enough to give reasonable opportunity to board in safety in absence of special circumstances within knowledge of operators. *Ft. Smith & W. R. Co. v. Green*, 56 Okl. 585, 156 P. 349.

⁹⁵ *Mayo v. Thede* (Okl.) 175 P. 348; *Chicago, R. I. & P. Ry. Co. v. Wheeler*, 79 P. 673, 70 Kan. 755, judgment reversed 83 P. 27, 70 Kan. 760; *Oil Well Supply Co. v. Johnson*, 98 P. 381, 78 Kan. 751; *Obenchain & Boyer v. Incorporated Town of Roff*, 116 P. 782, 29 Okl. 211; *Maurmair v. National Bank of Commerce of Tulsa*, 63 Okl. 283, 165 P. 413, withdrawing opinion, 158 P. 349; *Oklahoma Ry. Co. v. Christenson*, 47 Okl. 182, 148 P. 94; *Webster v. Shawnee-Tecumseh Traction Co.* (Okl.) 170 P. 1167.

It is ordinarily error to instruct on a material issue not raised by the pleading. *Chicago, R. I. & P. Ry. Co. v. Mailes*, 52 Okl. 278, 152 P. 1131; *Comanche Mercantile Co. v. Wheeler & Motter Mercantile Co.*, 55 Okl. 328, 155 P. 583; *Chambers v. Van Wagner*, 123 P. 1117, 32 Okl. 774.

Instructions which are not based on the evidence and are to some extent against the evidence are erroneous. *Babcock v. Dieter*, 2 P. 504, 30 Kan. 172.

It is not error to refuse to instruct upon an issue not within the pleadings. *Sand Springs Ry. Co. v. Baldrige*, 60 Okl. 102, 159 P. 487.

A requested instruction on an issue not presented by either the pleadings or evidence is properly refused. *City of Abilene v. Hendricks*, 13 P. 121, 36 Kan. 196; *Citizens' Bank of Wakita v. Garnett*, 95 P. 755, 21 Okl. 200; *First Nat. Bank of Ralston v. Walworth*, 98 P. 917, 22 Okl. 878; *Ft. Smith & W. R. Co. v. Collins*, 108 P. 550, 26 Okl. 82; *Finch v. Brown*, 111 P. 391, 27 Okl. 217.

An instruction applicable neither to the issue nor the evidence is erroneous. *First Nat. Bank of Arkansas City v. Skinner*, 62 P. 705, 10 Kan. App. 517.

It is error to instruct on an irrelevant issue not raised by the pleadings

when such instruction is strongly calculated to mislead the jury. *Kingfisher Nat. Bank v. Johnson*, 98 P. 343, 22 Okl. 228.

Giving of instructions on issue not raised by pleadings or evidence, and which will probably confuse jury, is error. *St. Louis & S. F. Ry. Co. v. Dobyns*, 57 Okl. 643, 157 P. 735.

The refusal of a special instruction requested by defendant was not error where the answer and evidence thereunder did not raise the question involved in the instruction. *Grisso v. Crump*, 61 Okl. 83, 160 P. 453.

A requested instruction, not relating to any issue in the case, was properly refused. *Lebanon State Bank v. Garber*, 105 Kan. 44, 181 P. 572.

Requested instructions, predicated upon only a part of the pleadings and evidence, held properly refused. *Midland Valley R. Co. v. Rippe*, 61 Okl. 314, 161 P. 233.

Where instructions are given that are not based on the evidence or the issues of the case, and which appear to have probably misled the jury, the judgment will be reversed and a new trial granted. *Zimmerman v. Knox*, 8 P. 104, 34 Kan. 245.

Where plaintiff in ejectment denied in her testimony that she executed certain deeds relied on by defendant, it was not error to refuse to instruct that if such deeds were without consideration plaintiff should recover. *Dyal v. Norton*, 47 Okl. 794, 150 P. 703.

The giving of an instruction that if it was understood that the obligation was a joint obligation, then defendant would be liable held erroneous, where no claim was made in the pleading or evidence that the obligation was a joint one. *Waldock v. First Nat. Bank of Idabel*, 143 P. 53, 43 Okl. 348.

In action for conversion, instruction authorizing recovery for breach of warranty was erroneous. *Pierce v. Barks*, 60 Okl. 97, 159 P. 323.

Failure to instruct on the effect of withdrawing or attempting to withdraw from a difficulty held not error, where there was no evidence that defendant withdrew or attempted to withdraw. *Brown v. Motley*, 51 Okl. 277, 151 P. 1060.

In an action for false imprisonment, the giving of instructions on matters outside any issue involved in the action was error. *Hostettler v. Carter* (Okl.) 175 P. 244.

Where a petition avers that plaintiff is a corporation duly organized under the law, and such averment is not denied under oath by defendant nor made an issue in the trial, and the court in its instructions makes the existence of the plaintiff an issue to be determined from the evidence, the instruction is erroneous. *Western Roofing Tile Co. v. Deibler*, 30 Okl. 347, 120 P. 579.

In action for rent under written lease for one year, where there was neither allegation nor evidence of plaintiff's failure to use reasonable diligence to mitigate damages, after abandonment of lease, and where proof showed receipt of two months' rent from subsequent tenant, refusal to instruct on mitigation of damages was not error. *Steinman v. John Hall Tailoring Co.*, 163 P. 452, 99 Kan. 699.

Where, in an action by real estate brokers for commission, the pleadings and proof did not present the issue of dual agency of plaintiffs, an instruction on dual agency was properly refused. *Schwartz v. Meschke*, 141 P. 175, 92 Kan. 650.

Where the question at issue was the validity of a mortgage, it was error

to charge the jury on a part of the statute of frauds having no application to chattel mortgages. *Gilmore v. Swisher*, 52 P. 426, 59 Kan. 172.

There being no allegation or proof of fraud or fraudulent representations in the sale of the property, an instruction, proper in such a case, was erroneously given, and calculated to mislead the jury. *Frick-Reid Supply Co. v. Aggers*, 114 P. 622, 28 Okl. 425.

An instruction covering fraud and mutual mistake, not pleaded, held improper. *First Nat. Bank of Hays City v. Staab*, 171 P. 3, 102 Kan. 369.

In action on note given for bank stock, defended on the ground that it was obtained by fraud and was without consideration, where no waiver of defense or failure of consideration was pleaded, it was not error to refuse instruction on waiver. *Atchison Savings Bank v. Potter*, 164 P. 149, 100 Kan. 407.

Where, in an action by attorneys on a father's oral contract to pay for defending his son, the court instructed that there must be shown a contract with defendant, and he was not liable for his son's debt, the refusal to instruct on the statute of frauds was not error. *Noble v. Fisher*, 150 P. 575, 96 Kan. 247.

Breach of contract.—In action for breach of contract of employment, failure to instruct as to reduction of damages by other employment as to which there was no issue held not error. *Sharpless Separator Co. v. Gray*, 62 Okl. 73, 181 P. 1074.

In an action for breach of an express warranty in a sale of personalty, the court should limit plaintiff's right to recovery to breach of the express warranty pleaded, and it was error to charge on an implied warranty not pleaded. *Burgess v. Felix*, 140 P. 1180, 42 Okl. 193.

Where, in an action for breach of marriage contract, plaintiff pleaded that the contract was an express oral one, and that it was expressed in words, an instruction that a promise of marriage might be inferred from acts and conduct was properly denied. *Reynolds v. Curry*, 105 P. 437, 81 Kan. 443.

Where, in a buyer's action for breach of warranty, the sole issue was whether there was a violation of an express warranty, the court properly refused to instruct under what circumstances a warranty would be implied. *Kennedy v. Goodman*, 39 Okl. 470, 135 P. 936.

Negligence and damages.—It is not error to refuse requested instructions as to a ground of negligence not alleged in the petition. *Cassingham v. Berry* (Okl.) 150 P. 139.

Where there was neither allegation nor proof that it was a master's duty to make rules as to the work, it was error to charge that, if plaintiff was injured as a result of the master's failure to make such rules, etc., it was liable. *Oklahoma Portland Cement Co. v. Brown*, 45 Okl. 476, 146 P. 6.

Where, in an action for damages from an error in a telegram, resulting in the plaintiff real estate brokers selling property at a sum which left them no commission, plaintiffs did not plead a binding contract of sale, it was error to instruct on what constitutes such a contract. *Levy Bros. v. Western Union Tel. Co.*, 39 Okl. 416, 135 P. 423.

In action for personal injuries, where answer consists of general denial and contributory negligence, defendant held not entitled to instruction that plaintiff fraudulently caused injury to himself, in absence of plea to that effect. *Missouri, K. & T. Ry. Co. v. Edmonds* (Okl.) 174 P. 1052.

The court should not submit the question whether defendant was negligent in a particular in which no negligence was alleged. *Missouri Pac. Ry. Co. v.*

It is not error to refuse an instruction, based upon a state of facts to support which there is no evidence,⁹⁶ though presented by the pleadings.⁹⁷

Haggart, 58 P. 796, 9 Kan. App. 393; *St. Louis & S. F. R. Co. v. Blinn*, 62 P. 427, 10 Kan. App. 468.

Instruction regarding imputed negligence was properly refused where that issue had been excluded for failure to plead it. *Angell v. Chicago R. I. & P. Ry. Co.*, 156 P. 763, 97 Kan. 688, rehearing denied 157 P. 1196, 98 Kan. 268.

Where a passenger sued a carrier upon the theory that she was violently thrown from a street car by a sudden jerk before it had come to a full stop, and defendant did not plead contributory negligence, but tried the case upon the theory that plaintiff's injury occurred by a fall after she had safely left the car, the failure of the court in its charge to direct the jury's attention to plaintiff's contributory negligence in attempting to alight while the car was in motion was not reversible error. *Van Vrankin v. Kansas City Elevated Ry. Co.*, 84 Kan. 287, 114 P. 202.

Where a petition for an accident at crossing does not allege that certain obstructions to the view were negligently placed on the right of way, but were only set forth as a basis for avoiding imputation of contributory negligence, an instruction basing the liability of the company on its negligence in so obstructing the view is erroneous. *Chicago, R. I. & P. Ry. Co. v. Assman*, 83 P. 1091, 72 Kan. 378.

Where plaintiff alleges, as ground of recovery for injuries at a crossing, specified acts of negligence of the railroad company in failing to give proper signals and the running at a reckless rate of speed, the court is not warranted in submitting, as an additional ground of recovery, negligence of the defendant in permitting obstructions to the view to remain on its right of way. *Missouri Pac. Ry. Co. v. Griffith*, 76 P. 436, 69 Kan. 130.

It is error to instruct that the jury may base a verdict for the plaintiff on the failure of the defendant to maintain gates or keep a flagman at the crossing, where a failure to do so is not charged in the petition, and has not been relied on at the trial as a ground of recovery. *Atchison, T. & S. F. R. Co. v. Powers*, 50 P. 452, 58 Kan. 544.

A bill of particulars alleged that defendant contracted to take good care of the horse and colt of plaintiff intrusted to his keeping, and that said horse and colt sickened and died for want of proper care and attention. Held, that it was error to instruct the jury under such pleadings, over the objection of the defendant, what the duty of defendant would have been if they should find that special and extra care had been contracted for. *Ransom v. Getty*, 14 P. 487, 37 Kan. 75.

In action for death, refusal of instruction that defendant had right to maintain electric wires across road was not error where such right was not contested. *Wade v. Empire Dist. Electric Co.*, 153 P. 28, 98 Kan. 366, rehearing denied 158 P. 1110.

⁹⁶ *Firebaugh v. Du Bois* (Okl.) 173 P. 1126; *Waters v. Dore*, 50 Okl. 183, 150 P. 885; *Rainey v. City of Lawrence*, 79 P. 116, 70 Kan. 518; *City of Lawton v. McAdams*, 83 P. 429, 15 Okl. 412; *Bouquot v. Awad*, 54 Okl. 55, 153 P. 1104.

Where in a buyer's action for breach of warranty, defendant testified that

⁹⁷ See note 97 on following page.

Ordinarily a court cannot submit by instructions an issue raised by a pleading which is abandoned by the pleader and in support of which no testimony is presented.⁹⁸

he had notice of the defects within a short time after plaintiff discovered them, the court properly refused to instruct that it was plaintiff's duty to notify defendant of the defect. *Kennedy v. Goodman*, 39 Okl. 470, 135 P. 936.

It is not error to refuse an instruction that, if a mortgagor demanded a receipt, his tender was not unconditional, where the evidence shows that the mortgagor asked for his note and mortgage, but did not make their delivery a condition of the payment, and the mortgagee refused the tender, because the mortgagor threatened to sue for damages. *Smith-Wogan Hardware & Implement Co. v. Bice*, 125 P. 456, 34 Okl. 204, Ann. Cas. 1914C, 274.

In an action by an attorney for services in certain cases, defendant pleaded that plaintiff had, without cause, abandoned same. The evidence failed to support such claim. Held, that an instruction that, if after plaintiff had been retained he had abandoned the cases without cause, he would not be entitled to recovery for his services was properly refused, as not based on the evidence. *Parks v. Burlingame*, 116 P. 187, 29 Okl. 23.

Refusal of an instruction that it is the duty of an agent to use the utmost good faith, and that he cannot recover commission for a sale unless he does so, held not error, where there was no evidence of bad faith. *Doub v. Co. v. Taylor*, 48 Okl. 713, 150 P. 687.

A refusal to instruct that before the plaintiff broker could recover he must have procured a purchaser ready, willing, and able to buy on the terms agreed upon, held not error where such instruction had no application to the facts proven that the sale was actually made on such terms. *First Nat. Bank of Coweta v. Brumbaugh*, 55 Okl. 506, 154 P. 1172. A refusal to instruct that before the plaintiff broker could recover he must have procured a written enforceable contract from the purchaser, binding him to take the land on the terms agreed upon, held not error where the sale had been completed. *Id.*

Refusal of a requested instruction on defense of former adjudication held

⁹⁷ It is not error to refuse an instruction on an issue raised by the pleadings, but supported by no evidence. *Miller Bros. v. McCall Co.*, 133 P. 183, 37 Okl. 634.

Issues unsupported by the evidence, though raised by the pleadings, should not be submitted. *Missouri, O. & G. Ry. Co. v. West*, 50 Okl. 521, 151 P. 212.

Although an issue is presented by the pleadings, it is not error to refuse a requested instruction thereon, even if it is abstractly correct, where there is no basis for it in the evidence. *Missouri, K. & T. Ry. Co. v. Taylor* (Okl.) 170 P. 1148.

It is not error to refuse an instruction on an issue raised by the pleadings, but abandoned for want of proof, or otherwise waived at the trial. *Jaques v. Order of United Commercial Travelers of America*, 104 Kan. 612, 180 P. 200.

The court need not instruct on a matter regarding which there is no dispute or point raised. *Russell v. Gregg*, 30 P. 185, 49 Kan. 89.

⁹⁸ *Cobe v. Coughlin Hardware Co.*, 112 P. 115, 83 Kan. 522, 31 L. R. A. (N. S.) 1126.

Where evidence is admitted, on which instructions are given, both evidence and instructions being competent if founded on proper pleadings, but no such issue is raised by the pleadings, the

not error, where there was no evidence reasonably tending to support such defense. *McDonald v. Cobb*, 52 Okl. 581, 153 P. 138.

In proceedings by a railroad company to condemn land for a right of way, it appeared that the land consisted of 160 acres, all of which, except 10 or 15 acres, was raw prairie, without improvements. No evidence was offered concerning teams being frightened by reason of the railroad. Held that, as the evidence did not make it applicable, it was not error to refuse an instruction that, in assessing damages, the liability of teams being frightened by trains, etc., did not constitute grounds for special compensation. *Chicago, K. & N. Ry. Co. v. Stewart*, 28 P. 1017, 47 Kan. 704.

Refusal to instruct that the vendor was not required by the contract to furnish an abstract held not error, where the undisputed evidence showed that the purchaser requested an abstract which the vendor agreed to furnish, and afterwards did furnish. *Dodderidge v. Bacon*, 150 P. 539, 96 Kan. 150.

Negligence and damages.—Where uncontradicted evidence showed that safety would result from blocking dangerous open spaces between rails, and that such blocking system was used on certain other roads without introducing any new danger, it is not error to refuse to instruct that defendant's failure to so block would not render it negligent. *St. Louis & S. F. R. Co. v. Loug*, 137 P. 1156, 41 Okl. 177, Ann. Cas. 1915C, 432.

Refusal to instruct, on a ground of contributory negligence not pleaded and only incidentally brought out on cross-examination of plaintiff, held not error. *Kell v. Evans*, 161 P. 639, 99 Kan. 273.

It is not error, in action for death of servant, to refuse requested instruction on question of assumption of risk, which deals wholly with ordinary risks and embodies no definition thereof, or any qualification appropriate to particular facts which involved extraordinary hazards. *Ft. Smith & W. R. Co. v. Knott*, 60 Okl. 175, 159 P. 847.

Refusal to instruct that if plaintiff was foreman or in charge, and had been warned of the high voltage, and could have avoided injury by using a ladder or scaffolding, he could not recover, held not error, in view of the evidence. *Litsch v. Kansas Gas & Electric Co.*, 148 P. 632, 95 Kan. 496.

In an action for damages from procuring an exchange of farms by fraud, it was not error to refuse an instruction based on the respective values of two farms, where the only evidence as to the value of one farm was that it was worthless. *Shuler v. Collins*, 136 P. 752, 40 Okl. 126.

Where there is no evidence of a want of ordinary care on the part of the injured party, it is not error to refuse to instruct that it was his duty to use all diligence to prevent the injury complained of. *Chicago G. W. Ry. Co. v. Bailey*, 71 P. 246, 66 Kan. 115.

An instruction implying that a certain fact would constitute contributory negligence, diminishing damages, should be refused, unless there is evidence to fully sustain the implication. *Brower v. Western Union Tel. Co.*, 105 P. 497, 81 Kan. 109.

The jury, in the consideration of the conduct and motives of men, may take into account the instinct of self-preservation and the known disposition to avoid injury; but the refusal so to instruct the jury is not error when there

instructions are erroneous; but, where they do not seem to have influenced the verdict, the error is harmless.⁹⁹

Where an instruction not authorized by the original petition is authorized by the evidence and by the petition as amended, the giving of such instruction is not error.¹

It is reversible error to instruct the jury to determine a disputed question of fact which is only incidentally involved in the issues, and to base the verdict upon their finding as to such collateral issue.²

An instruction is not erroneous, where it is based on some evidence, though that evidence is slight.³

is direct evidence of such conduct. *Chicago, R. I. & P. Ry. Co. v. Groves*, 44 P. 628, 56 Kan. 601.

In action for damages for electrocution of plaintiff's husband by contact with coil of defendant's wire, instructions framed on conjecture that deceased was a volunteer or an intermeddler was properly refused, where they were without support in the evidence. *Coberly v. United Water, Gas & Electric Co.*, 104 Kan. 124, 178 P. 393.

In action for injury to a minor employé from alleged failure to guard a machine as required by Factory Act, the sole issue was the breach of the statutory duty, and defendant's request for findings respecting his "negligence," if any, were properly denied. *Hockman v. Sifers Candy Co.*, 104 Kan. 94, 178 P. 254.

⁹⁹ *Atchison, T. & S. F. R. Co. v. Miller*, 18 P. 486, 39 Kan. 419.

¹ *St. Louis & S. F. R. Co. v. Davis*, 132 P. 337, 37 Okl. 340.

² *Fear v. First Nat. Bank of Clay Center*, 119 P. 539, 86 Kan. 140.

³ *McKnight v. Strasburger Bldg. Co.*, 150 P. 542, 96 Kan. 118.

The court may instruct upon any issue or theory of a party within the pleadings and which the evidence fairly tends to support, although the evidence is not direct or strong and might be deemed inadequate if the court was the trier of the fact. *Wyrick v. Parsons Ry. & Light Co.*, 163 P. 1059, 100 Kan. 122.

Refusal of instructions predicated on facts alleged in defendant's answer, and upon which he offered evidence, in an action for breach of the marriage promise, held error. *Falk v. Burke*, 143 P. 498, 93 Kan. 93, L. R. A. 1915B, 279.

In action to set aside compromise of claim against plaintiff, instructions stating in a general way what facts would have authorized judgments against plaintiff, and defining offense with which plaintiff was charged, held not objectionable as introducing extraneous issues. *Matthews v. McNeill*, 157 P. 387, 98 Kan. 5.

Petition alleging that defendant bank misappropriated plaintiff's money by loaning it to one known to be insolvent, and by using proceeds to liquidate accounts owed to it by borrower, set forth defendant's fraudulent conduct, so that it was proper to instruct on alleged fraud. *Allen v. People's State Bank*, 171 P. 638, 102 Kan. 592.

Negligence and damages.—In action for death of servant, where there was evidence that escape of gas was known to defendant, and that an inspection would have discovered its presence, instruction predicated liability on failure

An instruction predicated on evidence erroneously admitted is erroneous.⁴

When the court instructs a jury on what state of facts either party may recover, the instruction must include all the material facts in controversy.⁵

to inspect held not to violate rule that instructions must be based upon the evidence. *Ponca City Ice Co. v. Robertson* (Okla.) 169 P. 1111.

In action for injury while attempting to board train, it was reversible error to refuse requested instruction on doctrine of last clear chance, where evidence admitted at trial showed facts to which doctrine was applicable, even though it was not raised by pleadings. *Webb v. Missouri, O. & G. Ry. Co.* (Okla.) 179 P. 17.

In action under Gen. St. 1915, § 8423, for exemplary damages for delay in furnishing a car ordered, refusal to instruct that plaintiff could not recover if shipment was to be part of interstate commerce was error, where evidence was not clear as to that matter. *Farmers' Grain & Mercantile Co. v. Union Pac. R. Co.*, 103 Kan. 527, 175 P. 599.

Instruction that a salesman would not be liable to his employers for losses caused by the insolvency of parties whose notes he took, if the names were given him by his employers, held not erroneous under the evidence. *Singmaster v. Beckett*, 121 P. 339, 86 Kan. 494.

Petition and evidence in an action for injuries due to a failure to provide a belt shifter as required by the factory act (Gen. St. 1909, § 4679), held to authorize an instruction on the duty of warning the employé as to the operation of the saw by which he was injured while attempting to remove slivers therefrom. *Rank v. Kansas City Packing Box Co.*, 142 P. 942, 92 Kan. 917.

In action for injury to passenger, pleadings held to present issue of negligence in opening car door, injuring plaintiff's arm, authorizing instructions on such issue rather than on willful injury. *Shawnee-Tecumseh Traction Co. v. Newcome*, 59 Okla. 271, 158 P. 1193.

An instruction cannot be objected to because partly based on uncontradicted evidence. *Park View Hospital Co. v. Randolph Lodge*, No. 216, I. O. O. F., 162 P. 302, 99 Kan. 488.

⁴ *St. Louis & S. F. R. Co. v. Hart*, 45 Okla. 659, 146 P. 436.

⁵ *Johnson v. Fraser*, 18 P. 48, 2 Idaho (Hasb.) 404; *Murphy v. Hood & Lumley*, 73 P. 261, 12 Okla. 593; *Buhl Malleable Co. v. Cronan*, 117 P. 317, 59 Or. 242.

In action on notes the refusal of an instruction that the taker of a note as collateral security for an existing debt takes it for a valuable consideration, and may enforce payment to the extent of his interest, was not error, as it ignored knowledge of equities. *Mangold & Glandt Bank v. Utterback* (Okla.) 174 P. 542.

In an action on an accepted order, wherein the issues were whether the order was executed to be delivered on conditions which never happened, and whether plaintiff wrongfully obtained possession of it, instructions held erroneous, where they failed to submit such issues. *Bartholomew v. Fell*, 139 P. 1016, 92 Kan. 64.

An instruction in an action for services in preparing plans and specifications for the construction of waterworks, electric light, and sanitary sewer

Where the evidence fairly tends to establish the defense of contributory negligence, instructions disregarding that question are erroneous.*

system held erroneous, where it failed to present certain material issues pleaded by defendant. *Town of Walters v. Orth*, 59 Okl. 99, 158 P. 352.

An instruction in ejectment that actual notice of an unrecorded deed meant express information, and which excluded from consideration the effect of notice by circumstances sufficient to put a prudent person on inquiry, held erroneous. *Brooks v. Reynolds*, 132 P. 1091, 37 Okl. 767.

Where, in an action to recover land, an imperfect deed is not the only evidence of right of possession relied on by defendants, it is not error to refuse to charge that the imperfect deed does not convey the legal title. *Anderson v. Canter*, 63 P. 285, 10 Kan. App. 167.

Negligence and damages.—In action against railroad for damage to team, etc., where defense of contributory negligence was specially pleaded and was supported by evidence, instruction permitting jury to find for plaintiff without submitting his contributory negligence held error. *Kansas City, M. & O. Ry. Co. v. McDaniel* (Okl.) 165 P. 1144.

In action for death in crossing accident, instruction that if deceased knew of approach of train failure to give signal was immaterial, ignoring contingency that till too late decedent might have supposed driver also knew of its coming, was properly refused. *Angell v. Chicago, R. I. & P. Ry. Co.*, 156 P. 763, 97 Kan. 688, rehearing denied 157 P. 1196, 98 Kan. 268. Instruction that failure of decedent to remonstrate with driver on approaching railroad crossing was negligence in law if decedent saw approaching train, without referring to time of decedent's seeing it, was properly refused. *Id.*

Where a servant was injured while standing in front of an undermined ledge of salt by the fall of part thereof, alleged to be due to a workman striking it with a pick, an instruction that he could not recover if he knew that the salt was undermined and liable to fall at any time, and with this knowledge he stood where he knew he would be in danger if it fell, was objectionable, as premitting plaintiff's claim that the ledge fell by reason of the act of another workman, and not of its own weight. *Brice-Nash v. Barton Salt Co.*, 111 P. 462, 83 Kan. 447.

In an action against a railroad for damages caused by a fire, an instruction that disproof of negligence in certain respects will constitute a perfect defense amounts to a peremptory instruction against the plaintiff as to any other form of negligence proved. *Taggart v. Chicago, R. I. & P. Ry. Co.*, 115 P. 534, 84 Kan. 671.

A refusal to charge the jury that the evidence of plaintiff in regard to sounding the whistle and ringing the bell of the locomotive was of a negative character, while that of defendant was positive, and that the law es-

* *Chicago, R. I. & P. Ry. Co. v. Pitchford*, 44 Okl. 197, 143 P. 1146; *Oklahoma Ry. Co. v. Milam*, 45 Okl. 742, 147 P. 314; *Leach v. Hepler*, 124 P. 68, 32 Okl. 729.

An instruction setting forth a hypothetical statement of facts entitling plaintiff to recover for injuries at a crossing held erroneous, where it failed to mention contributory negligence. *Chicago, R. I. & P. Ry. Co. v. Clark*, 46 Okl. 382, 148 P. 998.

Though not raised by the pleadings, yet where raised by evidence admitted without objection the court should instruct upon the doctrine of the last clear chance.⁷

An instruction that refusal of a party to produce material evidence within his control warrants an inference that it is unfavorable to him was applicable, where the jury might infer defendant's failure to produce material evidence.⁸

§ 1234. Positive and negative evidence

Where there is both positive and negative evidence, the court should, on request, instruct that the law gives a preference to positive over negative evidence.⁹

§ 1235. Limiting effect of evidence

Where evidence is admissible on a certain point only, the court should advise the jury to consider it on that point alone.¹⁰

teems the latter class of evidence of more value than the former, is not error, where all modifying circumstances are ignored, and it is erroneously assumed that there was no positive evidence of such signal. *Kansas City, Ft. S. & G. R. Co. v. Lane*, 7 P. 587, 33 Kan. 702.

In an employé's action for injuries, refusal to submit to the jury in what respect, if any, defendant was negligent held error, where this was an important question of facts within the issues, and based on competent evidence. *Cole v. Atchison, T. & S. F. Ry. Co.*, 139 P. 1177, 92 Kan. 132.

Where, in an action for the death of a pedestrian, defendant offered evidence tending to show contributory negligence and suicide, it was error to refuse an instruction on contributory negligence. *Jones v. Joplin & P. Ry. Co.*, 137 P. 796, 91 Kan. 282.

Where an injured employé relied, in his action for injuries, upon the excessive speed of the car as well as upon the defective condition of the track, an instruction that he could not recover unless the defective track was the proximate cause was properly refused. *Great Western Coal & Coke Co. v. Malone*, 136 P. 403, 39 Okl. 693.

⁷ *Missouri, O. & G. Ry. Co. v. Parker*, 50 Okl. 491, 151 P. 325.

⁸ *Hodgson v. John Deere Plow Co.*, 104 Kan. 237, 178 P. 607.

⁹ Where there is positive evidence by those in charge of a train that the whistle was sounded at a crossing, and negative evidence of those within hearing that they did not hear it, the court should, on request, call the attention of the jury to the fact that the law gives a preference to positive over negative testimony. *St. Louis & S. F. R. Co. v. Brock*, 77 P. 86, 69 Kan. 448.

In action for destruction of property by fire, caused by train, held, that instruction as to weight of positive and negative testimony should not have been given, in view of character of conflicting evidence on issue of fact, to which it referred. *Smith v. Bush*, 102 Kan. 150, 169 P. 217.

¹⁰ *St. Louis & S. F. R. Co. v. Murray*, 50 Okl. 64, 150 P. 884.

Admission of testimony incompetent for one purpose, but competent for

It is error to admit documentary evidence and then direct that it be neither read nor commented on to the jury.¹¹

§ 1236. Matters of general knowledge

The jury may be instructed that they can use such general knowledge as they possess in common with all mankind.¹² But, an instruction authorizing the jury to take into consideration their own experience and observation regarding the matters under trial in addition to the evidence is erroneous.¹³

The court should ordinarily group the facts which the evidence tends to prove and instruct on the law applicable thereto,¹⁴ without

another, is not error, where the court limits its application to the issue on which it is competent. *Minor v. Atchison, T. & S. F. Ry. Co.*, 155 P. 35, 97 Kan. 200.

¹¹ *Bilby v. Brockman*, 55 Okl. 714, 155 P. 257.

¹² *Fisher v. O'Brien*, 162 P. 317, 99 Kan. 621, L. R. A. 1917F, 610.

The following instruction is not erroneous: "You must determine this case upon the law as given to you by the court, and the evidence as you have heard it from the witness stand, but in so doing you may call to your aid and use the knowledge and experience you possess in common with the generality of mankind." *Sanford v. Gates*, 16 P. 807, 38 Kan. 405.

In action for assault and battery, alleging defendants' conspiracy, instruction to estimate actual damages from the evidence and to consider it in connection with jury's knowledge and experience was not objectionable as disposing of all damages under same rule of proof. *Drysdale v. Wetz*, 171 P. 653, 102 Kan. 680.

¹³ *Chicago, R. I. & P. Ry. Co. v. Spring Hill Cemetery Ass'n*, 57 P. 252, 9 Kan. App. 882.

A question arose in the trial respecting the value of unripe and unharvested corn which was alleged to have been wrongfully converted at a place remote from a general market, and no testimony was presented to the jury of the value of such corn at the time and place of conversion. Held, that the knowledge of the value of that particular corn is not common to persons generally, and a direction to the jury that they might use their general knowledge in determining its value was misleading and erroneous. *Waite v. Teeters*, 14 P. 146, 36 Kan. 604.

It was error, in a personal injury suit, to instruct the jury, who had viewed the place of the accident, that they might find the safeness or unsafeness of such place on their own judgment, from what they saw, regardless of the sworn testimony. *City of Junction City v. Blades*, 41 P. 677, 1 Kan. App. 85.

In an action for personal injuries through the negligence of a city in failing to place a railing along an excavation at the intersection of streets, where the jury view the premises, it is not error to instruct the jury to determine from all the evidence, and from the view whether the city was negligent. *City of Clay Centre v. Jevons*, 2 Kan. App. 568, 44 P. 745.

¹⁴ It is generally the duty of the trial court, where there is a substantial dispute about the facts constituting the existence or want of probable cause,

expressing any opinion as to the facts shown by conflicting evidence.¹⁵ It is not error to assume the truth of matters proven without contradiction.¹⁶

§ 1237. Requested instructions

The refusal of requested instructions is not error where the law applicable to the facts in the case is fully covered by the court's charge, though the requested instructions may correctly state the law.¹⁷

to submit the evidence to the jury, with instructions to determine its credibility and what facts are proved, and that the facts amount to proof of probable cause or that they do not. The court should group the facts which the evidence tends to prove in the instructions, and tell the jury that if they find such facts have been established they must find that there was or was not probable cause. *Atchison, T. & S. F. R. Co. v. Watson*, 15 P. 877, 37 Kan. 773.

In a bastardy proceeding prosecuted by a married woman, where she has been permitted to testify to facts from which nonaccess of the husband might be inferred, there being no other evidence on that question, it is error to refuse an instruction correctly embodying the law in reference to her competency to testify to such facts, and the character and amount of evidence necessary to overcome the presumption of legitimacy. *Bell v. Territory*, 56 P. 853, 8 Okl. 75.

¹⁵ In action for injury at railroad crossing, held not error to refuse special instruction for defendant that as a matter of law plaintiff's testimony that he did not hear any signal did not contradict positive testimony of engineer and other witnesses that signals were given. *Ft. Smith & W. R. Co. v. Moore (Okl.)* 169 P. 904.

¹⁶ Where the ownership of the notes in suit is undenied, it is the duty of the court to charge that the owner thereof is entitled to all the rights of payee. *Keokuk Falls Imp. Co. v. Kingsland & Douglas Mfg. Co.*, 47 P. 484, 5 Okl. 32.

Where the answer alleges a failure of consideration, and the evidence shows that the note was executed on surrender of a note for a larger sum given for a valuable consideration, it was not error to charge to find for plaintiff, if there was a valuable consideration for the note in suit. *Harrison v. Smith*, 142 P. 317, 42 Okl. 607.

In action by bona fide holder of note, with plea of part payment and tender of balance, refusal of a requested instruction as to effect of defendant's payment to original payee held erroneous. *First Nat. Bank v. Ross (Okl.)* 167 P. 211.

In action on note signed by maker as trustee, where there were no allegations charging liability in fiduciary capacity, it is error to allow jury to find against defendant either in his individual or fiduciary capacity, as his liability as trustee was without the pleadings. *State v. Jackson (Okl.)* 166 P. 1041.

¹⁷ *Rumbaugh v. Rumbaugh*, 39 Okl. 445, 135 P. 937; *Holmes v. Halstid*, 7# Okl. 31, 183 P. 969; *Simpson v. Mauldin*, 160 P. 481, 61 Okl. 92; *Great West-*

Where, in an action on a partnership note, the partnership is shown and its discontinuance not shown, plaintiff is entitled to a particular instruction on the liability of each partner, though the

ern Coal & Coke Co. v. Serbantas, 150 P. 1042, 50 Okl. 118; Alfred v. St. Louis, I. M. & S. Ry. Co., 140 P. 415, 42 Okl. 4; Missouri, O. & G. Ry. Co. v. Miller, 145 P. 367, 45 Okl. 173; Fulsom-Morris Coal & Mining Co. v. Mitchell, 132 P. 1103, 37 Okl. 575; Ellet-Kendall Shoe Co. v. Ross, 115 P. 892, 28 Okl. 697; Pioneer Telegraph & Telephone Co. v. Davis, 116 P. 432, 28 Okl. 783; Gulf, C. & S. F. Ry. Co. v. Taylor, 130 P. 574, 37 Okl. 99; Enid Electric & Gas Co. v. Decker, 128 P. 708, 36 Okl. 367; Chicago, R. I. & P. Ry. Co. v. Carden, 46 Okl. 557, 149 P. 127; Moore v. Johnson, 136 P. 422, 39 Okl. 587; Great Western Coal & Coke Co. v. Malone, 136 P. 403, 39 Okl. 693; St. Louis & S. F. R. Co. v. Akard, 60 Okl. 4, 159 P. 344; Muskogee Electric Traction Co. v. Bryant, 56 Okl. 75, 155 P. 879; Kali Inla Coal Co. v. Ghinelli, 55 Okl. 289, 155 P. 606; Engelkemeier v. Lillis, 54 Okl. 282, 153 P. 877; Felt v. Westlake (Okl.) 174 P. 1041; Rock Island Coal Mining Co. v. Toleikis (Okl.) 171 P. 17; Grantz v. Jenkins (Okl.) 175 P. 527; Lusk v. Phelps, Id. 756; Chicago, R. I. & P. Ry. Co. v. Brooks (Okl.) 179 P. 924; Citizens' Bank of Headrick v. Citizens' State Bank of Altus, 75 Okl. 225, 182 P. 657; Gatiliff v. Territory, 37 P. 809, 2 Okl. 523; Atchison, T. & S. F. Ry. Co. v. Marks, 65 P. 996, 11 Okl. 82; Sovereign Camp of the Woodmen of the World, v. Welch, 83 P. 547, 16 Okl. 188; Higgins v. Street, 92 P. 153, 19 Okl. 45, 13 L. R. A. (N. S.) 398, 14 Ann. Cas. 1086; Citizens' Bank of Wakita v. Garnett, 95 P. 755, 21 Okl. 200; Coalgate Co. v. Hurst, 107 P. 657, 25 Okl. 588, writ of error dismissed 32 S. Ct. 838, 225 U. S. 697, 56 L. Ed. 1262; St. Louis & S. F. R. Co. v. Cox, Peery & Murray, 138 P. 144, 40 Okl. 258; Bleecker v. Miller, 138 P. 809, 40 Okl. 374; Farmers' Nat Bank of Wewoka v. McCoy, 141 P. 791, 42 Okl. 420, Ann. Cas. 1916D, 1243; Missouri, O. & G. Ry. Co. v. Vandivere, 141 P. 799, 42 Okl. 427; St. Louis & S. F. R. Co. v. Model Laundry, 141 P. 970, 42 Okl. 501; San Bois Coal Co. v. Resetz, 143 P. 46, 43 Okl. 384; St. Louis & S. F. R. Co. v. Brown, 144 P. 1075, 45 Okl. 143; Seay v. Plunkett, 145 P. 496, 44 Okl. 794; Tishomingo Electric Light & Power Co. v. Gullett, 52 Okl. 180, 152 P. 849; Moorehead v. Daniels, 57 Okl. 298, 153 P. 623; St. Louis & S. F. Ry. Co. v. Clappitt, 55 Okl. 686, 154 P. 40; Missouri, O. & G. Ry. Co. v. Davis, 54 Okl. 672, 154 P. 503; Minnetonka Oil Co. v. Haviland, 55 Okl. 43, 155 P. 217; Davenport v. Mitchell, 56 Okl. 175, 155 P. 869; Chickasha Inv. Co. v. Phillips, 58 Okl. 760, 161 P. 223; Fowler v. Fowler, 61 Okl. 280, 161 P. 227, L. R. A. 1917C, 89; Scott v. Vulcan Iron Works Co., 122 P. 186, 31 Okl. 334; Elsminger v. Beman, 124 P. 289, 32 Okl. 818; St. Louis & S. F. R. Co. v. Bilby, 130 P. 1089, 35 Okl. 589; Dewey Portland Cement Co. v. Blunt, 38 Okl. 182, 132 P. 659; Finch v. Brown, 111 P. 391, 27 Okl. 217; Standifer v. Sullivan, 30 Okl. 365, 120 P. 624; National Drill & Mfg. Co. v. Davis, 29 Okl. 615, 120 P. 976; Hicks v. Davis, 32 Okl. 195, 120 P. 280; Raugh v. Flst, 115 P. 551, 84 Kan. 740; Taylor v. Atchison Gravel, Sand & Rock Co., 135 P. 576, 90 Kan. 452; Chicago, R. I. & P. Ry. Co. v. Groves, 44 P. 628, 56 Kan. 601; St. Louis & S. F. Ry. Co. v. Hoover, 43 P. 854, 5 Kan. App. 577; (Kan.) Berry v. Dewey, 172 P. 27, 102 Kan. 593; Litsch v. Kansas Gas & Electric Co., 143 P. 632, 95 Kan. 496; Ruth v. Witherspoon-Engler Co., 100 Kan. 609, 164 P. 1064, rehearing denied Ruth v. Witherspoon-

other instructions cover the lawful defenses pleaded by the defendant partner.¹⁸

In a trial by a jury, it is the duty of the court to instruct the jury on questions of law which he deems applicable to the case

Englar Co., 166 P. 481, 101 Kan. 406; Stuckey v. Irwin, 163 P. 621, 100 Kan. 57; Cox v. Chase, 163 P. 184, 99 Kan. 740; Hopson v. Union Traction Co., 101 Kan. 499, 167 P. 1059; Griffith v. Midland Valley R. Co., 100 Kan. 500, 166 P. 467; Carver v. Kansas Fraternal Citizens, 103 Kan. 824, 176 P. 634; City of Emporia v. Schmidling, 6 P. 893, 33 Kan. 485; Chicago, R. I. & P. Ry. Co. v. Parks, 54 P. 1052, 59 Kan. 709; Rogers v. Kansas Co-op. Refining Co., 137 P. 991, 91 Kan. 351, rehearing denied 139 P. 1030, 92 Kan. 256; Culbertson v. Sheridan, 144 P. 268, 93 Kan. 268; Leavens v. Hoover, 145 P. 877, 93 Kan. 661; Berhenke v. Penfield, 146 P. 1187, 94 Kan. 532; Thompson v. Aultman & Taylor Mach. Co., 146 P. 1188, 94 Kan. 453; Atchison, T. & S. F. R. Co. v. Morrow, 45 P. 956, 4 Kan. App. 199; Niagara Ins. Co. of New York v. Knapp, 47 P. 628, 5 Kan. App. 880; P. 893, 33 Kan. 485; Chicago, R. I. & P. Ry. Co. v. Parks, 54 P. 1052, 59 Kan. 709; Patton v. Union Traction Co., 101 Kan. 388, 167 P. 1041; Madey v. Swift & Co., 101 Kan. 771, 168 P. 1105; State v. Groning, 5 P. 446, 33 Kan. 18; Haak v. Struve, 16 P. 686, 38 Kan. 326; Morgan v. Bell, 21 P. 255, 41 Kan. 345; City of Wichita v. Stallings, 54 P. 689, 59 Kan. 779; Sun Ins. Office of London v. Western Woolen Mill Co., 82 P. 513, 72 Kan. 41; City of Garnett v. Smith, 83 P. 615, 72 Kan. 664; Electric Ry., Light & Ice Co. v. Brickell, 85 P. 297, 73 Kan. 274; Votaw v. McKeever, 92 P. 1120, 76 Kan. 870; St. Louis & S. F. Ry. Co. v. Stevens, 43 P. 434, 3 Kan. App. 176; Atchison, T. & S. F. R. Co. v. Guinane, 51 P. 782, 6 Kan. App. 922; McCormick Harvesting Mach. Co. v. Hayes, 53 P. 70, 7 Kan. App. 141; Prosser v. Pretzel, 55 P. 854, 8 Kan. App. 856; Sweet v. Owens, 57 P. 254, 9 Kan. App. 48; McCormick Harvesting Mach. Co. v. Hayes, 62 P. 901, 10 Kan. App. 579; Anderson v. Canter, 63 P. 285, 10 Kan. App. 167.

Particular cases.—In action by employé of interstate carrier for personal injury, refusal of defendant's requested instructions was not error, where so far as stating the law applicable to theory on which case was tried, they were substantially covered by court's instruction on its own motion. St. Louis, I. M. & S. Ry. Co. v. True (Okl.) 176 P. 758.

Instructions, in an employé's action for injuries, that plaintiff could recover if he "was engaged in the discharge of his duty to the defendant, and in the line of his employment," and "in the performance of the duties of his employment," held to sufficiently cover the point, and hence the refusal of a further instruction on the same point was not error. Curtis & Gartside Co. v. Pribyl, 38 Okl. 511, 134 P. 71.

In foreclosure of mechanic's lien, error in refusing defendants' instructions as to effect of contractor's fraudulent change of contract was cured by instruction stating law as to alteration of contracts more favorable to defendants than instructions refused. Brown v. Tull (Okl.) 164 P. 785.

It was not error to refuse to instruct that defendant was not required to stop its train and give precedence to plaintiff's wagon, where other instruc-

¹⁸ Exchange State Bank v. Jacobs, 156 P. 771, 97 Kan. 798.

as made by the pleadings and evidence; and, if a party desires other or different instructions, he must make his request in writing for

tions fairly covered that issue. *Ft. Smith & W. R. Co. v. Moore* (Okla.) 169 P. 904.

Where the court correctly defines ordinary care and contributory negligence, it is not error to refuse a differently worded instruction presenting the same matter. *St. Louis & S. F. R. Co. v. Long*, 137 P. 1156, 41 Okla. 177, Ann. Cas. 1915C, 432.

Defendant's requested special instructions on the right of the plaintiff attorneys to recover the compensation sued for held sufficiently covered by the instructions given. *Turner v. Maxey*, 45 Okla. 125, 144 P. 1064.

Refusal of requested instruction on the measure of damages for personal injuries held not error, where the point made was covered by an instruction given. *Muskogee Electric Traction Co. v. Rye*, 47 Okla. 142, 148 P. 100.

The refusal to give an instruction as to one of several charges of negligence in the petition, though stating correctly a principle of law, is not prejudicial, where the instructions, as a whole, sufficiently advised the jury on the proposition contained in the one refused. *Sibley v. Kansas City Cotton Mills Co.*, 116 P. 889, 85 Kan. 256.

The refusal of an instruction as to the master's duty to furnish a safe place to work was proper, where the court by another instruction defined such duty. *Carroll v. Kansas Buff Brick & Mfg. Co.*, 129 P. 196, 88 Kan. 519.

Refusal of an instruction on assumption of risk held not error, where such subject was fully covered in the instructions given. *Smith v. St. Louis & S. F. R. Co.*, 95 Kan. 451, 148 P. 759.

In action for injury when struck by automobile, plaintiff's refused instruction that, even if its speed was lawful and reasonable, defendant might be liable if injury resulted from his failure to keep sufficient lookout, was properly covered by other instructions that he should have kept a lookout, and should have used ordinary care to avoid injury. *Coughlin v. Layton*, 104 Kan. 752, 180 P. 805.

Where, in action for injury to servant, court instructed that if plaintiff was injured at other than his usual working place the master was not bound, refusal of requested instruction on effect of direction to plaintiff to work at another place was not error. *Love v. Diplomat Mining Co.*, 104 Kan. 206, 178 P. 615.

In action on note signed by two directors, held, in view of instruction given, that refusal to give requested instruction as to basis of recovery was not error. *International Harvester Co. of America v. Franklin County Hardware Co.*, 101 Kan. 488, 167 P. 1057.

In action for fraudulent representations inducing purchase of corporation stock, refusal of instruction that fraud cannot be found from mere conjecture, but must be clearly proved, held not to require a reversal, where court charged fraud must be proved by preponderance of evidence. *Meyers v. Acme Iron Co.*, 103 Kan. 362, 175 P. 162.

Where, in a broker's action for commission, the court instructed that to be entitled to commission plaintiff must have been the "procuring" cause of a sale, it was not error to refuse to instruct that he must have been the "efficient" and "proximate" cause. *McClintick v. Pyle*, 137 P. 788, 91 Kan. 393.

them. If no such request is made, the instructions given stand as the law of the case for that trial.¹⁹

Refusal of an instruction on the duty of a city to keep its streets in repair held not erroneous, where such instruction was the negative of a proposition fairly included in an instruction given. *Martin v. City of Columbus*, 143 P. 421, 93 Kan. 79.

Where instructions given in an action to cancel a note and mortgage for an alleged fraud in the sale of property sufficiently presented defendant's theory of the case, which was that she stood in the relation of an innocent purchaser for value, it was not error to refuse further instructions requested by defendant. *Stroupe v. Hewitt*, 133 P. 562, 90 Kan. 200.

Though, in an action for fire set by a train, there was evidence of the accumulation of combustible material on plaintiff's property, so that the court might well have given an instruction referring expressly to that matter, to the effect that if plaintiff allowed dry grass and weeds to remain on its premises, so that fire could readily start therein, that could be considered as a circumstance tending to prove contributory negligence, yet the refusal of this was harmless; the jury having been told in general terms that any contributory negligence of plaintiff—any negligence in its management and control of its premises by reason of which the fire was communicated thereto—would bar recovery, and there having been no suggestion that plaintiff could have been negligent in any way affecting the case, except by permitting said accumulations. *Chicago, R. I. & P. Ry. Co. v. Lost Springs Lodge, No. 494*, I. O. O. F., 85 P. 803, 74 Kan. 847.

Striking from an instruction a theoretical proposition of law is harmless, where, in view of the instructions, fully and accurately explaining the duty of the party under the circumstances, and the evidence, it cannot be seen how the jury could have been aided by the reading to them of such proposition. *Bishop v. Atchison, T. & S. F. Ry. Co.*, 84 P. 718, 73 Kan. 761.

¹⁹ *Douglass v. Geiler*, 4 P. 1039, 32 Kan. 499; *Missouri, K. & T. Ry. Co. v. West*, 38 Okl. 581, 134 P. 655; *Chicago Live Stock Commission Co. v. Flx*, 78 P. 316, 15 Okl. 37; *Same v. Connally*, 78 P. 318, 15 Okl. 45; *Chicago, R. I. & P. Ry. Co. v. Radford*, 129 P. 834, 36 Okl. 657; *Dunnington v. Loeser*, 48 Okl. 636, 150 P. 874, denying rehearing, 48 Okl. 636, 149 P. 1161; *Chicago Live Stock Commission Co. v. Flx*, 78 P. 316, 15 Okl. 37; *Same v. Connally*, 78 P. 318, 15 Okl. 45; *Seay v. Plunkett*, 44 Okl. 794, 145 P. 496; *Muskogee Electric Traction Co. v. Eaton*, 49 Okl. 344, 152 P. 1109; *Ferris v. Shandy* (Okl.) 174 P. 1060; *St. Louis & S. F. R. Co. v. Walker*, 122 P. 492, 31 Okl. 494; *Elaminger v. Beman*, 32 Okl. 818, 124 P. 289; *Enid City Ry. Co. v. Reynolds*, 126 P. 193, 34 Okl. 405; *Hagerman v. Thatch*, 127 P. 254, 34 Okl. 772; *Chicago, R. I. & P. Ry. Co. v. McAlester*, 39 Okl. 153, 134 P. 661; *L. L. Tyler & Son v. Wheeler*, 41 Okl. 335, 135 P. 351; *Lowenstein v. Holmes*, 40 Okl. 33, 135 P. 727; *Cooper v. Harvey*, 94 P. 213, 77 Kan. 854; *Western Union Tel. Co. v. Getto-McClung Boot & Shoe Co.*, 61 P. 504, 9 Kan. App. 863; *Friedman v. Weisz*, 58 P. 613, 8 Okl. 392; *Sanders v. Cline*, 101 P. 267, 22 Okl. 154; *Morisette v. Howard*, 63 P. 756, 62 Kan. 463; *Farrar v. McNair*, 69 P. 167, 65 Kan. 147; *St. Louis & S. F. R. Co. v. Noland*, 90 P. 273, 75 Kan. 691; *Tays v. Carr*, 14 P. 456, 37 Kan. 141; *Smith v. Yost*, 59 P. 379, 10 Kan. App. 580; *Douglass v. Geiler*, 4 P. 1039, 32 Kan. 499; *O'Brien v. Foulke*, 77 P. 103, 69

It is error to refuse to give a requested instruction applicable to the issues and the evidence, when it is not covered by any other instruction or by the charge as a whole.²⁰

Kan. 475; Reamer v. Columbia, 47 P. 186, 5 Kan. App. 543; Roller v. James, 49 P. 630, 6 Kan. App. 919; Warders v. Union Pac. R. Co., 105 Kan. 4, 181 P. 604; Hamilton v. Atchison, T. & S. F. Ry. Co., 148 P. 648, 95 Kan. 353; Judy v. Buck, 82 P. 1104, 72 Kan. 106; McCrie v. Hixon Lumber Co., 51 P. 966, 7 Kan. App. 39; Dighera v. Wheat, 116 P. 616, 85 Kan. 458; Turner v. Tootle, 58 P. 562, 9 Kan. App. 765; National Bank of Belleville v. Ward, 51 P. 58, 6 Kan. App. 921; State v. Peterson, 16 P. 263, 38 Kan. 204; Ryan v. Madden, 26 P. 679, 46 Kan. 245; State v. Falk, 26 P. 1023, 46 Kan. 498; Hoyt v. Dengler, 38 P. 260, 54 Kan. 309; Kansas Loan & Trust Co. v. Love, 45 P. 953, 4 Kan. App. 188.

Particular cases.—The general admission of evidence competent for purposes of impeachment, but otherwise incompetent, will not be held prejudicial error, where no request was made to limit its effect to the purpose of impeachment. Brownell v. Moorehead (Ok.) 165 P. 408; Atchison, T. & S. F. Ry. Co. v. Baker, 130 P. 577, 37 Okl. 48.

Where a matter irrelevant to the issue is contained in a letter admitted in evidence, the party complaining thereof should call the trial court's attention to it and take exception and request that the jury be instructed not to consider such part. Tishomingo Electric Light & Power Co. v. Gullett, 52 Okl. 180, 152 P. 849.

In ejectment by the grantee of a trustee holding legal title to an Indian allotment of a townsite for the purpose of conveying lots therein to occupants upon payment of their pro rata of the price due the Indian, a charge that the burden was upon plaintiff to show by a preponderance of evidence that the sale of the lot was made to him by the trustee after default of the occupant and advertisement of the lot for sale with an opportunity given the occupant to pay the amount due on the lot, including the cost of advertisement and to take the deed therefor from the trustee, was not reversible error, the court not being requested to charge as to the presumptions arising relative to the trustee's having complied with the terms of the trust in executing the deed. Moore v. O'Dell, 111 P. 308, 27 Okl. 194.

Where the instructions given are unsatisfactory to a party, he should offer such instructions as in his opinion correctly state the law. Chickasha St.

²⁰ Dunlap & Taylor v. Flowers, 96 P. 643, 21 Okl. 600.

Where a defective request for an instruction brings to the attention of the court an important principle of law which ought to be stated to the jury, it may be prejudicial error to disregard it, and if an attempt be made by an instruction to submit to the jury the matter defectively covered by the request, it should be sufficiently explicit to cover the field of the request. Kansas City, M. & O. Ry. Co. v. Loosley, 90 P. 990, 76 Kan. 103.

Instructions need not be given in the exact language in which they are requested, though they be proper, it being sufficient if they are given in substance and effect. Jenson v. Will & Finck Co., 89 P. 113, 150 Cal. 398; Rouse v. Downs, 47 P. 982, 5 Kan. App. 549; Veseley v. Engelkemler, 61 P. 924, 10 Okl. 290.

The refusal of instructions, when the instructions are not applicable to the issues,²¹ or are not based on the evidence, is not error.²²

Ry. Co. v. Wund, 132 P. 1078, 37 Okl. 582. Special paragraphs of instructions on contributory negligence, in a passenger's action against a street railway company for injuries, held not erroneous, when considered with the entire charge, where no request was made for a specific instruction on such point. *Id.*

An instruction that plaintiff must show that defendant was guilty of negligence causing the injuries held not objectionable as too general, where no more specific instruction was requested. *Muskogee Electric Traction Co. v. Rye*, 47 Okl. 142, 148 P. 100.

Failure to define the word "imminently," in an instruction that the plaintiff mine employé did not assume the risk of the defects, which did not appear imminently dangerous, held not error in the absence of a request. *Great Western Coal & Coke Co. v. Malone*, 136 P. 403, 39 Okl. 693.

Where instructions given are correct as far as they go, and party desires an instruction on some element of a defense covered by an instruction he should request an instruction embodying such element, and, unless he does so, the instructions given will not work a reversal. *Slick Oil Co. v. Coffey* (Okl.) 177 P. 915; *St. Louis & S. F. R. Co. v. Crowell*, 127 P. 1063, 33 Okl. 773.

The refusal of a requested instruction which is objectionable in any respect is not error. *Missouri, O. & G. Ry. Co. v. Collins*, 47 Okl. 761, 150 P. 142; *Fulsom-Morris Coal & Mining Co. v. Mitchell*, 132 P. 1103, 37 Okl. 575; *Wichita Falls & N. W. Ry. Co. v. Puckett*, 53 Okl. 463, 157 P. 112; *San Bois Coal Co. v. Resetz*, 143 P. 46, 43 Okl. 384.

It is error for trial court to mark instructions "Given" and then fail to read them, under assumption that he had covered ground by his general charge. *Methvine v. Fisher* (Okl.) 166 P. 702.

In an action on an accident insurance policy, a requested instruction relative to the statements made by insured in his application, correct only in part, held properly refused. *Continental Casualty Co. v. Owen*, 38 Okl. 107, 131 P. 1084.

Where a party fails to properly present to the court in writing a special instruction desired, and a general instruction applicable to the issues has been given, failure to instruct on any given proposition is not error. *Livingston v. Chicago, R. I. & P. Ry. Co.*, 139 P. 260, 41 Okl. 505. A request for a special instruction should be submitted in writing, properly numbered and signed, and be delivered to the court at the proper time. *Id.*

Where defendant in a damage suit fails to request an instruction correctly defining the measure of damages, an instruction thereon slightly inaccurate, but not misleading the jury, where the damages awarded are not excessive, is not reversible error. *Lusk v. Kennedy* (Okl.) 176 P. 502.

An instruction that plaintiff could only recover if his negligence did not contribute to his injury, and if he was exercising ordinary care for his own

²¹ *Lady v. State* (Okl. Cr. App.) 192 P. 699.

²² *Wiley v. State* (Okl. Cr. App.) 191 P. 1057; *Tucker v. State* (Okl. Cr. App.) 191 P. 201; *Nail v. State* (Okl. Cr. App.) 192 P. 592.

Where issue has not been joined on the question, it is proper for the court to refuse to advise the plaintiff as to who has the burden of proof.²³

safety, sufficiently stated the laws of contributory negligence, in absence of request for more specific instructions. *City of Ada v. Smith* (Okla.) 175 P. 924.

Where impeaching evidence is withdrawn and the jury charged to disregard it, it is not reversible error for the court to omit in its written instructions to repeat the instruction to disregard the impeaching evidence; no request therefor being made. *Gulliford v. McQuillen*, 89 P. 927, 75 Kan. 454.

Where two or more persons are defendants in the same suit, and plaintiff offers evidence, competent as to one and incompetent as to the other, and the one as to whom it is incompetent objects thereto, and his objection is overruled, and the court omits to limit the application of such evidence to the defendant against whom it properly applies, the overruling of the objection was proper, and the omission to instruct was not material error, where the objecting defendants do not request an instruction making such limitation. *Sweet v. Montpelier Sav. Bank & Trust Co.*, 84 P. 542, 73 Kan. 47.

In replevin for live stock claimed under a chattel mortgage, wherein court instructed as to what constitutes a valid, oral, chattel mortgage, and where there was no request for an instruction relating to a written mortgage, failure to charge thereon was not prejudicial error. *State Bank of Downs v. Abbott*, 104 Kan. 344, 179 P. 326.

In an action for damages from fraud inducing the purchase of a lease, held that failure to instruct that defendant must have known that the representations were false was not error, in the absence of a request. *Anderson v. Heasley*, 148 P. 738, 95 Kan. 572.

In the absence of a request therefor, failure to instruct as to whether running a train faster than six miles an hour, in violation of an ordinance, was negligence, is not error. *Driver v. Atchison, T. & S. F. Ry. Co.*, 52 P. 79, 59 Kan. 773.

The failure of the court to instruct that the measure of damage for the destruction of trees was the diminished value of the land on which they were growing is not error when such instruction was not requested. *Missouri, K. & T. Ry. Co. v. Steinberger*, 55 P. 1101, 60 Kan. 856, affirming judgment 51 P. 623, 6 Kan. App. 585.

In an action for frightening a horse on a highway by an automobile, in the absence of a request for more definite instructions, a charge that plaintiff could recover if the injury was caused by the negligence of defendant, without contributory negligence on plaintiff's part, is not materially erroneous for failure to state that the negligence complained of must have been the proximate cause, and that injury was reasonably to have been anticipated therefrom. *Martin v. Garlock*, 108 P. 92, 82 Kan. 266, 20 Ann. Cas. 84.

In an instruction, in an action for breach of marriage promise, that the jury may take into account the plaintiff's seduction, the omission to define seduction is not error, in the absence of a request therefor. *Dalrymple v. Green*, 129 P. 1145, 88 Kan. 673, 43 L. R. A. (N. S.) 972.

Giving of an instruction on "contributory negligence" without specifically

²³ *Highland University Co. v. Long*, 53 P. 766, 7 Kan. App. 173.

§ 1237a. Objections and exceptions

"A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions; but it shall be sufficient to write at the close of each instruction, 'Refused and excepted to,' or, 'Given and excepted to,' which shall be signed by the judge."²⁴

Exceptions to instructions must specify the instructions objected to.²⁵

A general exception to an entire charge, and each and every part thereof, cannot be sustained. Such exception should point out the particular part or error which is complained of, so the trial judge may correct it, if he desires.²⁶

explaining that expression or stating a specific rule for reduction of damages on account of such negligence, held not error in the absence of a request. *Smith v. St. Louis & S. F. R. Co.*, 95 Kan. 451, 148 P. 759.

In action for breach of contract to furnish fuel oil, where plaintiffs introduced evidence from which price during remainder of period when defendant should have furnished same, and damages for failure could have been found, it was error to refuse request for additional findings as to such period. *Bagby v. Straub*, 101 Kan. 608, 168 P. 1098.

Failure to give a proper cautionary instruction relating to expert testimony desired by a party and orally outlined to the court was not error, where the request therefor was not made in writing, and where the court fairly instructed the jury upon the subject desired. *Cooper v. Harvey*, 94 P. 213, 77 Kan. 854.

²⁴ Rev. Laws 1910, § 5003.

²⁵ *Duroderigo v. Culwell*, 52 Okl. 6, 152 P. 605; *Higgins v. Street*, 92 P. 153, 19 Okl. 45, 13 L. R. A. (N. S.) 398, 14 Ann. Cas. 1086.

Where the court gives a series of instructions each of which is separately stated, an exception "to the giving of which instructions, and each of them," is properly saved. *Dunham v. Holloway*, 41 P. 140, 3 Okl. 244, judgment affirmed *Holloway v. Dunham*, 18 S. Ct. 784, 170 U. S. 615, 42 L. Ed. 1165.

²⁶ *State v. Wilgus*, 4 P. 218, 32 Kan. 126; *Haak v. Struve*, 16 P. 686, 38 Kan. 326; *Young v. Youngman*, 25 P. 209, 45 Kan. 65; *Ryan v. Madden*, 26 P. 679, 46 Kan. 245; *Fleming v. L. D. Latham & Co.*, 30 P. 166, 48 Kan. 773.

An exception, "to which instructions taken as a whole, and to each one separately, defendants excepted," will not avail as an exception to any particular paragraph. *Remund v. McCool*, 50 Okl. 69, 150 P. 1055.

An exception following an instruction, "Comes now the defendant and excepts to all that part of the court's charge contained in paragraph 2," is sufficient; paragraph 2 being directed to one proposition only. *Gilliam v. Newland*, 130 P. 133, 37 Okl. 36.

The general charge being divided into separate paragraphs, and numbered, the record showed that plaintiff excepted as follows: "To the giving of all and each of said instructions by the court the plaintiff then and there duly excepted and excepts." Held, that it will be presumed that plaintiff duly

Where the charge consists of specific instructions separately numbered, a general exception to the entire charge is not available if any instruction be correct.²⁷

Instructions apparently correct will not be carefully considered, where no specific defects are pointed out.²⁸

Where a party asks the court to give several separate instructions to the jury, and the court refuses to give any of them, a general exception taken to such refusal is not sufficient.²⁹

Where a party fails to object to instructions at the trial of the cause, he thereby waives all errors.³⁰

After instructions have been read to the jury, the arguments made, and cause submitted, exceptions to the charge come too late.³¹

In an action against a railway company to recover for damages

excepted to each separate paragraph and portion of the charge. *Bard v. Elston*, 1 P. 565, 31 Kan. 274; *Lorie v. Adams*, 33 P. 590, 51 Kan. 692.

Where instructions are given in writing and the case-made recites that to the giving of each and all of them the defendant excepts and that his exceptions were allowed, it is not a sufficient reservation to any particular instruction under Comp. Laws 1909, § 5795. *Eisiminger v. Beman*, 124 P. 289, 32 Okl. 818.

Where instructions are in numerous paragraphs involving the several propositions, and the only exception is to every instruction adverse to the defendants and every part thereof, and the instructions as a whole, the exception is insufficient to bring to the consideration of the court any separate paragraph, and will not avail unless the whole charge is erroneous. *Isnard v. Edgar Zinc Co.*, 106 P. 1003, 81 Kan. 765, judgment affirmed on rehearing 111 P. 185, 83 Kan. 261.

A general exception to instructions, several in number, and separate and distinct, given at the request of the other party, is insufficient. Each instruction should be separately excepted to. *Bard v. Elston*, 1 P. 565, 31 Kan. 274.

²⁷ *Denson v. Fowler*, 56 Okl. 670, 155 P. 1184; *Johnson v. Johnson*, 143 P. 670, 43 Okl. 582; *Myer v. Moon*, 26 P. 40, 45 Kan. 580; *Crosby v. Wilson*, 36 P. 985, 53 Kan. 565; *Standard Life & Accident Ins. Co. v. Davis*, 53 P. 856, 59 Kan. 521; *Carter v. Carter*, 50 P. 948, 6 Kan. App. 923; *Glaser v. Glaser*, 74 P. 944, 13 Okl. 389.

²⁸ *Stith v. Fullinwider*, 40 Kan. 73, 19 P. 314.

²⁹ *Hays v. Farwell*, 4 Kan. App. 387, 45 P. 910; *Fleming v. L. D. Latham & Co.*, 30 P. 166, 48 Kan. 773.

Where plaintiff prepares a full set of instructions, and requests the giving of the same as a whole, and excepts to refusal to give it as such whole, error in refusing to give a portion of the same will not be considered. *Murray v. Board of Com'rs of Woodson County*, 48 P. 554, 58 Kan. 1.

³⁰ *Carter v. Missouri Mining & Lumber Co.*, 41 P. 356, 6 Okl. 11.

³¹ *St. Louis & S. F. R. Co. v. Fling*, 127 P. 473, 36 Okl. 25.

caused by fire, defendant cannot complain of the submission to the jury of the question of negligence in permitting combustible matter to accumulate on its right of way under a petition not alleging that it negligently permitted such accumulations, where it, without any request for a continuance, joins in the trial of the issue.³²

The denial of a request to indorse, after each instruction, a party's exception and the ruling and the judge's signature, under the statute is not error, where exceptions are saved in the record.³³

An exception to an oral instruction is sufficiently saved where it is excepted to orally, and the instructions and exceptions are taken by the stenographer and certified in the case-made.⁸⁴

An exception merely to the "giving" of an instruction only raises an objection to the law thereof, and will not raise an objection that it was given after the jury had partly considered the case.³⁵

§ 1238. Forms

(Caption.)

Comes now the said plaintiff and moves the court to give to the jury the following instructions:

1. You are instructed to return a verdict in this case in favor of the plaintiff in the sum of \$_____.

Given, and excepted to by defendant. —, Judge.

Refused, and excepted to by plaintiff. —, Judge.

2. The testimony of one credible witness may be entitled to more weight than the testimony of many others, if, as to those other witnesses, you have reason to believe and do believe from the evidence and all the facts before you that such other witnesses have knowingly testified untruthfully, and are not corroborated by other credible witnesses, or by circumstances proved in the case.

Given, and excepted to by defendant. —, Judge.

Refused, and excepted to by plaintiff. —, Judge.

G. H., Attorney for Plaintiff.

²² Chicago, R. I. & P. Ry. Co. v. Spring Hill Cemetery Ass'n, 57 P. 252, 9 Kan. App. 882.

³³ *Lindley v. Kelly*, 47 Okl. 328, 147 P. 1015.

³⁴ **Hurst v. Hill, 122 P. 513, 32 Okl. 532.**

²⁸ *City of Topeka v. Heitman*, 28 P. 1096, 47 Kan. 739.

(Caption.)

Comes now the said defendant, and requests the court to give the following instructions to the jury:

1. You are instructed to return a verdict in this case for the defendant.

Given, and excepted to by plaintiff. _____, Judge.

Refused, and excepted to by defendant. _____, Judge.

2. You are instructed that, to entitle the plaintiff to recover in this action, the burden of proof is upon him to show to the satisfaction of the jury the existence of the contract sued on and also such a breach thereof as entailed loss upon the plaintiff.

Given, and excepted to by plaintiff. _____, Judge.

Refused, and excepted to by defendant. _____, Judge.

X. Y., Attorney for Defendant.

(1206)

CHAPTER XVIII

JUDGMENT

Sections

- 1239-1244. Article I.—Definition, validity, and parties.
 1245-1252. Article II.—Confession of judgment.
 1253-1261. Article III.—Conformity.
 1253-1255. Division I.—Conformity to issues.
 1256-1259. Division II.—Conformity to verdict.
 1260-1261. Division III.—Conformity to findings.
 1262-1291. Article IV.—Rendition, form, and requisites.
 1262-1267. Division I.—In general.
 1268-1271. Division II.—Rendition.
 1272-1275. Division III.—Equity.
 1276-1291. Division IV.—Record of judgment.
 1292-1304. Article V.—Default judgment.
 1292-1299. Division I.—Requisites and validity.
 1300-1304. Division II.—Opening and vacating judgment.
 1305-1324. Article VI.—Reversing, vacating, or modifying.
 1305-1314. Division I.—Authority to review.
 1315-1324. Division II.—Proceedings.
 1325-1364. Article VII.—Operation, construction, enforcement, and satisfaction.
 1325-1331. Division I.—In general.
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 1348-1364. Division IV.—Judgment liens.
 1365-1370. Article VIII.—Assignment of judgment.
 1371-1394. Article IX.—Collateral attack.
 1371-1374. Division I.—Judgment impeachable collaterally.
 1375-1390. Division II.—Grounds of attack.
 1391-1392. Division III.—Proceedings.
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 1395-1411. Division I.—In general.
 1412-1425. Division II.—Causes of action or defenses merged, barred, or concluded.
 1426-1429. Division III.—Persons to whom bar available.
 1430-1440. Division IV.—Judgments conclusive in general.
 1441-1453. Division V.—Persons concluded.
 1454-1461. Division VI.—Matters concluded.
 1462-1467. Article XI.—Amount of recovery.
 1468-1471. Article XII.—Actions on judgments.
 1472-1478. Article XIII.—Equitable relief.
 1479-1485. Article XIV.—Foreign judgments.
 1486-1488. Article XV.—Transcript.

ARTICLE I

DEFINITION, VALIDITY, AND PARTIES

Sections

1239.	Definition.
1240.	Validity.
1241.	Jurisdiction.
1242.	Judgment in rem.
1243.	Parties.
1244.	New parties.

§ 1239. Definition

"A judgment is the final determination of the rights of the parties in an action."¹

The distinction between law and equity having been abolished "judgment" and "decree" are convertible terms, and "judgment," being more general, includes "decree."²

A finding is an adjudication only as it is given effect in a judgment.³

The reasons announced by a court to sustain its judgment strictly speaking form no part of the judgment itself.⁴

§ 1240. Validity

A judgment, when not authorized by law, is void, as a general rule, though the court had acquired jurisdiction of the parties and of the subject-matter.⁵

Remedies which are inconsistent with each other cannot be applied in the same judgment.⁶

¹ Rev. Laws 1910, § 5123; *Fooshee & Brunson v. Smith*, 124 P. 1070, 34 Okl. 247; *Davis v. Norton*, 129 P. 750, 36 Okl. 505.

A judgment that the costs of the action be taxed against the defendants, and each of them, was equivalent to adjudging the costs against the defendant and comes within Rev. Laws 1910, § 5123, defining a judgment as the final determination of the rights of the parties, and is valid against a collateral attack. *Dixon v. Peacock*, 141 P. 429, 43 Okl. 87.

² *Henderson v. Arkansas* (Okl.) 176 P. 751.

³ *Lynn v. McCue*, 147 P. 808, 94 Kan. 761, rehearing denied 150 P. 523, 96 Kan. 114.

⁴ *Butt v. Herndon*, 13 P. 580, 36 Kan. 370.

⁵ After a court has acquired jurisdiction over subject-matter and parties, it should clearly appear that court exceeded its authority in particular judgment rendered before it should be held to be void. *Pyeatt v. Estus*, 179 Pac. 42, 4 A. L. R. 1570.

⁶ Where plaintiff sought and recovered damages for conversion of wheat by

A judgment for the recovery of money, not stating the amount for which it was rendered is void.⁷

A judgment for costs entered on the journal, without stating the amount of the costs taxed, as computed by the clerk, is not a nullity; but such judgment will support an execution issued, and a levy thereof, to enforce payment of the costs of the action.⁸

When a contract is originally usurious, the taint of usury attaches to a judgment founded upon such usurious transaction.⁹

A judgment against a person who was deceased at the time suit was brought is void;¹⁰ but a judgment against a person who has died pending the action is not absolutely void.¹¹

§ 1241. — Jurisdiction

It is requisite to the validity of a judgment that it should have been rendered by a court having jurisdiction of the parties, of the general subject-matter, and of the particular matter which the judgment professes to decide.¹²

an elevator association, he was not entitled to recover against its officers on ground that they permitted it to engage in unlawful grain speculations whereby it became insolvent, as the two remedies were inconsistent. *Bonnett v. Farmers' & Growers' Shipping Ass'n*, 105 Kan. 121, 181 P. 634.

Two conflicting money judgments cannot be upheld in the same case. *Moline Elevator Co. v. Loewen Real Estate & Investment Co.*, 57 Okl. 478, 157 P. 99.

⁷ *Board of Com'rs of Custer County v. Moon*, 57 P. 161, 8 Okl. 205.

⁸ *Edwards v. Farmers' & Merchants' State Bank*, 72 P. 534, 67 Kan. 67.

⁹ *Bean v. Rumrill* (Okl.) 172 P. 453.

¹⁰ A judgment in attachment against a party who has died pending the action, rendered by a court of general jurisdiction, or by one which has acquired jurisdiction over the cause and the parties, is not absolutely void. *Mosley v. Southern Mfg. Co.*, 46 P. 508, 4 Okl. 492.

¹¹ A judgment quieting title against a person who was deceased when the action was instituted was void. *Morris v. Winderlin*, 142 P. 944, 92 Kan. 935. The defendant, in an action to recover possession of land and for partition, held entitled to protection as an innocent purchaser under Code Civ. Proc. § 83 (Gen. St. 1909, § 5676), in his title purchased in reliance on a judgment in a suit to quiet title which was afterwards set aside, only in so far as such judgment was against a party living when the suit to quiet title was instituted. *Id.*

A judgment obtained in an action to quiet title to land by service of publication only is void where the action was not commenced until after the person named as defendant was dead. *Harris v. Defenbaugh*, 109 P. 681, 82 Kan. 765.

¹² *Dickson v. Lowe* (Okl.) 163 P. 523; *Jefferson v. Gallagher*, 56 Okl. 405,

Where an unauthorized person brings an action in the name of a party who has not consented thereto, such action is fictitious, and the court does not acquire jurisdiction of the plaintiff named, or of the subject-matter, and any judgment rendered in such proceedings is void.¹³

A judgment rendered without notice to a party in interest is void as against such party.¹⁴

150 P. 1071; *Sharp v. Sharp* (Okl.) 166 P. 175, L. R. A. 1917F, 562; *Rogers v. Duncan*, 57 Okl. 20, 156 P. 678.

The first requisite to validity of judgment is that court shall have had jurisdiction, which may consist of jurisdiction of parties, subject-matter, or of the particular matter which judgment professes to decide. *Standard Savings & Loan Ass'n v. Anthony Wholesale Grocery Co.*, 62 Okl. 242, 162 P. 451, L. R. A. 1917D, 1029.

¹³ *Southern Pine Lumber Co. v. Ward*, 85 P. 459, 16 Okl. 131, judgment affirmed 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420.

¹⁴ *Caulk v. Lowe* (Okl.) 178 P. 101.

It was error to render judgment requiring defendant to surrender for cancellation a note executed by plaintiffs and held by a bank not a party to the action, though defendant was president and managing officer of the bank. *Jounson v. Filtsch*, 138 P. 165, 37 Okl. 510, judgment modified on rehearing 135 P. 806, 42 Okl. 64.

Where the United States was not a party to an action by the state to quiet title to an island in the Arkansas river, the Supreme Court could not determine the title as between the federal government and an individual claiming under a government patent. *State v. Nolegs*, 139 P. 943, 40 Okl. 479.

Where affidavit for publication was not sufficient, trial court never acquired jurisdiction of defendants so served, and judgment against them was void, and it was not necessary that they be served with case-made, notice of its settlement, or service of summons in error. *Rentle v. Rentle* (Okl.) 172 P. 1063.

No valid personal judgment can be obtained against a party unless he is personally served with process within the state, or voluntarily enters his appearance. *Continental Gin Co. v. Arnold* (Okl.) 167 P. 613, L. R. A. 1918B, 511.

An action in personam cannot be maintained against a nonresident defendant and a judgment rendered therein is void for lack of jurisdiction. *Continental Gin Co. v. Arnold* (Okl.) 167 P. 613, L. R. A. 1918B, 511.

A judgment rendered against defendants who failed to appear and who were not personally served held void, where the affidavit for service by publication was fatally defective. *Griffin v. Jones*, 45 Okl. 306, 147 P. 1024.

A judgment, based on attachment and service by publication, where the defendant resided in the state on the land attached, and the sheriff's deed on sale under such judgment, are void. *Arnold v. Joines*, 50 Okl. 4, 150 P. 130.

Where there is a direct proceeding by motion to set aside a judgment by one of the defendants at the same term at which the judgment is rendered, and the return of the officer is ambiguous and open to the construction that but one writ was served on both the defendants, and the evidence conclu-

A judgment is not void for want of jurisdiction unless such want appears on the record, but at most is voidable only.¹⁵

Where a court of general and superior jurisdiction has jurisdiction both of the subject-matter of the action and also of the parties, no merely irregular or erroneous exercise of its jurisdiction will render its final judgment void.¹⁶

If a judgment or decree includes a decision of a separable subject-matter within, and another beyond, the jurisdiction, it is valid as to the former and a mere nullity as to the latter.¹⁷

ively shows that no service was had on one defendant, it is error to overrule the motion. *Jackson v. Tenney*, 87 P. 867, 17 Okl. 495.

A decree of divorce on a forged entry of appearance and without jurisdiction of the defendant is a nullity. *Brown v. Dann*, 81 P. 471, 71 Kan. 733. Where a decree of divorce is granted on a forged entry of appearance, and the defendant afterwards appears and moves to set aside the void judgment, but subsequently consents that the motion may be dismissed, the dismissal will not validate the judgment or sever the marriage relation. *Id.*

A judgment entered against one who has not been served on an appearance by an unauthorized attorney, which has not been ratified or confirmed, is absolutely void as against the one for whom the unauthorized appearance was made. *Reynolds v. Fleming*, 1 P. 61, 30 Kan. 106, 46 Am. Rep. 86; *First Nat. Bank v. Wm. B. Grimes Dry Goods Co.*, 28 P. 56, 45 Kan. 510.

An injunction against a person out of the state, not served with summons and not appearing, and not ratifying an unauthorized appearance by an attorney filing a demurrer and subsequently asking to withdraw it, and not waiving want of jurisdiction, is void for want of jurisdiction. *State v. Will*, 119 P. 379, 86 Kan. 197, rehearing denied 121 P. 362, 86 Kan. 561.

¹⁵ *Edwards v. Smith*, 142 P. 302, 42 Okl. 544.

The absence of a summons from the files after a judgment rendered, and the fact that the appearance docket does not contain an entry of the return, do not render void a judgment which recites service and default of the defendant. *Greenwood County Bank v. O. B. Walker Telephone Co.*, 128 P. 357, 88 Kan. 287.

The authorities of the state of Texas, by legislative enactment, organized the disputed territory known as "Greer County" into a county government, and the inhabitants of such territory exercised all the governmental functions, legislative, executive, and judicial, for a number of years, and until March 16, 1896; the United States acquiesced in such acts until it was decided by the supreme court of the United States that such territory belonged to the United States, and was not within the boundaries of the state of Texas. Held, that such county government was a de facto government, and the courts held therein under and by virtue of the laws of Texas were de facto courts, and a judgment duly rendered in the county court of Greer county during such period is a valid and binding judgment. *Cullins v. Overton*, 54 P. 702, 7 Okl. 470.

¹⁶ *Sweet v. Ward*, 23 P. 941, 43 Kan. 695.

¹⁷ *Roth v. Union Nat. Bank of Bartlesville*, 58 Okl. 604, 160 P. 505.

In action against guardian for diversion of trust fund and to fix trust on

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§ 1242. — Judgment in rem

Jurisdiction to render judgment in rem inheres only in courts of the state which is the situs of the res.¹⁸

§ 1243. Parties

"Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; it may determine the ultimate rights of the parties on either side, as between themselves, and it may grant to the defendant any affirmative relief to which he may be entitled. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment may be proper. The court may also dismiss the petition with costs, in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or proceed in the cause against the defendant or defendants served."¹⁹

land purchased therewith in his wife's name, properly brought in county where land was, where jurisdiction was obtained on one defendant, in view of Code Civ. Proc. § 61 (Gen. St. 1915, § 6952), summons could be served on other defendant in another county, warranting establishment of a lien against land, but not a personal judgment against defendant served in another county. *Clingman v. Hill*, 104 Kan. 145, 178 P. 243.

That a judgment for plaintiff in a suit to quiet title contained an ineffective recital that any of plaintiff's children thereafter born should have no interest in the property held not to invalidate the judgment as against parties duly served and against whom decree was rendered. *Bell v. Watkins*, 135 P. 596, 90 Kan. 558.

That a judgment rendered against an estate under Rev. Laws 1910, § 6350, directed the issuance of execution held not to impair its effectiveness as an adjudicated claim against the estate. *National Lumber & Creosoting Co. v. Robison's Estate*, 48 Okl. 140, 149 P. 1133.

¹⁸ *Sharp v. Sharp* (Okl.) 166 P. 175, L. R. A. 1917F, 562.

¹⁹ Rev. Laws 1910, § 5124.

In equitable suit in district court, where all parties, plaintiffs and defendants, were before court, and submitted proof to sustain their pleadings, court, under Rev. Laws 1910, § 5124, should render a judgment meeting all exigencies of litigation and equitably settle all conflicting rights and claims, however numerous and complicated. *Henderson v. Arkansas* (Okl.) 176 P. 751.

A personal judgment for the price of land may be rendered in an action against the purchaser who went into possession, though his wife was not a party; no claim of homestead exemption being asserted. *Witt v. Boothe*, 158 P. 851, 98 Kan. 554.

A party is bound by the allegations of his pleadings, and is not entitled to recover a judgment against one of two defendants as a city treasurer, when

Where three defendants, in a joint answer, have claimed damages by reason of a breach of warranty, one defendant cannot recover damages which have accrued to himself individually and in which the other defendants have no joint interest.²⁰

Where parties who are not served are not necessary parties, a judgment may be sustained as to the parties against whom it is properly rendered.²¹

Where, in an action against a railroad company and its employés, the company was liable solely on the principle of respondeat superior, a judgment on a verdict against the company and in favor of one of the employés is unauthorized.²²

Where a separate judgment is rendered against each of two separate defendants it is immaterial, for the purpose of enforcing the judgment against one of the defendants, whether the judgment against the other defendant is void or valid.²³

In an action on a note in which the payee is joined with another beneficially interested, where the payee transfers its interest to its coplaintiff, judgment may be rendered in the name of the plaintiff solely entitled thereto.²⁴

In an action against a guardian on an attachment bond signed by his name as "guardian," a judgment against the guardian is a personal judgment against him, and is not a charge against the ward's person or estate.²⁵

the petition alleges that the defendants are jointly indebted to plaintiff as a banking firm, but must recover against both defendants, or wholly fail in the action. *City of Syracuse v. Reed*, 49 P. 259, 5 Kan. App. 806.

In action against several minor defendants, who defended by legal guardian, who was also guardian ad litem, there being no evidence to support judgment against one of defendants, judgment against guardian will be reversed. *Folsom v. Mullen*, 56 Okl. 550, 156 P. 326.

²⁰ *Dempster Mill Mfg. Co. v. Fitzwater*, 49 P. 624, 6 Kan. App. 24.

²¹ *Echols v. Reeburgh*, 62 Okl. 67, 161 P. 1065.

An action was commenced against three persons as a partnership, under the name and style of R. & Co., to recover the price of a barrel of whisky. An answer under oath was filed, denying the partnership, and no reply was filed, nor any evidence offered to prove the partnership. The case proceeded against the parties as individuals. Held that, where the facts fixed the liability of one of the persons, a judgment rendered against that one individually was not error. *Smith v. Straub*, 20 P. 516, 41 Kan. 7.

²² *Chicago, R. I. & P. Ry. Co. v. Austin*, 144 P. 1069, 43 Okl. 698.

²³ *School Dist. No. 63 v. Chicago Lumber Co.*, 21 P. 599, 41 Kan. 618.

²⁴ *Wade v. Hall*, 64 Okl. 178, 166 P. 720.

²⁵ *Jones v. Johnson (Okl.)* 178 P. 984.

§ 1244. — New parties

"When a judgment is recovered against one or more persons, jointly indebted upon contract, those who were not originally summoned may be made parties to the judgment by action." ²⁶

ARTICLE II

CONFESSION OF JUDGMENT

Sections

- 1245. Confession by defendant—Form.
- 1246. By prisoner—Witness.
- 1247. By attorney—Authority.
- 1248. By agreement.
- 1249. Cause to be stated.
- 1250. Affidavit.
- 1251. Enforcement.
- 1252. Offer to confess judgment—Form.

§ 1245. Confession by defendant—Form

"Any person indebted, or against whom a cause of action exists, may personally appear in a court of competent jurisdiction, and, with the assent of the creditor or person having such cause of action, confess judgment therefor; whereupon judgment shall be entered accordingly." ²⁷

CONFESSION OF JUDGMENT BY DEFENDANT

(Caption.)

I, A. B., the defendant above named, do hereby confess judgment in the above entitled cause in favor of the plaintiff, C. D., for the sum of \$——, and I hereby authorize entry of judgment herein for said sum in favor of said plaintiff. I hereby state that the facts on which the indebtedness for which judgment is confessed arose as follows: (Stating same), and that said sum of \$—— is justly due from me to the said C. D. on said indebtedness.

(Verification.)

A. B.

§ 1246. — By prisoner—Witness

"If any person be in custody in a civil action, at the suit of another, no warrant of attorney, executed by the person in custody,

²⁶ Rev. Laws 1910, § 5298.

²⁷ Rev. Laws 1910, § 5131.

to confess judgment in favor of the person at whose suit he is in custody, shall be of any force, unless some attorney, expressly named by the person in custody, be present and sign the warrant of attorney as a witness." ²⁸

§ 1247. — By attorney—Authority

"Judgments may be entered upon confession by an attorney, authorized for that purpose by a warrant of attorney, acknowledged or proved as conveyances of land, without any previous process or proceeding; and judgments so entered shall be a lien from the date of entry." ²⁹

A court has no jurisdiction to enter a judgment for plaintiff, in an action on a note, upon an appearance made for defendant under a stipulation in the note authorizing entry of appearance by any attorney of a court of record; this being, in effect, a confession of judgment not in accordance with the statutory provisions. ³⁰

"Every attorney, who shall confess judgment in any case, shall, at the time of making such confession, produce the warrant of attorney for making the same to the court before which he makes the confession, and the original, or a copy of the warrant, shall be filed with the clerk of the court in which the judgment shall be entered." ³¹

§ 1248. — By agreement

Where a judgment was entered on stipulation, the court having jurisdiction of the subject-matter and of the parties, it will not be set aside at the same term without a showing that some injustice has been done to the party against whom it was rendered. ³²

Where the counsel for both parties submitted all issues presented by a motion for judgment on the pleadings and consented to such judgment as the court might enter, they waived any objection that

²⁸ Rev. Laws 1910, § 5137.

²⁹ Rev. Laws 1910, § 5132; *Harn v. Cole*, 95 P. 415, 20 Okl. 553.

³⁰ *McCrairy v. Ware*, 51 P. 293, 6 Kan. App. 155.

³¹ Rev. Laws 1910, § 5136.

³² *Starr v. Tennant*, 128 P. 733, 35 Okl. 125.

Where a judgment was entered on stipulation and approved by all the parties and their counsel, the court properly refused to set it aside on motion of some of the parties only, in the absence of fraud in procuring a consent judgment. *United States Const. Co. v. Armour Packing Co.*, 128 P. 731, 35 Okl. 177.

otherwise might have been made that judgment was rendered before the case regularly stood for trial.³³

A judgment confessed by one without authority may be set aside on motion and proper showing.³⁴

Where one of several joint debtors on a note consents to a judgment against all without a trial, and on motion the court sets aside the judgment as to a portion of the defendants who did not authorize such consent, it is error not to set the judgment aside as to all of the defendants.³⁵

A consent decree is not void as between the parties because another should have been made a party, or because infant parties were not properly represented.³⁶

A judgment rendered by the judge in vacation and in another county is void, though entered by agreement of the parties.³⁷

§ 1249. Cause to be stated

"The debt or cause of action shall be briefly stated in the judgment, or in writing, to be filed as pleadings in other actions."³⁸

§ 1250. — Affidavit

"Before any judgment shall be entered by confession, an affidavit of the defendant must be filed, stating concisely the facts on which the indebtedness arose, and that the amount of such indebtedness is justly due and owing by the defendant to the plaintiff."³⁹

§ 1251. Enforcement

"Such judgment shall authorize the same proceedings for its enforcement as judgments rendered in actions regularly brought and

³³ Dawson v. Kroning (Ok.) 173 P. 521.

³⁴ Where, in an action against a school district, a director, assuming to act for the district, appears and confesses judgment for the full amount of the claim, such judgment will be set aside on motion of the treasurer of the district, showing that all authority had been taken from the director to appear for the district and vested in such treasurer, that the director had knowledge of such fact, and that the judgment of confession was obtained by fraud and collusion between plaintiff and such director. Moore v. School Dist. No. 71 of Oklahoma County, 66 P. 279, 11 Okl. 332.

³⁵ Outcalt v. Collier, 58 P. 642, 8 Okl. 473, reversing judgment 52 P. 738, 6 Okl. 615, on rehearing.

³⁶ Schermerhorn v. Mahaffie, 8 P. 199, 34 Kan. 108; Same v. Williams, Id.

³⁷ Dunn v. Carrier, 40 Okl. 214, 135 P. 337.

³⁸ Rev. Laws 1910, § 5133.

³⁹ Rev. Laws 1910, § 5134.

For form of affidavit, see ante, § 1245.

prosecuted; and the confession shall operate as a release of errors." ⁴⁰

§ 1252. Offer to confess judgment—Form

"The defendant, in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff or his attorney an offer, in writing, to allow judgment to be taken against him for the sum specified therein. If the plaintiff accept the offer and give notice thereof to the defendant or his attorney, within five days after the offer was served, the offer, and an affidavit that the notice of acceptance was delivered within the time limited, may be filed by the plaintiff, or the defendant may file the acceptance, with a copy of the offer, verified by affidavit; and in either case, the offer and acceptance shall be noted in the journal, and judgment shall be rendered accordingly. If the notice of acceptance be not given in the period limited, the offer shall be deemed withdrawn, and shall not be given in evidence or mentioned on the trial. If the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer." ⁴¹

OFFER TO CONFESS JUDGMENT

(Caption.)

To A. B., Plaintiff:

The above named defendant, C. D., hereby offers to allow judgment to be taken against him for \$—— and costs in the above entitled action.

C. D., Defendant.

⁴⁰ Rev. Laws 1910, § 5135.

⁴¹ Rev. Laws 1910, § 5301.

If a notice of acceptance of offer of judgment be not given within the period limited therefor by Gen. St. 1901, § 5000, the offer is deemed withdrawn without any action of one party making it. *Johnson v. Wamego Tp., Pottawatomie County*, 105 P. 530, 81 Kan. 259.

An offer to allow judgment, served in vacation, but not accepted within five days after service, as provided by Gen. St. 1901, § 5000, will not sustain a judgment thereon over the objection of the party who made the offer, though such offer had been filed with the clerk and was on file when accepted. *Johnson v. Wamego Tp., Pottawatomie County*, 105 P. 530, 81 Kan. 259.

Where an offer based on alleged settlement pleaded is not accepted by plaintiff, and a trial is had which results in a verdict which is set aside by the court and a new trial granted, and the offer in the answer is not withdrawn, and plaintiff files an acceptance and moves for judgment on the pleadings, and defendant joins in a hearing as to whether the acceptance is a compliance

ARTICLE III

CONFORMITY

DIVISION I.—CONFORMITY TO ISSUES

Sections

- 1253. Conformity to issues in general.
- 1254. Conformity to pleadings.
- 1255. Prayer.

DIVISION II.—CONFORMITY TO VERDICT

- 1256. Judgment on verdict.
- 1257. Interest.
- 1258. On special verdict.
- 1259. Judgment against verdict.

DIVISION III.—CONFORMITY TO FINDINGS

- 1260. Supported by findings.
- 1261. Approval of findings.

DIVISION I.—CONFORMITY TO ISSUES

§ 1253. Conformity to issues in general

The judgment must be sustained by the pleadings and evidence;⁴² otherwise, it is a nullity.⁴³

It is error to render judgment for plaintiff on any issue as to

with the offer and does not withdraw the offer, it will be deemed a continuing one, and upon acceptance and compliance with its conditions the court is warranted in entering judgment in conformity with the offer and acceptance. *Felght v. Thisler*, 114 P. 249, 84 Kan. 185.

⁴² *Graves v. Ray*, 75 Okl. 143, 182 P. 513; *Crawford v. Cassity*, 78 Okl. 261, 190 P. 412.

Under an allegation of fraud and deceit, as the ground for a recovery of damages, the court could not render judgment for plaintiff on a finding by the jury of a mutual mistake of facts. *Hallowell v. Smith*, 43 P. 89, 2 Kan. App. 473.

⁴³ *Rogers v. Bass & Harbour Co.*, 47 Okl. 786, 150 P. 706; *Anglea v. McMaster*, 87 P. 660, 17 Okl. 501; *Standard Savings & Loan Ass'n v. Anthony Wholesale Grocery Co.*, 62 Okl. 242, 162 P. 451, L. R. A. 1917D, 1029.

Personal judgments against defendants over their objection, entirely outside issues is error. *Paulsen v. Western Electric Co. (Okl.)* 171 P. 38.

That part of a judgment in an ancillary suit by a receiver to obtain possession of property which appointed the receiver permanent custodian is beyond the issues and will be set aside, the extent of the power of the receiver being properly justiciable in the main action. *Severns v. English*, 63 Okl. 84, 159 P. 917, judgment modified on rehearing 63 Okl. 84, 163 P. 526.

In foreclosure where a defendant filed a cross-petition, alleging that a co-

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which the burden of proof rests on him and as to which he has offered no evidence.⁴⁴

A judgment for attorney's fees cannot be upheld as punitive damages, where the record shows that no issue as to punitive damages was determined.⁴⁵

In an equitable suit, where all parties submitted proof to sustain their pleadings, the district court, in granting plaintiff the necessary and proper relief, was not restricted by his prayer for specific relief, but under the prayer for general relief might grant such appropriate relief as followed legitimately and logically from all pleadings and proof.⁴⁶

defendant was indebted to it, and that C., a third defendant, claimed some interest in land inferior to that of defendant, a personal judgment against C. was a nullity being without issues. *Standard Savings & Loan Ass'n v. Anthony Wholesale Grocery Co.*, 62 Okl. 242, 162 P. 451, L. R. A. 1917D, 1029.

The court should not disregard competent testimony as to the sufficiency of title to land in another state, and, without either pleading or proof of the law of such state, pass judgment by an independent examination of the abstract. *Spaeth v. Kouns*, 148 P. 651, 95 Kan. 320, L. R. A. 1915E, 271.

On the trial of a civil action, where one of two defendants has pleaded new matters of fact which, if sustained by the evidence, entitle him to relief concerning the subject-matter of the action, and he has produced evidence tending to establish such issue, it is error to render judgment without regard thereto. *Rankin v. Trickett*, 89 P. 698, 75 Kan. 306.

Where a demurrer to a petition is sustained on the ground of misjoinder of causes, and without other pleading the court enters a judgment for defendant that he is the owner and entitled to the possession of the property in question, such judgment is based on no allegation of fact in any pleading, and is *coram non jure* and void. *New v. Smith*, 119 P. 380, 86 Kan. 1.

Where, in an action for damages for refusal of a corporation to transfer stock on its books on demand, the only allegation as to damages is that defendant converted the stock to its own use, to the damage of plaintiff, in the sum of 20 cents per share, judgment should not be rendered for that amount, where the only evidence of damage is the production of certificates of stock assigned to the plaintiff, reciting that the shares are \$1 each, fully paid. *Uncle Sam Oil Co. v. Forrester*, 100 P. 512, 79 Kan. 610; *Same v. Oehler*, 100 P. 512, 79 Kan. 861.

Where petition avers acts done in pursuance of conspiracy and plaintiff fails to prove conspiracy, he may yet recover against such defendants as are shown guilty of tort. *Harbison v. White*, 56 Okl. 566, 156 P. 335.

⁴⁴ *Miller v. Kroenert*, 106 P. 459, 81 Kan. 590.

⁴⁵ *Evans v. Central Life Ins. Co.*, 125 P. 86, 87 Kan. 641, 41 L. R. A. (N. S.) 1130.

⁴⁶ *Henderson v. Arkansas* (Okl.) 176 P. 751.

§ 1254. Conformity to pleadings

A judgment should not be rendered on an issue which is not fairly raised by the pleadings.⁴⁷

Where a court has jurisdiction of the parties, the subject-matter, and of the particular question adjudicated, its judgment is not void because the petition is defective;⁴⁸ but judgment for plaintiffs, unauthorized by the petition and evidence, is void.⁴⁹

⁴⁷ *Spaeth v. Kouns*, 148 P. 651, 95 Kan. 320, L. R. A. 1915E, 271; *Champion v. Oklahoma City Land & Development Co.*, 61 Okl. 135, 159 P. 854.

A decree for reformation held unauthorized, where there was no allegation in the petition of either fraud or mistake in the execution of the deed. *Thraves v. Greenlees*, 142 P. 1021, 42 Okl. 764. The reformation of a deed so as to convey a less estate than that named will not be granted where the elements necessary to justify it are not pleaded. *Id.*

Where in a pedestrian's action for injuries from being struck by an automobile the jury found that the driver of the car was negligent in a particular not complained of in the petition, the driver was entitled to judgment. *Keck v. Jones*, 155 P. 950, 97 Kan. 470.

A petition for recovery of money had and received and for exemplary damage will not support a judgment establishing a trust. *Citizens' Bank & Trust Co. of Pryor v. Hale* (Okl.) 177 P. 366.

Where a passenger holding a ticket for a station at which the train was not scheduled to stop was ejected before he reached that station, for refusal to pay fare to the next station beyond at which the train did stop, and sued the company for damages as for a wrongful ejection, he could not recover as for a breach of a contract to permit him to alight at his station. *Noble v. Atchison, T. & S. F. R. Co.*, 46 P. 483, 4 Okl. 534.

In the absence of a motion by defendant to require plaintiff to elect on which of several causes of action he would rely, or a motion to make his petition more definite, a judgment which can be upheld on any of the causes or on any combination of any of them which are not inconsistent will be sustained. *Kansas Refrigerator Co. v. Pert*, 42 P. 943, 3 Kan. App. 364.

In replevin, a general denial in a case where plaintiff has obtained possession but does not prevail at the trial authorizes judgment for the possession or for the value of the property as the facts warrant. *Stiller v. Atchison, T. & S. F. Ry. Co.*, 124 P. 595, 34 Okl. 45.

Where in an action to enjoin a sale of plaintiff's goods on execution issued

⁴⁸ *Bell v. Ford* (Okl.) 173 P. 524.

Where court has jurisdiction of subject-matter and of parties, though their petition was defective in stating cause of action, if relief sought can be determined, judgment rendered thereon is not void. *Stauffer v. Watts* (Okl.) 174 P. 1031.

Judgment, in cause in which defendant appears and in which petition presents subject-matter within court's jurisdiction, but states cause of action defectively or not at all, is erroneous but not void. *Chivers v. Board of Com'rs of Johnston County*, 62 Okl. 2, 161 P. 822, L. R. A. 1917B, 1296.

⁴⁹ *Choi v. Turk*, 55 Okl. 499, 154 P. 1000.

The joinder in a petition of two causes, only one of which is maintainable, does not vitiate the entire procedure, and a judgment on the maintainable cause of action is valid.⁵⁰

Where two railroad companies are jointly charged with setting a fire, a judgment may be rendered against either or both as may be proper under the evidence.⁵¹

§ 1255. Prayer

The right to recover depends, not upon the prayer, but upon the scope of the issues made or which might have been made,⁵² and, if a cause of action is sufficiently stated and proved, the court will decree proper legal redress, whether it conforms to prayer or not.⁵³

on a judgment alleged to have been paid, and to have the judgment satisfied of record, and also for damages for such levy as malicious, the court required plaintiff to elect on which cause of action he would proceed, whereupon plaintiff chose the latter, it was error to render an order canceling the judgment, since such issue had been abandoned. *W. W. Kendall Boot & Shoe Co. v. Davenport*, 65 P. 688, 63 Kan. 884.

⁵⁰ *Continental Gin Co. v. Arnold* (Okl.) 167 P. 613, L. R. A. 1918B, 511.

⁵¹ *St. Louis & S. F. R. Co. v. Noland*, 90 P. 273, 75 Kan. 691.

⁵² *Paulsen v. Western Electric Co.* (Okl.) 171 P. 38.

Right to recover depends not upon the prayer, but upon the scope of the pleading and the issues made or which might have been made under it. *Wilmington v. Summers*, 62 Okl. 98, 162 P. 206.

⁵³ *Eagan v. Murray*, 102 Kan. 193, 170 P. 389.

That plaintiff did not demand the precise relief to which he was entitled held not to deprive him of his right to recover, where the petition stated facts entitling him to recover damages for maintenance of a public nuisance. *City of Ardmore v. Colbert*, 52 Okl. 235, 152 P. 603.

An answer and cross-petition which stated facts entitling defendant to a money judgment, and prayed that his lien be preserved and for such other relief as he may in equity be entitled to, held sufficient to entitle him to a money judgment, though there was no prayer therefor. *Nesbitt v. Chesebro*, 133 P. 545, 89 Kan. 863, judgment modified on rehearing 136 P. 793, 91 Kan. 14.

Where a judgment is justified by the pleadings and proof, it is immaterial that it is not in conformity with the prayer of the complaint. *Hardy v. Ladow*, 83 P. 401, 72 Kan. 174; *First Nat. Bank v. Wattles*, 54 P. 1103, 8 Kan. App. 136.

A judgment for defendant in an action for the recovery of land is necessarily a bar to another action by the plaintiffs, and the fact that the judgment quiets the title in defendant is without prejudice to plaintiffs as against the objection that no affirmative relief was prayed in the answer. *Balin v. Osoba*, 91 P. 57, 76 Kan. 234.

In view of Code Civ. Proc. § 92 (Gen. St. 1915, § 6983), requiring a petition to contain a demand for relief to which party supposes himself to be entitled, one purpose of a prayer is that a party may understand what relief will be given against him if default be made, and defendant may ordinarily assume

Where, in the prayer of a petition, there is a demand for both general and specific relief, that a mistake is made in the prayer for specific relief will not prevent the granting of such relief as the allegations of the petition and the evidence in the case justify under the prayer for general relief.⁵⁴

DIVISION II.—CONFORMITY TO VERDICT

§ 1256. Judgment on verdict

"When a trial by jury has been had, judgment must be entered by the clerk in conformity to the verdict, unless it is special, or the court order the case to be reserved for future argument or consideration."⁵⁵

A judgment must be supported by the verdict and a judgment which goes beyond the verdict is erroneous.⁵⁶

In a suit on a claim, part of which has been allowed, the court on verdict for defendant should enter judgment for the amount so allowed.⁵⁷

Judgment on a note and mortgage may be rendered on a verdict which does not state the amount due, where the only question in dispute was their validity.⁵⁸

Judgment may be rendered for plaintiff in an action to foreclose a vendor's lien, upon demurrer to defendant's evidence being sustained, without return of a verdict by the jury.⁵⁹

that a plaintiff will not be given greater relief than that specifically demanded. *City of Parsons v. Parsons Water Supply & Power Co.*, 104 Kan. 294, 178 P. 438.

In an action in which plaintiff asked only \$57, and at no time asked or obtained leave to amend, or amended his pleadings, it was error to give him judgment for \$72 and costs. *Kansas City, L. & S. R. Co. v. Richolson*, 1 P. 138, 31 Kan. 28.

⁵⁴ *Missouri, K. & T. Ry. Co. v. Murphy*, 90 P. 290, 75 Kan. 707.

⁵⁵ *Rev. Laws 1910*, § 5138.

Where the court makes the caption of the verdict part of his instructions, and it appears that the jury, by striking the name of one defendant from the caption and striking "s" from word "defendants," intended to find for him. It is error to disregard such intent in entering judgment. *St. Louis & S. F. R. Co. v. Williams*, 55 Okl. 682, 155 P. 249.

⁵⁶ *Smith v. Eagle Mfg. Co.*, 108 P. 626, 25 Okl. 404.

⁵⁷ *Selzer v. Selzer*, 45 Okl. 372, 145 P. 318.

⁵⁸ *Matthews v. McNeill*, 157 P. 387, 98 Kan. 5.

⁵⁹ *Ames v. Millam*, 53 Okl. 739, 157 P. 941.

§ 1257. — Interest

The judgment must follow the verdict, and where the verdict is general and for a sum in gross, and the question of interest was not reserved by the court, and nothing in the record indicates that the jury omitted interest, it will be presumed that it is embraced in their finding, and the court cannot add interest to the amount found.⁶⁰

§ 1258. On special verdict

"Where the verdict is special, or where there has been a special finding on particular questions of fact, or where the court has ordered the case to be reserved, it shall order what judgment shall be entered."⁶¹

Where the general verdict was one which could properly be returned under the pleadings and evidence, there is no error in ignoring the special findings and rendering judgment thereon, in the absence of a motion for judgment on such findings.⁶²

A judgment based on irreconcilable answers returned to special questions will be reversed.⁶³

Where the jury especially found that defendant who cross-complained suffered certain damage, but answered question as to damages allowed in negative, defendant is entitled on such findings to judgment for amount of damage found.⁶⁴

⁶⁰ Wyant v. Beavers, 63 Okl. 68, 162 P. 732.

Where the verdict in an action for services did not mention interest, in entering the judgment the court could not allow interest. Carter v. Christie, 42 P. 256, 1 Kan. App. 604.

It is error to compute interest on the amount of a verdict for a period prior to the date of its rendition, and render judgment therefor, when the verdict neither includes such interest nor affords data for its computation. Southern Kansas Ry. Co. v. Showalter, 47 P. 331, 57 Kan. 681.

The jury should include in their verdict any interest found due; but where the rate of interest and the dates between which it is to be reckoned are stated in the verdict, the court can determine its amount and include it in the judgment on such verdict. Mills v. Mills, 18 P. 521, 39 Kan. 455.

⁶¹ Rev. Laws 1910, § 5139.

⁶² Carter v. Missouri Mining & Lumber Co., 41 P. 356, 6 Okl. 11.

⁶³ Dunlap v. Chicago, R. I. & P. Ry. Co., 143 P. 415, 93 Kan. 50.

⁶⁴ Kemper Grain Co. v. Farmers' Grain & Elevator Co. of Cunningham, 163 P. 450, 99 Kan. 712.

§ 1259. Judgment against verdict

"Where, upon the statement in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party."⁶⁵

⁶⁵ Rev. Laws 1910, § 5140.

Where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so entered by the court, though a verdict has been found against such party. *Whitaker v. Crowder State Bank*, 110 P. 776, 26 Okl. 786.

A motion for judgment notwithstanding the verdict does not raise the question of the sufficiency of the evidence to sustain the verdict. *Bank of Commerce of Sulphur v. Webster* (Okl.) 172 P. 943.

Where in action on note defendant's fiduciary liability was not involved, and jury found in his favor as individual, but against him as trustee, judgment must, under Rev. Laws 1910, § 5140, be rendered in favor of defendant, notwithstanding verdict. *State v. Jackson* (Okl.) 166 P. 1041.

In action for injuries on the theory that the boards of a runway were old, weak, and not properly fastened where the verdict was for plaintiff after a finding that the walk was too narrow, judgment was properly entered for defendant. *Case v. Yoakum*, 161 P. 642, 99 Kan. 253.

Under Rev. Laws 1910, § 5140, the trial court without special findings has no authority to render a judgment notwithstanding the verdict, unless the same is warranted by the pleadings. *Barnes v. Universal Tire Protector Co.*, 63 Okl. 292, 165 P. 176. A motion for judgment non obstante verdicto does not present for consideration errors in the admissions of evidence. *Id.* A motion for judgment non obstante verdicto does not present for consideration the sufficiency of the evidence. *Id.*

Where defendant, in an action on a partnership dissolution agreement, pleaded a mutual mistake, and, upon evidence that plaintiff knew of the mistake, requested leave to amend by alleging a mistake on his part and fraud of plaintiff, which request was refused, it was error to render judgment against defendant notwithstanding a general verdict in his favor. *Wait v. McKibben*, 140 P. 860, 92 Kan. 394.

Where summons in garnishment on a judgment against A. was served on B. and issue joined under Comp. Laws 1909, § 5718, and the jury found that the property in possession of the garnishee was held by him under mortgage, and no payment or tender of the amount of the mortgage debt was made to the garnishee as required by section 4432, defendant's motion for judgment notwithstanding verdict for plaintiff should have been sustained because of such defect. *Bailey v. Willoughby*, 124 P. 955, 33 Okl. 194.

Where, in a section hand's action for injuries, the special findings established that his injuries resulted from an assumed risk, the court should have set aside a general verdict in his favor and rendered judgment for defendant. *Metz v. Missouri Pac. Ry. Co.*, 135 P. 578, 90 Kan. 463.

Where, in an action for the death of plaintiff's husband from being run over by a locomotive, it appeared that the railway company, if liable, was liable on the principal of respondeat superior, it was error to render judg-

Where there is no legal evidence reasonably tending to support the verdict for defendant, the overruling of plaintiff's motion for judgment, notwithstanding the verdict, is error.⁶⁶

The fact that the evidence is conflicting does not preclude a motion for judgment, where the case is one in which the verdict is advisory only.⁶⁷

On motion for judgment notwithstanding the verdict, when there are no findings of fact, the only question for review is on the pleadings.⁶⁸

A trial court may even after a motion for a new trial is overruled reserve for consideration the question whether judgment should be entered on the verdict of the jury.⁶⁹

DIVISION III.—CONFORMITY TO FINDINGS

§ 1260. Supported by findings

A judgment is supported by the findings where no other judgment could have been rendered upon the findings, and where all the elements necessary to support the verdict are embraced in such findings.⁷⁰

ment against the company on a verdict finding against the company and in favor of the defendant employé. *St. Louis & S. F. R. Co. v. Williams*, 55 Okl. 682, 155 P. 249.

⁶⁶ *Schafer v. Midland Hotel Co.* (Okl.) 171 P. 337.

⁶⁷ *Parker v. Hamilton*, 49 Okl. 693, 154 P. 65.

⁶⁸ *Foster v. Leftwich*, 52 Okl. 28, 152 P. 583.

⁶⁹ *State v. Webb*, 36 P. 1117, 53 Kan. 464.

⁷⁰ *Boynton v. Hardin*, 58 P. 1007, 9 Kan. App. 166.

A petition charged that a note and mortgage were given by a husband to his wife to defraud the husband's creditors. The answer was a general denial and an avoidance, and the reply denied generally the answer. The court found that the note and mortgage were for a bona fide debt, and that plaintiff's judgment was a lien on the property, and rendered judgment against defendants for one-half the costs, restrained the payment of the note and mortgage, and ordered them sold to pay plaintiff's judgment. Held, that such judgment was erroneous. *Case v. Jacobitz*, 62 P. 115, 9 Kan. App. 842.

In an action for assault, where the jury returned a verdict of one dollar, and by special findings allowed one dollar as punitive damages and nothing for actual damages, and the findings found none of the elements authorizing punitive damages, but did authorize an allowance of actual damages, and plaintiff was entitled to recover nominal damages, it was error to render judgment for defendant on the findings. *Burnell v. Bradbury*, 77 P. 85, 69 Kan. 444.

Special findings held to sustain a judgment for damages for fraud inducing a purchase of an interest in a valueless business in which one of defendants

Where special findings of a jury material to the issue are in harmony with a general verdict for plaintiff, it is error to award judgment for defendant on findings collateral to the issue.⁷¹

§ 1261. Approval of findings

Where special findings as returned are attacked as contrary to the evidence, no judgment can be rendered upon them until they are approved by the trial court.⁷²

was interested as a partner, which fact was concealed from purchaser. *Abmeyer v. German-American State Bank*, 103 Kan. 356, 179 P. 368.

A contention that a judgment is not supported by special findings is not meritorious, when there are general findings which support it. *Shattuck v. Board of Com'rs of Harvey County*, 66 P. 1057, 63 Kan. 849.

⁷¹ *Citizens' Nat. Bank v. Larabee*, 67 P. 546, 64 Kan. 158.

Where, in an equity suit, the court made special findings for defendants and also found generally on all issues, and some of the special findings were insufficient to support the judgment, plaintiffs having neglected to request further findings or to modify those made, the special findings will be disregarded and the general finding held to support the judgment. *People's Gas Co. v. Fletcher*, 105 P. 34, 81 Kan. 76, 41 L. R. A. (N. S.) 1161.

⁷² *Swan v. Beris Rock Salt Co.*, 119 P. 871, 86 Kan. 260.

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ARTICLE IV**RENDITION, FORM, AND REQUISITES****DIVISION I.—IN GENERAL****Sections**

- 1262. For defendant.
- 1263. Against infant.
- 1264. On motion.
- 1265. Judgment in foreclosure suit.
- 1266. Appeal from county commissioners.
- 1267. Corporations—Involuntary dissolution.

DIVISION II.—RENDITION

- 1268. Time.
- 1269. Ejectment.
- 1270. Interplea.
- 1271. Bastardy.

DIVISION III.—EQUITY

- 1272. In general.
- 1273. Specific performance.
- 1274. Foreclosure.
- 1275. Mechanic's lien.

DIVISION IV.—RECORD OF JUDGMENT

- 1276. Journal entry—Form.
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- 1283. Nunc pro tunc orders.
- 1284. Lost or destroyed judgment.
- 1285. Filing transcript—Justice's judgment.
- 1286. In other county.
- 1287. Record in realty case.
- 1288. Recording.
- 1289. Involuntary dissolution.
- 1290. Record as notice.
- 1291. Orders and decrees

DIVISION I.—IN GENERAL**§ 1262. For defendant**

"If a counterclaim or set-off, established at the trial, exceed the plaintiff's claim so established, judgment for the defendant must be

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given for the excess; or if it appear that the defendant is entitled to any affirmative relief, judgment shall be given therefor.”⁷³

§ 1263. Against infant

“It shall not be necessary to reserve, in a judgment or order, the right of an infant to show cause against it after his attaining full age; but in any case in which, but for this section, such reservation would have been proper, the infant, within one year after arriving at the age of twenty-one years, may show cause against such order or judgment.”⁷⁴

§ 1264. On motion

Defendant, by filing answer to a motion for judgment in a stipulation, does not become entitled to three days' notice of the hearing.⁷⁵

Where defendant, after plaintiff's motion for judgment has been sustained, is permitted to file an amended answer, such permission is an informal setting aside of an order sustaining the motion.⁷⁶

Where there is no jury, a court may, after taking the case under advisement, decide it upon any proposition within the pleadings and the evidence, whether insisted upon by counsel or not.⁷⁷

§ 1265. Judgment in foreclosure suit

“In actions to enforce a mortgage, deed of trust, or other lien or charge, a personal judgment or judgments shall be rendered for the amount or amounts due as well to the plaintiff as other parties to the action having liens upon the mortgaged premises by mortgage or otherwise, with interest thereon, and for sale of the property charged and the application of the proceeds; or such application may be reversed (reserved) for the further order of the court, and the court shall tax the costs, attorney's fees and expenses which may accrue in the action, and apportion the same among the parties according to their respective interests, to be collected on the order of sale or sales issued thereon; when the same mortgage embraces separate tracts of land situated in two or more counties, the sheriff of each county shall make sale of the lands situated in

⁷³ Rev. Laws 1910, § 5141.

⁷⁴ Rev. Laws 1910, § 5142.

⁷⁵ *Berry v. Dewey*, 102 Kan. 392, 170 P. 1000.

⁷⁶ *Eritts v. Reidel*, 165 P. 671, 101 Kan. 68.

⁷⁷ *Johnson v. Myers*, 122 P. 713, 32 Okl. 421.

the county of which he is sheriff. No real estate shall be sold for the payment of any money or the performance of any contract or agreement in writing, in security for which it may have been pledged or assigned, except in pursuance of a judgment of a court of competent jurisdiction ordering such sale. The court may, in the order confirming a sale of land under order of sale on foreclosure or upon execution, award or order the issuance of a writ of assistance by the clerk of the court to the sheriff of the county where the land is situated, to place the purchaser in full possession of such land, and any resistance of the service of such writ of assistance shall constitute an indirect contempt of the process of such court, and if any person who has been removed from any lands by process of law or writ of assistance or who has removed from any lands pursuant to law on adjudication or direction of any court, tribunal or officer, afterwards, without authority of law, returns to settle or reside upon such land, he shall be guilty of an indirect contempt of court, and may be proceeded against and punished for such contempt." ⁷⁸

§ 1266. Appeal from county commissioners

"The district court may make a final judgment and cause the same to be executed, or may send the same back to the board with an order how to proceed, and require said board of county commissioners to comply therewith by a mandamus or attachment as for contempt." ⁷⁹

§ 1267. Corporations—Involuntary dissolution

"If it shall be adjudged that a corporation against which an action shall have been brought" for involuntary dissolution, "has, by neglect, abuse or surrender, forfeited its corporate rights, privileges and franchises, judgment shall be rendered that the corporation be excluded from such corporate rights, privileges and franchises, and that the corporation be dissolved." ⁸⁰

⁷⁸ Sess. Laws 1915, p. 352, § 1, amending Rev. Laws 5128, effective March 22, 1915.

⁷⁹ Rev. Laws 1910, § 1644.

⁸⁰ Rev. Laws 1910, § 1274.

DIVISION II.—RENDITION

§ 1268. Time

The trial judge after trying a case without a jury may take same under advisement for a reasonable time, though such time extend beyond the term,⁸¹ provided judgment is then rendered in open court.⁸²

The rendition of a judgment final as to all parties, while the issues remain undisposed of, is error.⁸³

The courts cannot withhold relief from one entitled to it in order to enable his adversary to construct the defenses for a prospective attack when favorable conditions shall arise.⁸⁴

§ 1269. Ejectment

Where one brings an action to recover land, and the facts show that he is entitled to recover but a portion thereof, he may recover that part which the pleadings and the facts show him entitled to.⁸⁵

⁸¹ Potts v. First State Bank of Talihina, 51 Okl. 162, 151 P. 859.

Where a case is tried to the court, it may, after hearing of the evidence, take the matter under advisement until the next term, when it may in open court render judgment. Barnes v. Benham, 75 P. 1130, 13 Okl. 582.

⁸² A district court is without authority in vacation to render judgment in a case tried in term time and taken under advisement. Nason v. Patten, 129 P. 138, 88 Kan. 472.

On October 26th a cause in the district court of B. county, G., judge, presiding, was submitted for judgment. The next day the court adjourned until November 19th, on which day it failed to meet and was adjourned by operation of law without fixing any time to reconvene. November 20th, in the same district, the district court of G. county convened, D., judge presiding, and continued until December 20th, when it adjourned until December 26th. On December 21st G., as presiding judge of B. county, without an order from the Supreme Court so to do, convened said court and rendered judgment in said cause. Held, that the term in which the cause was submitted expired by operation of law by commencement of the term of the district court of G. county, and said judgment was void. Lookabaugh v. Okeene Hardware & Implement Co., 106 P. 844, 25 Okl. 474.

⁸³ General Electric Co. v. Sapulpa & I. Ry. Co., 49 Okl. 376, 153 P. 189.

Rendition of a judgment final as to all parties, while issues remain undisposed of, held error. United States Fidelity & Guaranty Co. v. Fidelity Trust Co., 49 Okl. 398, 153 P. 195.

Under Comp. Laws 1909, § 5794, the court properly entered judgment for defendant after sustaining a demurrer to plaintiff's evidence. Oklahoma Moline Plow Co. v. Smith, 139 P. 285, 41 Okl. 498.

⁸⁴ McQuiston v. Walton, 69 P. 1048, 12 Okl. 130; Cunningham v. Morris, 69 P. 1133, 12 Okl. 132.

⁸⁵ Edwards v. Brusha, 90 P. 727, 18 Okl. 234.

In an action for the recovery of land, the plaintiff may recover such part

Where persons in possession of separate parts of tracts without common interest are joined in ejectment for whole tract and file separate answers and consent to consolidation of actions, judgment may be rendered against all for possession of entire premises.⁸⁶

A judgment in ejectment, rendered prior to issuance of patent for the Indian lands in controversy, cannot affect the rights of the patentee while the patent is outstanding.⁸⁷

§ 1270. Interplea

Where, on trial of an interplea in attachment, the jury found for interpleader that the property attached was covered by his chattel mortgage and that neither plaintiffs nor the sheriff, before levying the writ had paid or tendered to him the amount of the debt and interest thereby secured, as required by law, the court should, of its own motion, dissolve the attachment, order the property returned, and tax plaintiff with the cost of the attachment and of the interplea.⁸⁸

When, in an action by the owner of attached wheat for damages from the sale thereof pending the litigation, the evidence showed that plaintiff acquiesced in such sale and payment of expenses, and there was no evidence of any unreasonable expense connected therewith, defendants were liable only for the net amount received for the wheat and costs of suit and plaintiff could not recover the costs of harvesting.⁸⁹

Where, in an action of attachment, parties interplead, claiming the right to the property levied upon by writ of attachment, and where the property has been sold and converted into money by the order of the court, and the money brought into court, then a verdict of the jury in the alternative, for the possession of the property, or

of the land to which he shows title and right of possession, notwithstanding he is not entitled to recover all of the land sued for. *Jameson v. Goodwin* (Okla.) 170 P. 241.

In an action for the possession of a tract of land, where the plaintiff in his petition claims ownership and possession of only a three-fourths interest, and the evidence at the trial shows no greater claim, ownership, or right of possession, judgment for plaintiff for the possession of the entire tract is erroneous. *Holmden v. Janes*, 21 P. 591, 42 Kan. 753.

⁸⁶ *Mullen v. Carter* (Okla.) 173 P. 512.

⁸⁷ *Reynolds v. Brooks*, 49 Okl. 188, 152 P. 411.

⁸⁸ Rev. Laws 1910, § 4041; *Dodder v. Moberly*, 114 Pac. 714, 28 Okl. 334.

⁸⁹ *Tuttle v. Bell*, 142 P. 940, 92 Kan. 725, rehearing denied 144 P. 217, 98 Kan. 234.

the value thereof in case the property cannot be had, is not necessary. A money judgment in such case is sufficient.⁹⁰

§ 1271. Bastardy

A bastardy proceeding is a special proceeding in the nature of a civil action, and the court has no authority to impose imprisonment as part of the original judgment in such cases, in order to compel the judgment debtor to secure the payment of the judgment by executing a bond, in the absence of a statute conferring such authority.⁹¹

DIVISION III.—Equity

§ 1272. In general

Equity, looking beyond the mere form to the substance, can decree such relief as appears just and best calculated to protect the rights of the parties.⁹²

⁹⁰ Ranney-Alton Mercantile Co. v. Hanes, 60 P. 284, 9 Okl. 471.

⁹¹ Ex parte Comstock, 61 P. 921, 10 Okl. 299.

⁹² Foster v. Hoff, 131 P. 531, 37 Okl. 144, Ann. Cas. 1916B, 218.

Where buildings were erected on land obtained by fraud of the purchaser, it was error, on canceling the deed in favor of the vendor, to give personal judgment against him for the amounts of mechanics' liens established against the premises, the property alone being liable. West v. Badger Lumber Co., 43 P. 239, 56 Kan. 287.

Where a grantor has a mind so weak that she has no intelligent conception of the quality or quantity of land she is about to convey, cannot count money, does not know whether \$10 is more than \$100, and where the consideration was grossly inadequate, and a reconveyance cannot be granted, equity will grant plaintiff judgment for the value of the land less the amount actually received. Paulter v. Manuel, 108 P. 749, 25 Okl. 59.

A decree, in a suit to cancel a deed and have title decreed in plaintiff, construed, and held to be a denial of relief to plaintiff, where, though not specifically denying such relief, it confirmed defendant's title and quieted it as against plaintiff's claims. Grant v. Creed, 54 Okl. 222, 153 P. 1110.

Where grantee in deed fulfilled agreement to support grantor during the grantee's life, but his widow refused to remain with grantor, judgment refusing cancellation, but making care of grantor a charge on the land, is proper. Simmons v. Shafer, 160 P. 199, 98 Kan. 725.

Where a bank intentionally returns a valuation of its property at 75 per cent. of its true value, in violation of Williams' Const. § 273, and by connivance with the county board of equalization secures a valuation of all property at 75 per cent. of its true value, which valuation the State Board of Equalization corrects as to the bank's property, equity will not, in a suit to enjoin collection of taxes, relieve the bank from its predicament, though other taxpayers may have profited by the transaction. Chickasha Nat. Bank v. Cloud, 139 P. 1134, 40 Okl. 623.

In granting equitable relief under a contract, the court should go only

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Where directors of an insolvent corporation sold all of its property and paid debts alleged to be due themselves, but paid nothing to plaintiff, equity had jurisdiction of an action to charge such directors as trustees.⁹³

As a general rule, courts of equity may give relief against public nuisances by compelling an abatement, or by restraining the continuance of an existing nuisance, or by enjoining the commission or establishment of a contemplated nuisance.⁹⁴

The vendor is not entitled to a personal judgment, against a sub-purchaser taking with notice, for the unpaid price, but is entitled to a judgment in rem against the land remaining in such sub-purchaser's possession.⁹⁵

The relief granted in equity is such as the nature of the case, the law and the facts, demand, not at the beginning, but at the time the decree is entered.⁹⁶

The judgment in a case wherein the verdict is advisory only is not void because rendered after filing of a motion for new trial by the party for whom judgment is rendered and before passing on the motion.⁹⁷

It is error to render judgment on the report of a referee after having set it aside.⁹⁸

In an equitable suit the court may attach to the grant of relief any reasonable conditions that to it seem proper.⁹⁹ Hence a de-

so far as is just and equitable. *Work v. Fidelity Oil, Gas & Mineral Co.*, 98 P. 801, 79 Kan. 118.

⁹³ *Union Coal Co. v. Wooley*, 54 Okl. 391, 154 P. 62.

⁹⁴ *Town of Rush Springs v. Bentley*, 75 Okl. 119, 182 P. 664.

⁹⁵ *Kee v. Satterfield*, 46 Okl. 660, 149 P. 243.

⁹⁶ *Superior Oil & Gas Co. v. Mehlin*, 108 P. 545, 25 Okl. 809, 138 Am. St. Rep. 942.

⁹⁷ *Parker v. Hamilton*, 49 Okl. 693, 154 P. 65.

⁹⁸ *Burchett v. Hamil*, 47 P. 1053, 5 Okl. 300.

⁹⁹ *Henderson v. Arkansas* (Okl.) 176 P. 751.

Where a decree is entered in favor of a defendant for the cancellation of promissory notes in the possession of the plaintiff, the court as a means to secure compliance with the decree may properly render a judgment against the plaintiff for the amount of the notes canceled, providing therein that the judgment shall be satisfied upon delivery of the notes to the clerk of the court for cancellation within a time specified. *Minneapolis Threshing Mach. Co. v. Currey*, 89 P. 688, 75 Kan. 365.

A judgment against a corporation, which orders the defendant to issue certificates of stock to the plaintiff, and place them in the hands of the

cree canceling a conveyance obtained by fraud of the grantee should provide for restoration by the grantor of the consideration received.¹

§ 1273. Specific performance

In a petition for specific performance of a contract to convey land, a cause of action for damages arising out of the same transaction may be united, and, if evidence justifies a decree of specific performance in part only, the court may apportion the price and damages in accordance with the evidence; but, if no decree for specific performance can be had, judgment may be rendered for any proper damages.²

Where, in an action to enforce specific performance, the consideration has been fully paid, and defendant cannot specifically perform, the court may award plaintiff damages measured by the value of the land when it should have been conveyed, with interest thereon.³

Where the petition alleged all the facts in relation to the contract, and prayed for specific performance and for the amount named as a penalty for failure to convey, plaintiff at the close of the testimony

clerk of the court within a certain time after it shall be served with a copy of the order, and which finds the value of the stock to be a certain sum, and further directs that in default of the defendant's compliance with the order for the issuance and delivery of the certificates the plaintiff have judgment for the value of the stock, is conditional in form and effect, and as to the money award contained in it should be vacated and entered only upon proof of the defendant's noncompliance with the main order. *Consolidated Mining & Prospecting Co. v. Huff*, 63 P. 442, 62 Kan. 405.

Where the court has determined that defendant, who purchased land under foreclosure proceedings which were void because service was had by publication on the mortgagor, who was dead at the time, has acquired a complete title by his adverse possession, no error is committed by its refusal to require defendant to redeem the land as an equitable assignee of the original mortgage. *Goodman v. Nichols*, 23 P. 957, 44 Kan. 22.

¹ *Schriber v. Maxwell*, 144 P. 191, 93 Kan. 211, modifying judgment on rehearing 140 P. 865, 92 Kan. 306.

² *Huey v. Starr*, 101 P. 1075, 79 Kan. 781, rehearing denied 104 P. 1135, 79 Kan. 781.

The Code has abrogated the rule that a judgment for damages for breach of contract will not be awarded where specific performance is impossible, unless the court determines that such judgment would be just and equitable. *Stramel v. Hawes*, 154 P. 232, 97 Kan. 120.

³ *Ball v. White*, 50 Okl. 429, 150 P. 901.

could waive claim for damages.⁴ And, where one holding under a contract has in good faith made lasting improvements, the court may, in awarding damages, decree it a lien upon the premises.⁵

The court, exercising its equitable powers, may prescribe in its decree such conditions as will do equity between the parties.⁶

⁴ *Berry v. Second Baptist Church of Stillwater*, 130 P. 585, 37 Okl. 117.

⁵ *Superior Oil & Gas Co. v. Mehlin*, 108 P. 545, 25 Okl. 809, 138 Am. St. Rep. 942.

In action for specific performance of real estate contract and for return of \$450 paid thereon by plaintiff, where there was evidence of a change precluding specific performance and of a waiver, and where result was that defendants had a partially completed house into which plaintiff's money had gone, a judgment, refusing specific performance and giving plaintiffs a lien upon property for \$450, was not materially erroneous. *Thomas v. Neloms*, 104 Kan. 366, 179 P. 307.

In suit to compel conveyance of part of lot purchased by plaintiff after part payment of contract price and for damages, depending upon construction of uncertain and ambiguous provision entitling plaintiff to plat lot and to conveyance of any platted lots on payment of proportionate part, held, on facts and circumstances, that judgment offsetting damages by interest and ordering a conveyance and holding plaintiff liable on balance of contract and foreclosing contract as an equitable mortgage was not inequitable. *Baskin v. Strang Land Co.*, 104 Kan. 320, 179 P. 356.

⁶ *Skidmore v. Leavitt* (Okl.) 175 P. 503.

In an action brought by a railroad company to enforce specific performance of a right of way contract, signed by the husband alone, where it appears that a part of the land embraced in the contract is the homestead of the owner, but the pleadings, findings, and evidence fail to show what particular part of the land is occupied as a homestead, it is error in the trial court to decree specific performance as to the whole of the tract. *Conboy v. Kansas City & S. W. Ry. Co.*, 22 P. 719, 42 Kan. 658.

Beneficiary certificate providing for payment of \$100 for erection of monument for member does not entitle beneficiary to personal judgment for \$100 in default of erection of monument. *Sovereign Camp of Woodmen of the World v. Jackson*, 57 Okl. 318, 157 P. 92, L. R. A. 1916F, 166.

Plaintiff was employed to prosecute to judgment a suit by a husband and wife to recover a homestead, the conveyance of which to defendant the wife signed while insane, under a recorded contract, whereby he was to receive one-half the land recovered. Held, that on recovering judgment he was not entitled to a conveyance without repayment to defendant of one-half the money paid by it for the land, and that defendant was entitled to improvements placed on the land by it while in possession under its deed. *Topeka Water Supply Co. v. Root*, 42 P. 715, 56 Kan. 187.

In an action for specific performance of a contract requiring the purchaser of land to execute a mortgage to secure the price, but silent as to its terms, the court may provide in the decree that the mortgage shall contain the usual terms and conditions. *Harrell v. Neef*, 102 P. 838, 80 Kan. 348.

Under Civil Code, § 398, a judgment ordering the vendor to make a deed will be construed to order a warranty deed where the contract provides for

By a decree of specific performance, all doubt as to the marketability of title of infants to real estate reserved to them by decree in divorce and sold at guardian's sale with the approval of the probate court will be removed.⁷

§ 1274. Foreclosure

A judgment in foreclosure should provide for the sale of the mortgaged property, and for execution for any balance due after sale;⁸ but, where the mortgage was made by husband and wife to secure the husband's indebtedness, foreclosure may be decreed against both, without personal judgment against the wife, though the consideration moved to her.⁹

Where the plaintiff's evidence fails to establish any direct liability of the grantee of the mortgagor, but the evidence of grantor's filing a cross-petition shows the grantee's assumption of the mortgage, the court may render a personal judgment for the grantor

that kind of a conveyance. *Paris v. Golden*, 153 P. 523, 96 Kan. 668, rehearing denied 154 P. 1123, 97 Kan. 174. Where the purchaser sues for specific performance of a land sale contract, and alleges his willingness to accept a warranty deed conveying such title as the vendor had when action was brought, such allegation is not an offer to take the property subject to an existing mortgage. *Id.*

In suit against corporation for specific performance of its option contract for delivery of oil at price fixed in president's unauthorized and repudiated contract with another company, temporary injunction against sale of oil was reversible error. *Quaker Oil & Gas Co. v. Jane Oil & Gas Co.*, 63 Okl. 234, 164 P. 671.

⁷ *Guy v. Hansow*, 122 P. 879, 86 Kan. 933.

⁸ *Zweigart v. Strahan* (Okl.) 175 P. 213.

In Nebraska, where personal service has been had on defendants, and the court has jurisdiction, and the proceeds of the foreclosure sale are insufficient to satisfy the debt, the court has authority, on the incoming of the order of sale, to render a judgment for the deficiency. *Blumle v. Kramer*, 79 P. 215, 14 Okl. 366; *Id.*, 79 P. 1134, 14 Okl. 373. Where a statute of a sister state providing for entry of deficiency judgment is repealed, but with a saving clause providing that the repeal shall not affect any action then pending, nor causes of action not in suit accruing prior to the repeal, any action pending or cause which has accrued is not affected. *Id.* In an action in Nebraska to foreclose a mortgage, the findings of the court as to the amount due are not a judgment in personam, but are sufficient as a basis on which to obtain a deficiency judgment. *Id.* Where proceeds of a sale of property are insufficient to satisfy the debt, on motion for deficiency judgment, no service of notice of such motion is required, other than the original service of summons. *Id.*

⁹ *Kerr v. McKinney* (Okl.) 170 P. 685.

and against the grantee for the difference between the plaintiff's recovery and the proceeds of the grantee's interest at the sale.¹⁰

Where a purchaser of an equity of redemption of mortgaged land has not made the debt his own, a deficiency judgment cannot ordinarily be rendered against him in a suit on the debt, or to foreclose the mortgage.¹¹

In an action upon a note secured by a mortgage, waiving appraisalment, where the mortgagor claimed to be sole owner of the land, it was not error to decree a sale of his interest therein if he defaulted in payment of judgment, following the terms of mortgage.¹²

A judgment, directing that the interest of the mortgagors be sold to satisfy the mortgage debt, does not affect the interest of the mortgagors' grantee.¹³

In an action by the owner of the equity of redemption against the mortgagee in possession to redeem, the court may decree the time within which the owner of the right of redemption may redeem, and order a sale if redemption be not made within that time.¹⁴

§ 1275. Mechanic's lien

Where the proceeds of the sale of property upon which liens for labor and material have attached, are insufficient to pay all claimants, the court should order payment in proportion to the amount due each.¹⁵

A subcontractor, materialman, or laborer, in no privity with owner, and in whose favor no direct liability has been imposed, is not entitled to a personal judgment against the owner.¹⁶

¹⁰ Scott v. Norris, 62 Okl. 292, 162 P. 1085.

¹¹ Van Eman v. Mosing, 129 P. 2, 36 Okl. 555, L. R. A. 1917C, 590.

¹² Neil v. Union Nat. Bank of Chandler (Okl.) 178 P. 659.

¹³ Page v. Turk, 143 P. 1047, 43 Okl. 667.

¹⁴ In an action by the owner of an equity of redemption against a mortgagee in possession for an accounting and to redeem, where the value of the premises is greatly in excess of the mortgage debt, and the improvements placed on the premises by the mortgagee, and the mortgagee has been in possession for 10 years, and the rents and profits have not decreased the amount of his claim, it is not error to decree a time within which the owner of the right of redemption may redeem and order a sale if redemption be not made within that time. Harding v. Gillett, 107 P. 665, 25 Okl. 199.

¹⁵ Republic Supply Co. v. Powell (Okl.) 175 P. 519; Rev. Laws 1910, § 3879.

¹⁶ Paulsen v. Western Electric Co. (Okl.) 171 P. 38.

A subcontractor, entitled to a mechanic's lien, is not entitled to a per-

An employé of a subcontractor who filed a lien against the property, and who in a suit by his principal to foreclose his own lien is made a party, but is not served with process, files no pleading, and makes no appearance, is not in court, and it cannot award a judgment in his favor.¹⁷

Where demands due at separate times are included in a mechanic's lien, and parts of the lien described were due at the time the action was brought and part not due, the court may render judgment for the amount which was not due at the time the action was brought, but subsequently fell due, and was unpaid when the decree was rendered.¹⁸

Where the owner of a lot agrees with contractors for a building thereon for a specific sum, and under the contract pays them therefor within 60 days of the time when the last material is furnished, and his property is, in a suit, subjected to a subcontractor's lien, he is entitled to a judgment against the contractors for the amount of the judgment, interest, and costs recovered by the subcontractor or materialmen.¹⁹

DIVISION IV.—RECORD OF JUDGMENT

§ 1276. Journal entry—Form

"All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action."²⁰

sonal judgment against the owner on account thereof. *Bryan v. Orient Lumber & Coal Co.*, 55 Okl. 370, 156 P. 897; *Union Bond & Investment Co. v. Bernstein*, 139 P. 974, 40 Okl. 527; *Scroggy v. Kelley*, 122 P. 694, 32 Okl. 398.

A subcontractor, materialman, or workman between whom and the owner there is no privity of contract, and in whose favor no direct liability has been imposed on the owner, is not entitled to a personal judgment against the owner, but the judgment should be personal against the original contractor and a decree establishing the lien and ordering a sale. *Alberti v. Moore*, 93 P. 543, 20 Okl. 78, 14 L. R. A. (N. S.) 1036.

¹⁷ *Alberti v. Moore*, 93 P. 543, 20 Okl. 78, 14 L. R. A. (N. S.) 1036.

¹⁸ *El Reno Electric Light & Telephone Co. v. Jennison*, 50 P. 144, 5 Okl. 759.

¹⁹ *Alberti v. Moore*, 93 P. 543, 20 Okl. 78, 14 L. R. A. (N. S.) 1036.

²⁰ Rev. Laws 1910, § 5143.

In an action upon a promissory note, tried to a jury, and in which the jury returns a verdict for the plaintiff for a certain amount, it is the duty of the clerk, under the provisions of Civ. Code, § 409, to immediately enter judgment upon the journal of the court for the amount of the verdict, unless otherwise directed by the court; and if he fails so to do he may thereafter

An "entry of judgment" ordinarily consists of the ministerial act of recording the same in the proper book of judgments.²¹

JOURNAL ENTRY OF JUDGMENT

(Caption.)

Now, on this —— day of ——, 19—, being one of the regular judicial days of the ——, 19—, term of said court, this cause comes on to be heard in its regular order; and the plaintiffs appeared by X. Y., of the law firm of Y. & Z., their attorneys, and the defendant appeared by G. H., of the law firm of H. & J., its attorneys. A jury of twelve good men were regularly impaneled and sworn to try the issues joined between plaintiffs and defendant and a true verdict render according to the evidence. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the instructions of the court, and the arguments of counsel, the jury retired to consider their verdict, and subsequently returned into court their verdict, finding all of the issues for the defendant.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed by the court that the above entitled action be and the same is hereby dismissed, and that defendant do have and recover from plaintiff his (defendant's) costs and disbursements incurred in this action, and that said defendant go hence without day. ——, Judge.

JOURNAL ENTRY OVERRULING MOTION FOR NEW TRIAL

(Caption.)

On this —— day of ——, 19—, being one of the regular judicial days of the ——, 19—, term of said court, this cause came on for hearing on the motion of the plaintiffs herein for a new trial, the plaintiffs being present by G. H., their attorney, and the defendant being present by X. Y., its attorney; and the court, having heard the arguments of counsel and being fully advised, finds that said motion should be overruled.

enter the same, the form thereof being approved by the court, without notice to the defendants, at any time before the rights or interests of third parties intervene which may be affected by such entry without notice. *Selders v. Boyle*, 49 P. 320, 5 Kan. App. 451.

²¹ *De Watteville v. Sims*, 44 Okl. 708, 146 P. 224.

It is therefore ordered, adjudged, and decreed by the court that the motion of plaintiffs for a new trial be, and the same is, hereby overruled, and the verdict of the jury herein is sustained; to which ruling of the court plaintiffs then and there excepted, and, upon application, are granted an extension of sixty (60) days from this date within which to prepare and serve case-made on appeal to the Supreme Court of Oklahoma; the defendant to have ten (10) days thereafter in which to suggest amendments; the case-made to be settled and signed upon five (5) days' notice.

_____,
Judge of District Court, Presiding at the Trial.

JOURNAL ENTRY IN SUIT TO CANCEL CONVEYANCES, UPHOLDING SUCH
CONVEYANCES

(Caption.)

Now, on this _____ day of _____, 19—, the above entitled matter coming on for hearing, and the plaintiffs appearing in person and by their attorneys, _____, and the defendants, J. D., F. E., and R. H., appearing in person and by their attorneys, _____, and all parties having announced ready for trial, the plaintiffs introduced their testimony and rested; and thereupon the defendants, J. D., F. E., R. H., and each of them, demurred to the evidence introduced on behalf of the plaintiffs, which demurrer was by the court overruled, to which action the defendants and each of them at the time excepted.

Thereafter the said defendants, J. D., F. E., and R. H., introduced their testimony, and all parties rested, and the plaintiffs made certain requests for special findings of facts, and the court reserved its decision until _____, the _____ day of _____, 19—.

And now, on this _____ day of _____, 19—, the above entitled matter coming on further for hearing, and all parties being present as heretofore set out, and the court, being fully advised in the premises, finds all of the issues both of fact and of law in favor of the defendants, J. D., F. E., and R. H., and against the plaintiffs and each of them, and the court files in writing its special findings of fact upon the request of such special findings heretofore submitted by the plaintiffs, and the plaintiffs and each of them at the time duly excepted to each and all of the court's findings.

It is therefore considered, ordered, adjudged, and decreed by

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the court that the plaintiffs and each of them have no right, title, interest, or estate in and to the undivided one-fourth interest covering the A. M. allotment in controversy in this action; and it is further ordered that the plaintiffs and each of them take nothing herein, and that their petition be dismissed with prejudice, and that the defendants and each of them do have and recover of and from the plaintiffs and each of them all costs of this action, taxed at the sum of \$——, to all of which the said plaintiffs and each of them at the time duly excepted, and said plaintiffs in open court gave notice of their intention to appeal to the Supreme Court of the state of Oklahoma.

And now, on this —— day of ——, 19——, the above entitled matter coming on further for hearing upon the motion of the plaintiffs for a new trial and upon the final account and report of the receiver heretofore filed herein, all parties being present as aforesaid, and the court, being fully advised in the premises, finds:

That the plaintiffs' motion for new trial should be denied and overruled, and the court further finds that the final account and report of the receiver, H. H., should be approved and confirmed, and that said receiver should be discharged of and from any further duties or liabilities herein, and that said receiver should be allowed for his services rendered herein the sum of \$——.

The court further finds that a bond should be given by the defendants pending an appeal, or pending the determination of said appeal, if perfected, for the purpose of protecting the plaintiffs in the payment of any royalties received by the defendants or any of them since the institution of this suit.

It is therefore by the court further considered, ordered, adjudged, and decreed that the motion of the plaintiffs for a new trial be and the same is hereby denied and overruled, to which action of the court the plaintiffs and each of them except, and give notice of their intention to appeal to the Supreme Court of the state of Oklahoma in open court.

And it is by the court further considered, ordered, adjudged, and decreed that the final account and report of the receiver, H. H., be and the same hereby is approved and allowed, and said receiver is hereby discharged of and from any further duties or liabilities herein, on the filing of the bond herein ordered to be filed

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by the said defendants, and it is further ordered that said receiver be and hereby is allowed as compensation for his services herein the sum of \$——, to be taxed as costs herein and to be paid by the plaintiffs.

(It is further ordered that, pending the perfection of an appeal herein and pending the determination of said appeal, if perfected, the plaintiffs have one-half of the proceeds of all royalties derived from the undivided one-fourth interest owned by the said defendants, J. D., R. H., and F. E., until the amount paid said plaintiffs shall equal the sum of —— dollars (\$——), as provided by the terms and conditions of the contract of ——, 19—, between the plaintiffs and the defendant J. D., provided, however, that the compensation allowed the receiver shall be deducted from said sum,) and by the purchase of the oil, and paid to the clerk of this court; and it is by the court further ordered that, pending the perfection of an appeal herein and pending the determination of said appeal, if perfected, the defendants furnish bond to the plaintiffs in the sum of \$——, conditioned that said defendants will account to and pay over to the plaintiffs the royalties due them under said above mentioned contract of ——, 19—, and conditioned further that said defendants will account to and pay over to the plaintiff, if it should be so finally adjudged, all royalties or profits received by said defendants from the undivided one-fourth interest in and to the lands described in the plaintiffs' petition herein, since the commencement of this suit.

It is further ordered that said defendants furnish said bond within 10 days from this —— day of ——, 19—, and that the same be approved by the court clerk of —— county, Oklahoma, and filed herein.

For good cause shown it is by the court further ordered and decreed that the plaintiffs be and they hereby are given and granted an extension of time of 120 days from and after this date within which to make and serve case-made herein, and the defendants have ten (10) days thereafter within which to suggest amendments, and the same to be settled upon five (5) days' notice thereafter by either party. ——, Judge.

(1242)

JOURNAL ENTRY (QUIETING TITLE)

(Caption.)

Now, on this ——— day of ———, 19—, the same being one of the regular judicial days of the ———, 19—, term of said court, this matter comes on for hearing in its regular order in open court on the pleadings filed herein by the plaintiffs, and by the defendant C. C., and by the intervener, J. P.; said plaintiffs appearing by their attorney, W. J., and said defendant appearing in person and by his attorney, A. B., and the said intervener appearing in person and by his attorney, X. Y., and the said F. E. H. appearing not, but makes default; and it appearing to the court that the said defendant F. E. H. has been duly notified of the pendency of this action by due and legal service of summons upon him by the sheriff of ——— county, Oklahoma, as appears from said summons and the sheriff's return thereon now on file in this action, and all parties being ready for trial and waiving a jury and consenting that said cause be submitted to the court:

Whereupon the court, after examining all of the pleadings filed herein, and after hearing the evidence, both oral and documentary, introduced on behalf of the plaintiffs, and on behalf of the defendant C. C., and on behalf of the intervener, and after hearing the argument of counsel and being fully advised in the premises, finds the issues, all and singular, in favor of the intervener, J. P., and the defendant C. C., except in so far as they conflict with the necessary contentions of the intervener, and against the plaintiff and the other defendants.

And the court further specifically finds that the warranty deed executed on ———, 19—, by S. H. and F. E. H. to W. H. was given without any consideration of any kind or character, and further that said deed was given for the purpose of shielding the title to the lots in controversy and defrauding the creditors of F. E. H.

And further finds that the quitclaim deed of S. H. and F. E. H. to the defendant C. C., in ———, 19—, conveying the said lots 1 and 2 in block 47 in ——— addition to the city of ———, Oklahoma, was given for a valuable consideration, and that the said C. C. was and is an innocent purchaser for value of said lot 1 and that portion of lot 2 consisting of a strip along the Missouri, Kansas & Texas

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Railway Company right of way ten feet wide, which strip is as described in a certain contract hereinafter referred to, executed by and between the H. Brokerage Company and J. P.

The court further finds that on the — day of —, 19—, the H. Brokerage Company and the intervener, J. P., for a good and valuable consideration, entered into a contract in writing by the terms of which the said H. Brokerage Company, then owned by F. E. H., agreed to sell to the intervener, J. P., lot 2 in block 47, — addition to the city of —, Oklahoma, except a strip along the Missouri, Kansas & Texas Railway Company right of way 10 feet wide, the consideration for the sale of said lot being \$—, payable as follows: \$— in cash upon the execution of the contract, the remaining \$— payable in monthly installments of \$— a month, represented by notes, and that upon the completion of said payments it was agreed that a sufficient conveyance should be made to the said J. P. covering the portion of said lot described in said contract. The court further finds that the said defendant C. C. took title to the said property with notice of the said contract and subject to the terms thereof.

The court further finds that all of the said notes have been paid in accordance with the terms of the said contract, and that all of the said notes have been surrendered to the said J. P., intervener, except the last five notes, and that the amount of the said five notes has been paid into the — National Bank of —, Oklahoma, to the credit of W. H., now deceased, the original plaintiff herein, said payments being made without notice to or knowledge of the said J. P. that the said defendant C. C. claimed any right to said payments and that the said five notes are in the control of plaintiffs and should be surrendered canceled to the intervener, and that the said defendant C. C. is entitled to the said money paid on the five notes and now held by the said bank to the credit of W. H., deceased.

The court further finds that the said J. P. is entitled to receive a deed of conveyance from the said C. C. to the portion of said lot 2 covered by the said contract.

It is therefore ordered, adjudged, and decreed that the title and possession of the said J. P. in and to lot 2, block 47, — addition to the city of —, Oklahoma, save and except a strip along

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the Missouri, Kansas & Texas Railway right of way ten feet wide be and the same is hereby forever settled and quieted in the said intervener, J. P., against all claims or demands by the said plaintiffs and the said defendants C. C., F. E. H., and S. H., and those claiming or to claim under them or either of them.

And it is further ordered, adjudged, and decreed that the said plaintiffs and the said defendants C. C., F. E. H., and S. H., and those claiming through, by, or under them or either of them, be and they are perpetually enjoined and forbidden to claim any right, title, interest, or estate in and to said premises by virtue of any deeds or contracts hostile or adverse to the said intervener, J. P., and the said parties are hereby perpetually forbidden and enjoined from disturbing the said intervener, J. P., in his said possession and title to said premises, and from setting up any claim or interest adverse to the title of the said intervener, J. P.; and it is further ordered and directed that the said defendant C. C. shall execute forthwith a proper deed of conveyance to the said J. P. to the said lot 2, in block 47, ——— addition to the city of ———, Oklahoma, save and except a strip along the Missouri, Kansas & Texas Railway Company right of way ten feet wide.

It is further ordered, adjudged, and decreed by the court that the title and possession of the said defendant C. C. in and to all of lot 1, block 47, ——— addition to the city of ———, Oklahoma, and a strip along the Missouri, Kansas & Texas Railway Company right of way ten feet wide off of lot 2 in said block 47, ——— addition to the city of ———, Oklahoma, be and the same is hereby forever settled and quieted in the said defendant C. C. against all claims or demands by the said plaintiffs and the said defendants F. E. H. and S. H., and the intervener, J. P., and those claiming under them or either of them.

That the deed executed on ———, 19—, by S. H. and F. E. H., to W. H., purporting to convey the lots above described, as well as all other deeds, contracts, or conveyances affecting the said lots 1 and 2, block 47, ——— addition to the city of ———, Oklahoma, adverse to the title of the said defendant C. C. and the title of the said intervener, J. P., be and the same are hereby cancelled and removed as clouds on the title of said defendant C. C., and the said intervener, J. P., in and to the said described premises.

(1245)

And it is further ordered, adjudged, and decreed that the said plaintiffs and the said defendants F. E. H. and S. H. and the said intervener, J. P., and those claiming through, by or under them or either of them, be and they are hereby perpetually enjoined and forbidden to claim any right, title, interest, or estate in and to said lot 1, block 47, ——— addition to the city of ———, Oklahoma, and a strip along the Missouri, Kansas & Texas Railway right of way ten feet wide off of lot 2 in said block 47, ——— addition to the city of ———, Oklahoma, by virtue of any deeds or contracts hostile or adverse to the possession and title of the said defendant C. C., and the said parties are hereby perpetually forbidden and enjoined from disturbing the said defendant C. C. in the said possession and title to said premises, and from setting up any claim or interest adverse to the said defendant C. C.

And it is further adjudged that the said defendant C. C. and the said intervener, J. P., have and recover their costs from the plaintiffs herein for which execution may issue.

———, Judge.

§ 1277. Clerk to make record

"The clerk shall make a complete record of every cause as soon as it is finally determined, whenever such record shall be ordered by the court."²²

§ 1278. — When made

Since a journal entry speaks as of the date the judgment was rendered, its validity is not impaired by the expiration of the term in the meantime;²³ that is if a judgment be ordered and its terms prescribed by the court during a term, it is a judgment rendered in term time, although the entry thereof be not in fact prepared and transcribed on the journal until after the close of the term.²⁴

²² Rev. Laws 1910, § 5144.

It is the duty of the clerk to record the judgments, orders, and proceedings of the court. *Boynton v. Crockett*, 69 P. 869, 12 Okl. 57.

²³ *Miller v. Phillips*, 141 P. 297, 92 Kan. 662.

²⁴ *Iliff v. Arnott*, 3 P. 525, 31 Kan. 672.

An order for alimony is void where, after adjournment of the term sine die, the court and counsel in a divorce suit meet at another place, and agree on the journal entry of such order. *Packard v. Packard*, 7 P. 628, 34 Kan. 53.

Omission of clerk to record a judgment does not destroy the judgment, nor does its validity or effect remain in abeyance until it is formally entered on the journal. *Kinkel v. Chase*, 102 Kan. 275, 169 P. 1134.

§ 1279. — Contents

"The record shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments and all material acts and proceedings of the court; but if the items of an account, or the copies of papers attached to the pleadings, be voluminous, the court may order the record to be made by abbreviating the same, or inserting a pertinent description thereof, or by omitting them entirely. Evidence must not be recorded."²⁵

§ 1280. To be signed

"He shall make up such record, in each cause, in the vacation next after the term at which the same was determined; and the presiding judge of such court shall, at its next term thereafter, subscribe the same."²⁶

Where the clerk of court records the judgments, orders, and proceedings, such records or journals need not be signed by the judge to give them validity.²⁷

The reasons which influence a court to direct a verdict need not be inserted in a formal journal entry of the judgment based on the verdict.²⁸

The defeated party in an action cannot, by withholding his consent to a form of judgment entry prepared by the prevailing party, prevent the entry of judgment, as there is no provision of the statute requiring that the parties agree upon a particular form of judgment.²⁹

The journal entry, which it is the customary practice for attorneys to agree upon and file, is not the record, but is a mere form for the convenience of the clerk in making the record.³⁰

§ 1281. Completing record

"When the judicial acts or other proceedings of any court have not been regularly brought up and recorded by the clerk thereof, such court shall cause the same to be made up and recorded with-

²⁵ Rev. Laws 1910, § 5146.

²⁶ Rev. Laws 1910, § 5145.

²⁷ *Boynton v. Crockett*, 69 P. 869, 12 Okl. 57; *Gordon v. Bodwell*, 39 P. 1044, 55 Kan. 131.

²⁸ *Homeland Realty Co. v. Robison*, 136 P. 585, 39 Okl. 591.

²⁹ *State v. Linderholm*, 135 P. 564, 90 Kan. 489.

³⁰ *State v. Linderholm*, 135 P. 564, 90 Kan. 489.

in such time as it may direct. When they are made up, and, upon examination, found to be correct, the presiding judge of such court shall subscribe the same."³¹

§ 1282. Conclusiveness

When the clerk enters the judgments and orders of the court, the record imports absolute verity, and can only be changed or modified by order of the court;³² but recitals in the journal entry concerning rulings on the burden of proof will be controlled by what actually transpired at the trial, as disclosed by the transcript of the evidence, and the instructions.³³

Where the court has refused to expunge one of two journal entries of a judgment, they will be treated as one record covering the points decided.³⁴

A recital of service in the judgment cannot be set aside, except on the most convincing evidence.³⁵

§ 1283. Nunc pro tunc orders

On proper motion and notice, the court may by nunc pro tunc order correct its records so that they will speak the truth, and can add any proceedings omitted by clerk through accident or mistake;³⁶ and where the default was that of the court or its officer,

³¹ Rev. Laws 1910, § 5147.

Where judgment was rendered on December 30, 1915, and where, on February 5, 1916, and during same term, the court signed a precedent for judgment, clerk might enter such judgment on journal, as clerk of district courts, during term at which proceedings were had may correct, amend, or supply omissions to make records speak truth. *Neil v. Union Nat. Bank of Chandler* (Okl.) 178 P. 659.

³² *Boynton v. Crockett*, 69 P. 869, 12 Okl. 57.

³³ *First Nat. Bank of Laramie, Wyo., v. Vaughan*, 151 P. 1118, 96 Kan. 402.

³⁴ *Page v. Pierce*, 139 P. 1173, 92 Kan. 149.

³⁵ Where the judgment roll shows service of process in a particular way, no different service will be presumed. *Pettis v. Johnston*, 78 Okl. 277, 190 P. 681.

³⁶ *Runyan v. Herrod*, 62 Okl. 87, 162 P. 196.

The court may, at any time during the term at which the proceedings were had, correct, amend or supply omissions, so as to make the record speak the truth, and when so corrected the record relates to the time when the proceedings were in fact had. *Ex parte Cook*, 103 P. 1041, 2 Okl. Cr. 684.

Every court of record by nunc pro tunc order, on proper application and notice, can enter its judgments which by mistake the clerk has omitted to record. *Courtney v. Barnett* (Okl.) 166 P. 207; *Runyan v. Herrod*, 62 Okl. 87, 162 P. 196; *In re McQuown*, 91 P. 689, 19 Okl. 347, 11 L. R. A. (N. S.) 1136;

it was the duty of the court to make its record complete where the default is called to its attention with or without a motion.⁴⁷

Clark v. Bank of Hennessey, 79 P. 217, 14 Okl. 572, 2 Ann. Cas. 219; Rev. Laws 1910, § 5267, subd. 3.

The failure of the clerk or recording officer to make a correct record does not vitiate the proceedings in a court of record. *Ex parte Cook*, 103 P. 1041, 2 Okl. Cr. 684.

Where the clerk failed to enter a judgment ordered on a verdict, held not error for the court to grant at a succeeding term, on notice, a *nunc pro tunc* order, directing the clerk to enter such judgment of record as of the proper date. *Mooney v. First State Bank of Washington, Okl.*, 48 Okl. 676, 149 P. 1173.

Where the district clerk has failed to enter a judgment of record, the proper remedy is by application to the district court, upon notice, for an order directing the omitted judgment to be entered *nunc pro tunc*. *Hirsh v. Twyford*, 139 P. 313, 40 Okl. 220.

Where no entry has been made of a judgment for defendant in an action to quiet title, the defendant's grantee may move in his own name for the entry of a judgment *nunc pro tunc*. *Plummer v. Ash*, 133 P. 157, 90 Kan. 40. Where in an action to quiet title constructive service was had on a nonresident defendant who appeared by attorney, plaintiff could not prevent entry of judgment *nunc pro tunc* for defendant on motion made five years afterwards by merely showing that defendant did not authorize the appearance of the attorney. *Id.*

Where counsel have objections to the journals of the court, they should present the same by proper motion, and have them corrected, or have omissions supplied. *Boynton v. Crockett*, 69 P. 869, 12 Okl. 57.

In habeas corpus proceeding, trial court's refusal to hear evidence in support of a motion that record in another proceeding, claimed to be essential to petitioner's case, be supplied *nunc pro tunc* was within its discretion. *Ex parte Cowan*, 163 P. 451, 99 Kan. 711.

After expiration of term, and after judgment affirmed, the trial court, on knowledge of what took place, can correct the journal entry to rectify the judgment actually rendered. *State v. City of Stafford*, 161 P. 657, 99 Kan. 265.

Where the clerk fails to enter on the journal a formal order showing the convening of the court, the same may be entered in conformity with the facts even after the expiration of the term. *Ex parte Tucker*, 111 P. 665, 4 Okl. Cr. 221. The formal order opening the court adjudges nothing respecting any person's right in any case, and upon which no person is entitled to a hearing before it is made, and, where the clerk neglects to enter the order in regular course, no notice is required to be given to any person before a *nunc pro tunc* entry is made. *Id.*

In an action for injunction by S. against B. and wife, the court has no power to make a *nunc pro tunc* order for the entry of judgment in an ejectment suit formerly brought by B. against S. *Bridges v. Sargent*, 40 P. 823, 1 Kan. App. 442.

⁴⁷ *Board of Com'rs of Day County v. State of Kansas*, 91 P. 699, 19 Okl. 375.

A district court has inherent power to correct the record of its proceedings so that it shall speak the truth, and this power is not lost by lapse of time and may be exercised by the court on its own motion and without notice.

The court is not confined to any particular class of evidence, but may correct its record upon any competent evidence.³⁸

The statute prescribing procedure for correction of mistakes of the clerk or irregularity in obtaining a judgment, refers solely to civil matters and does not apply to a criminal case.³⁹

A nunc pro tunc entry imports the same verity and proves the contents of the order as effectively as if the order had been entered when made.⁴⁰

On the hearing of a motion for a nunc pro tunc entry the question is, what order was in fact made at the time by the trial court, and upon such question the minutes on the court's docket and the testimony of the presiding judge are ordinarily controlling.⁴¹

The jurisdiction of a court of record to order nunc pro tunc entry of its judgments omitted from record by the clerk of court is not lost by lapse of time, where no intervening rights are affected.⁴²

A nunc pro tunc judgment of a court empowered thereto is not open to collateral attack by a party to the proceeding because not made upon sufficient evidence, or because of erroneous findings of fact, or because not supported by findings of fact.⁴³

Counsel cannot correct the record, however, by filing affidavits or inducing the clerk to include matters not part of the transcript.⁴⁴

A journal entry that a motion for new trial was denied on the day filed cannot be attacked on a second motion filed after the time

Christisen v. Bartlett, 85 P. 594, 73 Kan. 401, denying rehearing of 84 P. 530, 73 Kan. 401.

³⁸ *Lamb v. Alexander* (Okl.) 179 P. 587.

Where a demurrer to a petition states several grounds, and is sustained on one of them, and a judgment for defendant rendered, but the record shows only that the demurrer is sustained, without indicating upon what ground, the court may at a subsequent term amend the record, so as to state upon what ground the demurrer was sustained, if the fact be established by satisfactory proof, which need not, however, be founded upon any record or other writing. *Martindale v. Battey*, 84 P. 527, 73 Kan. 92.

³⁹ *Ex parte Tucker*, 111 P. 665, 4 Okl. Cr. 221; Rev. Laws 1910, § 5268.

⁴⁰ *Bash v. Howald*, 59 Okl. 116, 157 P. 1154.

A nunc pro tunc entry of an order showing convening of court imports absolute verity when questioned in any other than a proceeding to vacate the same. *Ex parte Tucker*, 111 P. 665, 4 Okl. Cr. 221.

⁴¹ *Schockey v. Akey*, 6 Kan. App. 920, 49 P. 694.

⁴² *Courtney v. Barnett* (Okl.) 166 P. 207.

⁴³ *Courtney v. Barnett* (Okl.) 166 P. 207.

⁴⁴ *Jenkins v. State*, 11 Okl. Cr. 168, 145 P. 500.

for filing such motion, on the ground that any hearing and order were without opportunity to except, where it does not affirmatively appear that movant's attorney was without notice or knowledge of the court's action.⁴⁵

§ 1284. Lost or destroyed judgment

Where orders or judgments of courts of record are lost or are not reduced to writing, they may be supplied or substituted on proper application and proof satisfactory to the court.⁴⁶

§ 1285. Filing transcript—Justice's judgment

When a transcript of a judgment of a justice has been filed with the clerk of the district court, such judgment is not a judgment of the district court, so as to give it power to inquire into its validity.⁴⁷

However, the record of the transfer is not conclusive.⁴⁸

⁴⁵ *Boorigle v. Boyd*, 139 P. 253, 41 Okl. 550.

⁴⁶ *In re Bates' Guardianship* (Okl.) 174 P. 743.

Laws Kan. 1883, c. 92, authorizes proceedings to establish the record of a judgment destroyed by fire. Section 5 provides that "the defendant may answer by general denial, or by setting forth any new matter arising subsequent to the judgment which operated in whole or in part to extinguish or set aside the same." The holder of a second mortgage obtained a judgment foreclosing it. He was then made a party to a suit in which the first mortgage was foreclosed. The records of both judgments were destroyed by fire, after which execution was issued on the one foreclosing the first mortgage, the land sold, and the sale confirmed. In a suit by the second mortgagee to establish his judgment, held, that the first mortgagee could establish his own

⁴⁷ *Boardman Co. v. Cobb*, 62 Okl. 165, 162 P. 729; Rev. Laws 1910, § 5217; *Ray v. Harrison*, 121 P. 633, 32 Okl. 17, Ann. Cas. 1914A, 413.

Assuming the statutes of Missouri to be the same as those of Kansas, the filing of the transcript of a justice's judgment in a circuit court of Missouri does not make the justice's judgment the judgment of the circuit court. *Hinman v. Missouri, K. & T. Ry. Co.*, 83 Kan. 35, 110 P. 102, 21 Ann. Cas. 1152.

Judgments of United States Commissioners and mayors of cities and towns in Indian Territory, enforceable at admission of state, held transferable to district court of proper county, and enforceable by execution out of district court. *Turk v. Mayberry*, 121 P. 665, 32 Okl. 66.

⁴⁸ Where a justice of the peace, to enable the transfer of a judgment under section 119 of the justices' act, certifies to an abstract that the judgment therein described was rendered by him, and the uncontradicted evidence shows that the judgment was rendered by his predecessor, the record of the transfer will be vacated, and the issuance of process on the judgment as transferred will be enjoined. *Hamilton v. Thompson*, 44 P. 437, 8 Kan. App. 8.

Where a justice's abstract of judgment was in form, "debt, 1.0212; costs 7.3, 20," but in other respects correct, an execution for the correct amount of \$102.12 and \$73.20 was not void. *Dickens v. Crane*, 6 P. 630, 33 Kan. 344.

§ 1286. — In other county

Where the plaintiff recovers judgment against defendant in the county court of one county, he has a right thereafter to have the judgment recorded and entered in the judgment docket of the district clerk of another county.⁴⁹

A transcript of a judgment of a county court filed with the clerk of the district court of another county renders it a judgment of the latter court only for enforcement, and does not take control of the judgment from the court rendering it.⁵⁰

§ 1287. Record in realty case

"When any part of real property, the subject matter of an action, is situated in any other county or counties than the one in which the action is brought, a certified copy of the judgment in such action must be recorded in the office of the register of deeds of such other county or counties, before it shall operate therein as notice, so as to charge third persons, as provided in the preceding section. It shall operate as such notice, without record, in the county where it is rendered."⁵¹

§ 1288. Recording

"Any judgment or decree of a court of competent jurisdiction finding and adjudging the rights of any party to real estate or any interest therein, duly certified, may be filed for record and recorded in the office of the register of deeds, with like effect as a deed duly executed and acknowledged."⁵²

judgment by way of counterclaim, and that the sale thereunder operated to bar a sale of the land under the plaintiff's judgment. *Davidson v. Beers*, 25 P. 859, 45 Kan. 365.

The practice of preparing and presenting journal entries to the judge for his signature is only in aid of the clerk, and, where the clerk accepts and records an entry prepared by counsel though not approved by the judge or adverse counsel, such entry, when recorded, becomes the judgment of the court, and on destruction of the journal such original entry, when identified, is a sufficient memorandum to authorize the court to direct the same entered of record to restore the judgment. *Boynton v. Crockett*, 69 P. 869, 12 Okl. 57.

⁴⁹ *Lowenstein v. Young*, 57 P. 164, 8 Okl. 216.

⁵⁰ *Hudson v. Ely*, 129 P. 11, 36 Okl. 576.

⁵¹ Rev. Laws 1910, § 4733.

⁵² Rev. Laws 1910, § 1177.

§ 1289. — Involuntary dissolution

Upon the rendition of a judgment in involuntary dissolution proceedings "against a corporation, the county attorney must cause a copy of the judgment to be filed forthwith in the office of the secretary of state, whose duty it shall be to record the same." ⁵³

§ 1290. Record as notice

"When it is provided in this chapter that any order or decree of a county court or judge, or a copy thereof, must be recorded in the office of the county register of deeds, notice is imparted to all persons of the contents thereof, from the time of filing the same for record." ⁵⁴

§ 1291. Orders and decrees

"Orders and decrees made by the county court, or the judge thereof, need not recite the existence of facts, or the performance of acts upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered or adjudged, except as otherwise provided in this chapter. All orders and decrees of the court or judge must be entered at length in the minute book of the court, and upon the close of each regular or special term the judge must sign the same." ⁵⁵

"Every direction of a court or judge made, or entered in writing, and not included in a judgment, is an order." ⁵⁶

"Orders, made out of court, shall be forthwith entered by the clerk in the journal of the court, in the same manner as orders made in term." ⁵⁷

"Judges of the district, superior and county courts shall, within their respective districts and counties, be authorized to hear and determine at chambers, motions to dissolve attachments and injunctions, and generally to exercise such supervisory control of the other officers and processes of their courts as to prevent abuses or oppression thereby or thereof." ⁵⁸

⁵³ Rev. Laws 1910, § 1277.

⁵⁴ Rev. Laws 1910, § 6491.

⁵⁵ Rev. Laws 1910, § 6489.

⁵⁶ Rev. Laws 1910, § 5316.

⁵⁷ Rev. Laws 1910, § 5317.

⁵⁸ Rev. Laws 1910, § 5318.

ARTICLE V

DEFAULT JUDGMENT

DIVISION I.—REQUISITES AND VALIDITY

Sections

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DIVISION II.—OPENING AND VACATING DEFAULT JUDGMENT

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DIVISION I.—REQUISITES AND VALIDITY

§ 1292. Petition

A default judgment rendered on a petition which wholly fails to state a cause of action, is void; ⁵⁹ but, where the court has jurisdiction of the person and subject-matter, a decree on default is not void if the petition contained allegations sufficient to challenge judicial examination. ⁶⁰

⁵⁹ Clark v. Holmes, 31 Okl. 164, 120 P. 642, Ann. Cas. 1913D, 385.

A complaint which states no cause of action will not support a judgment by default, and such judgment will be reversed in the appellate court. Farris v. Henderson, 33 P. 380, 1 Okl. 384; Lewis v. Clements, 95 P. 769, 21 Okl. 167.

Where a petition in ejectment shows on its face that plaintiff has no title to the premises sued for, a judgment by default in his favor is erroneous, and will be reversed. Perry v. Snyder, 75 Okl. 24, 181 P. 147.

⁶⁰ Hill v. Persinger, 57 Okl. 663, 157 P. 744.

Where allegations of petition invoked action of court to determine its sufficiency, a judgment in such action by default against the defendant personally served will not be void. Gibson v. Dizney (Okl.) 178 P. 124.

In action to quiet title, uncontroverted allegations of petition sufficient, under Code Civ. Proc. § 618 (Gen. St. 1909, § 6213), to entitle plaintiff to judgment by default, where defendants do not appear. Seaton v. Escher, 121 P. 907, 86 Kan. 679.

The only allegations fixed by a default judgment are those traversable, and issues cannot be joined on mere conclusions of law.⁶¹

§ 1293. When party is in default

A party is not in default, though not present when the case is called for trial, so long as he has a pleading on file which makes an issue in the case that requires proof on the part of the opposite party in order to entitle him to recover; but he may appear and defend during the trial.⁶² He is not in default where he has on file and not disposed of any motion, demurrer, or answer, or other pleading which raises an issue of law or fact.⁶³ But he may be held in default for failure to answer an amended petition filed without notice, where the amendment is filed in conformity with a ruling of the court on a motion by defendant; no notice being neces-

⁶¹ *International Harvester Co. of America v. Cameron*, 105 P. 189, 25 Okl. 256.

⁶² *Millikan v. Booth*, 46 P. 489, 4 Okl. 713.

Where an issue of fact was joined, though a default was entered for failure to appear when the cause was called for trial, a party was entitled as of right, on appearing at the trial at the close of the testimony of a witness, to cross-examine the witness. *Millikan v. Booth*, 46 P. 489, 4 Okl. 713.

⁶³ *Oklahoma State Bank of Cushing v. Buzzard*, 61 Okl. 88, 160 P. 462. Where defendant, granted time to plead, filed a proper pleading presenting question of jurisdiction, a judgment by default without disposal of pleading is premature. *Id.*

Before a judgment can be entered, the answer or other plea must be disposed of by way of motion, demurrer, or in some other manner. Where petition to recover on a foreign judgment showed that the cause of action was barred by limitations, an answer specifically set up such bar, but the court entered a purported default judgment and a trial was had, and the only evidence introduced was copies of the pleadings and the original judgment, held that, the defense being sufficient, it was reversible error to render judgment for plaintiff. *Crossan v. Cooper*, 137 P. 354, 41 Okl. 281.

Judgment cannot be taken while motion made within time to plead is undisposed of, and not waived, unless its determination could not affect the rights of plaintiff. *Atchison, T. & S. F. Ry. Co. v. Lambert*, 121 P. 654, 31 Okl. 300, Ann. Cas. 1913E, 329.

Where a motion to make a petition more definite and certain, not frivolous, has been filed by a party within the time to plead, and is pending undisposed of and not waived, a judgment on the pleadings cannot be taken against defendant. *St. Louis & S. F. R. Co. v. Young*, 130 P. 911, 35 Okl. 521.

Where defendant appeared, filed demurrer, was present at final hearing, and joined in submitting cause to court, judgment was not by default. *Chivers v. Board of Com'rs of Johnston County (Okl.)* 161 P. 822, L. R. A. 1917B, 1296.

sary in such case.⁶⁴ However, where plaintiff, required to make his petition more definite and certain, merely amends by a slight interlineation and no docket entry is made showing filing of amended or refiled of original amended petition, and defendant has no notice of amendment, judgment against him for default of answer should not be entered.⁶⁵

Where a case against two defendants is called, and one fails to appear and the other appears, and states that he has no defense, and the court hears plaintiff's evidence and renders judgment for him, it is not error to refuse to set aside the judgment, though there was an answer on file, and the record of the judgment states that defendants failed to appear and plead, and were adjudged in default.⁶⁶ An action may be a joint action against all defendants, so as to require the court to refuse judgment against defaulting defendants on the defense pleaded by the others.⁶⁷ If the defendant is given a fixed period within which to file an answer, his filing another pleading does not operate to extend the time.⁶⁸

⁶⁴ The defendant filed a motion to require the plaintiff to make his petition more definite. The court was then in session, and, though the term continued for some time, the motion was not called up. At the next term, in the absence of the defendant, the plaintiff called up the motion. The court sustained it, and required him to amend, which he did. At the second term, thereafter, the plaintiff took judgment by default. The order requiring the plaintiff to amend was noted by the judge on the motion docket, and by the clerk on his minute docket, but it was not entered on the journal. The defendant having moved to set aside the default, the order was entered on the journal nunc pro tunc, and the motion to set aside the default overruled. Code Civ. Proc. § 136, provides that the plaintiff may amend without leave at any time before answer, but notice of such amendment shall be served on the defendant or his attorney. Held, that notice of the amendment in this case was not required; that the nunc pro tunc entry was properly made; and that the defendant was not entitled to have the default set aside. *Cross v. Stevens*, 25 P. 880, 45 Kan. 443.

⁶⁵ *Clark v. Spruens*, 173 P. 275, 103 Kan. 218.

⁶⁶ *Galbraith v. Oklahoma State Bank*, 130 P. 541, 36 Okl. 807.

⁶⁷ *McLeod v. Palmer*, 150 P. 535, 96 Kan. 159. Action to recover interest in a decedent's estate held not such an action. *Id.*

⁶⁸ Where defendant is authorized to file answer to pending cause within stated time, filing of motion to require plaintiff to permit copies of its records to be made does not extend time, and, if answer be not made within time, default may be taken. *Harn v. Amazon Fire Ins. Co. (Okl.)* 167 P. 473.

(1256)

§ 1294. Proof taken—Damages

"If the taking of an account, or the proof of a fact, or the assessment of damages, be necessary to enable the court to pronounce judgment upon a failure to answer, or after a decision of an issue of law the court may, with the assent of the party not in default, take the account, hear the proof, or assess the damages; or may, with the like assent, refer the same to a referee or master commissioner, or may direct the same to be ascertained or assessed by a jury. If a jury be ordered, it shall be on or after the day on which the action is set for trial."⁶⁹

If the action is on contract for the recovery of money only, the plaintiff is entitled to judgment for the amount claimed without any evidence;⁷⁰ but if the action is in tort, or on an unliquidated demand, the plaintiff should introduce evidence in support thereof.⁷¹ In a proceeding for an injunction, the plaintiff is not entitled to a default judgment without proof establishing a *prima facie* case.⁷²

Where the plaintiff is permitted, without notice to defendant, to

⁶⁹ Rev. Laws 1910, § 5130.

⁷⁰ In an action for a breach of promise of marriage, where plaintiff seeks to recover damages, the action is one "on contract," "for the recovery of money only," within the meaning of Civ. Code, § 128, which provides that "every material allegation of the petition, not controverted by the answer, shall be taken as true," and "allegations of value, or of amount of damages, shall not be considered as true by failure to controvert them; but this shall not apply to the amount claimed in actions on contract, express or implied, for the recovery of money only," and, upon default, judgment may be rendered for the amount claimed, without proof, although plaintiff also alleges, for the purpose of enhancing her damages, seduction under such promise. *Cole v. Hoeburg*, 13 P. 275, 36 Kan. 263.

In an action for an amount due on a note executed by defendant, who fails to file any answer, but makes default, plaintiff is entitled to judgment for the amount claimed, without any evidence. *Cooper v. Brinkman*, 17 P. 157, 38 Kan. 442.

Where no pleading was filed by defendant, and plaintiffs' pleading and opening statement showed that the rights of the parties depended upon a written contract, the court properly rendered judgment thereon without taking testimony. *Hutton v. Stewart*, 135 P. 681, 90 Kan. 602.

⁷¹ *St. Louis & S. F. R. Co. v. Zumwalt*, 31 Okl. 159, 120 P. 640.

Upon petition claiming damages, it is error to pronounce judgment without hearing proof or assessing damages. *City of Guthrie v. T. W. Harvey Lumber Co.*, 50 P. 84, 5 Okl. 774; *Atchison, T. & S. F. Ry. Co. v. Lambert*, 121 P. 654, 31 Okl. 300, Ann. Cas. 1913E, 329.

⁷² One sued county commissioners and a contractor to enjoin the making of an embankment for use as a highway obstructing the flow of water. The contractor did not answer or defend. Held, that plaintiff was not entitled to judgment by default against the contractor, in the absence of proof es-

amend the petition by increasing the amount of damages, the court does not have jurisdiction to give judgment by default for a greater sum than was asked in the original petition.⁷³

§ 1295. Time for rendering judgment

Without some statutory limitation, a default judgment may be rendered at any time during any term of court after the time fixed or allowed for answer has expired, notwithstanding the case was not placed on the trial docket, prepared, and printed pursuant to law.⁷⁴

A judgment entered on default before the time for answering had expired is irregular, but not void.⁷⁵

Where a party to an action deliberately puts himself in default, so far as he is concerned the action may be tried and judgment rendered at any time thereafter.⁷⁶

It is not mandatory upon the court, on plaintiff's failure to arrive at the exact hour set for trial, to proceed and render judgment by default.⁷⁷

§ 1296. Validity of judgment—Service—Form of judgment.

Default judgments are not favored,⁷⁸ and should not be rendered unless jurisdiction clearly appears,⁷⁹ but are not void because the

establishing a prima facie case. *Darlington v. Board of Com'rs of Cloud County*, 88 P. 529, 75 Kan. 810.

⁷³ In action of ejectment and for a money judgment for rent, in which plaintiffs, without notice to defendant, as required by Rev. Laws 1910, § 4795, were permitted to amend their petition by increasing amount of damages, the court had no jurisdiction to render judgment by default for a greater sum than was asked in original petition. *Davenport v. Jamison* (Okl.) 177 P. 550.

⁷⁴ *Neil v. Union Nat. Bank of Chandler* (Okl.) 178 P. 659; Rev. Laws 1910, §§ 5040, 5041; *Western Coal & Mining Co. v. Green*, 64 Okl. 53, 166 P. 154; *Leonard v. Hargis*, 43 P. 586, 58 Kan. 40.

⁷⁵ *Mitchell v. Aten*, 14 P. 497, 37 Kan. 33, 1 Am. St. Rep. 231.

⁷⁶ *Herman v. Gardener*, 103 Kan. 659, 175 P. 971.

⁷⁷ *St. Louis, I. M. & S. Ry. Co. v. Hardwick*, 115 P. 471, 28 Okl. 577.

⁷⁸ Since the law favors the litigation of every case on its merits default judgments are not favored. *Lovejoy v. Stutsman*, 46 Okl. 122, 148 P. 175.

⁷⁹ Before judgment can be rendered against defendants, who have not been served with summons, it must be shown clearly that they personally appeared, or that some authorized person appeared for them. *Howell v. Campbell*, 37 P. 120, 53 Kan. 742.

A personal judgment without service of legal process is void. *Schott v. Linscott*, 103 P. 997, 80 Kan. 536.

A default judgment, where there is no proof of service, should be set aside. *Shanholtzer v. Thompson*, 103 P. 595, 24 Okl. 198, 138 Am. St. Rep. 877.

court did not examine or inspect the service or proof of publication.⁸⁰

The Supreme Court of Kansas views with much liberality defects in the affidavit to obtain service by publication,⁸¹ and while the Supreme Court of the territory of Oklahoma held that, where the plaintiff seeks to bring the defendant into court on service by pub-

⁸⁰ *Williams v. Moorehead*, 7 P. 226, 33 Kan. 609.

⁸¹ A judgment on service by publication is not wholly void because the affidavit for publication, though good on its face, and bearing the signature of the purported affiant and the jurat of a notary public, was not in fact sworn to. *McMahan v. Noble*, 112 P. 600, 83 Kan. 749.

An affidavit to obtain service by publication in an action to quiet title reciting that plaintiff has filed his petition against the defendant, praying judgment, describing the land, and praying that defendants may be barred of any right or interest therein, is not so defective in stating the cause of action as to render a judgment based thereon absolutely void. *Finn v. Howard*, 94 P. 801, 77 Kan. 421, 127 Am. St. Rep. 420. Where an affidavit for service by publication is defective, but not substantially worthless, the judgment by default entered thereon may be irregular and subject to reversal; but, if the material facts are inferentially stated in the affidavit, the judgment will not be absolutely void. *Id.*

An affidavit for publication service, which did not use the precise language of the statute in stating that personal service could not be made within the state, but in which that required fact did appear inferentially from the statement that the parties to be served were absent from the state, was voidable only; hence a judgment based on that affidavit is valid on collateral attack. *Morris v. Sadler*, 88 P. 69, 74 Kan. 892.

In an action to quiet title, the land was properly described as the southwest quarter of section 25. Defendant was summoned by publication, which erroneously described the land as the southwest quarter of section 24. Defendant defaulted, and a decree was entered as prayed for. Three years afterwards a purchaser from defendant moved to set aside the judgment on the ground of the error in the description of the land. Held that, as an examination of the petition would have given defendant full information, the motion was improperly granted. *Allison v. Whitaker*, 106 P. 1050, 81 Kan. 706.

An affidavit of nonresidence, filed as provided by Code Civ. Proc. § 73, followed by publication of notice in accordance with section 74, and approved by the court as required by section 75, confers jurisdiction to hear and determine the action in which such service is made, and a judgment rendered therein is unimpeachable unless assailed for a cause and within the time prescribed by the statute, though the affidavit was untrue and the defendant was ignorant of the pendency of the action and made no appearance therein. *Davis v. Vinson Land Co.*, 90 P. 766, 76 Kan. 27; *Spangler v. Same*, 90 P. 768, 77 Kan. 838.

A judgment based upon a willfully false affidavit for service by publication is not absolutely void, but is binding until corrected in some proper and timely proceeding. *Duphorne v. Moore*, 107 P. 791, 82 Kan. 159; *Brunbaugh v. Wilson*, 82 Kan. 53, 107 P. 792.

lication under the statute, he must strictly comply with the requirements of the statute, and, unless this be done, the judgment will be void for want of jurisdiction of the person of the defendant,⁸² the Supreme Court of the United States held on appeal in the same case, without expressly determining whether the affidavit was sufficient, that the grantee of a purchaser at a foreclosure sale cannot, because of the insufficiency of the affidavit for service by publication, be dispossessed or the judgment set aside by a court of equity at the instance of one claiming under the mortgagor by a deed subsequent to the mortgage, which remains unpaid, but the latter is only entitled to be let in to make any equitable defense which he may have.

A judgment by default on constructive service by publication, there being no personal service, and no appearance of defendant, is void, where, at the commencement of such action and of the making of such publication, the defendant was a resident of the state, and by due diligence, summons could have been served on him personally.⁸³

Where an action is brought on a note, and summons issued to the sheriff of another county is there served upon the defendant, and judgment is rendered on default, it is void; the court having no jurisdiction of the person under the statute, providing that actions of that class must be brought in the county in which the defendant resides or may be summoned.⁸⁴

A default judgment against a corporation on service on a subordinate officer, where it is not shown the chief officer could not be found in the county, should be vacated.⁸⁵

A default judgment in a mortgage foreclosure suit which refers to, but misdescribes, the land described in the petition will be construed to embrace the land correctly described in the petition.⁸⁶

⁸² *Romig v. Gillett*, 62 P. 805, 10 Okl. 186, judgment reversed 23 S. Ct. 40, 187 U. S. 111, 47 L. Ed. 97.

A default judgment rendered on publication against the "Farmers' Loan and Trust Company," purporting to bar the lien of a mortgage assigned of record to the "Farmers' Loan & Trust Company, Trustee," is not binding on the latter. *Farmers' Loan & Trust Co. v. Essex*, 71 P. 268, 66 Kan. 100.

⁸³ *Hockaday v. Jones*, 56 P. 1054, 8 Okl. 156.

⁸⁴ *Foster v. Cimarron Valley Bank*, 76 P. 145, 14 Okl. 24; Code Civ. Proc. art. 5, § 57 (Rev. Laws 1910, § 4679).

⁸⁵ *Ozark Marble Co. v. Still*, 103 P. 586, 24 Okl. 559; Rev. Laws 1910, § 4715.

⁸⁶ *Sharp v. McColm*, 101 P. 659, 79 Kan. 772.

Persons to whom rights of the defendant are assigned after commencement of the action, and after he had sufficient actual notice thereof, obtain substantially the same rights as the assignor possessed, and are bound by the notice which he had.*7

DEFAULT JUDGMENT

(Caption.)

Now on this ——— day of ———, 19—, the same being one of the regular judicial days of the ——— term, 19—, of said court, this cause comes on to be heard in its regular order upon call of the calendar, the same having been duly set down for trial on this day, the plaintiff appearing in person and by his attorney, G. H., and announcing ready for trial, and the defendant, C. D., being called three times in open court, failed to appear, except, demur, answer, or plead, and wholly made default; and the court having ordered that the allegations of the plaintiff's petition be taken as true, and it appearing that the plaintiff's action is based upon a verified open account, and that the defendant, C. D., though duly and regularly personally served with process herein more than twenty days prior to this date, has failed to answer or otherwise plead within the time and in the manner required by law, and the court having heard the evidence and the oral testimony of witnesses, and being fully advised in the premises finds that all the allegations of plaintiff's petition are true; that (set forth principal allegations of petition).

It is therefore by the court ordered, adjudged, and decreed that the plaintiff, A. B., have and recover of and from the defendant, C. D., the sum of ——— dollars, with interest thereon from the ——— day of ———, 19—, at the rate of ——— per cent. per annum, and his costs herein expended.

———, Judge.

§ 1297. Actions to which state is party—Dismissal—Default—Notice to Attorney General

"No order shall be made by any county, district or superior court in this state dismissing, for want of prosecution, any action now pending or hereafter filed, wherein the state of Oklahoma is an interested party and in which the Attorney General or any assistant Attorney General shall appear as attorney of record, for the state,

*7 McLeod v. Palmer, 173 P. 533, 103 Kan. 233.

nor shall any judgment by default against the state of Oklahoma be rendered by any such court in such action, unless proof is made (that the Attorney General or assistant Attorney General appearing as counsel for the state, shall have been notified) in writing by registered mail, at least ten days prior to the date set for such trial or hearing that the action has been set for trial." ⁸⁸

§ 1298. — Notice—How given—Proof

"A printed docket or other written notice, setting forth the style of the cause and the day that the same is set for trial or hearing, may be mailed, by registered mail, by the court clerk or opposing counsel, addressed to the Attorney General or the assistant Attorney General appearing as attorney of record for the state of Oklahoma, not less than ten days prior to the date set for such trial or hearing, and the registry return of such notice shall be sufficient proof of the notice herein required." ⁸⁹

§ 1299. — Judgment without notice void

"All orders and judgments rendered in the absence of proof of the notice herein required and in violation of the provisions of this section shall be void, and the court shall on its own motion vacate and set aside same when the same is brought to its attention." ⁹⁰

DIVISION II.—OPENING AND VACATING DEFAULT JUDGMENT

§ 1300. Opening judgment after default on service by publication

"A party against whom a judgment or order has been rendered, without other service than by publication in a newspaper, may, at any time within three years after the date of the judgment or order, have the same opened, and be let in to defend. Before the judgment or order shall be opened the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit or other evidence, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the subject of the

⁸⁸ Sess. Laws 1919, c. 45, § 1.

⁸⁹ Sess. Laws 1919, c. 45, § 2.

⁹⁰ Sess. Laws 1919, c. 45, § 3.

judgment or order sought to be opened, which, by it, or in consequence of it shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section, nor shall they affect the title of any property sold before judgment under an attachment. The adverse party, on the hearing of an application to open a judgment or order, as provided by this section, shall be allowed to present counter affidavits or other evidence to show that during the pendency of the action the applicant had notice thereof in time to appear in court and make his defense." ⁹¹

⁹¹ Rev. Laws 1910, § 4728.

In action to quiet title where nonresident defendant was summoned by publication without actual notice, and suffered a default judgment, and where plaintiff then conveyed to purchaser in good faith, Code Civ. Proc. § 83 (Gen. St. 1909, § 5676), protected purchaser, though judgment was set aside as between plaintiff and defendant. *Whiteman v. Cornwell*, 164 P. 280, 100 Kan. 234.

Where the court has jurisdiction, a judgment by default, quieting title of a party in possession under a tax deed, void on its face, will not be set aside on motion filed more than three years afterwards. *Brenholts v. Miller*, 101 P. 998, 80 Kan. 185.

In an action by a foreign corporation, defendant, after being in default 56 days, asked permission to plead. The court granted leave to answer to the merits only, refusing to allow a plea in abatement for the purpose of dismissing the action for failure of plaintiff to comply with Gen. St. 1901, c. 23, § 39, relating to the organization of foreign corporations. Held, that the ruling was not an abuse of discretion. *Kansas Torpedo Co. v. Erie Petroleum Co.*, 89 P. 913, 75 Kan. 530.

Under the above statute, the motion to vacate decree and notice to adverse parties should be within three years after decree. *Hill v. Persinger*, 57 Okl. 663, 157 P. 744.

A motion to vacate a judgment for want of service of process must be presented within three years. *Pettis v. Johnston*, 78 Okl. 277, 190 P. 681. Decisions that judgment valid on its face, rendered without service or appearance, may be vacated at any time not adhered to. *Id.*

In order to open a judgment rendered upon service by publication, under Comp. Laws 1885, c. 80, § 77, notice of the intention to apply for vacation of the judgment must be given, a full answer, with offer to pay costs, and an affidavit of want of actual notice of the pendency of the original action, must be filed, all within three years from the time when the judgment was rendered. *Satterlee v. Grubb*, 16 P. 475, 38 Kan. 234.

The right of defendant served only by publication, to have the judgment opened within three years (Code, § 77), is not lost by delay, and a continuance obtained by plaintiff, in consequence of which the hearing is not had until more than the three years after judgment entered does not affect said right. *Albright v. Warkentin*, 2 P. 614, 31 Kan. 442.

Code, § 77, provides that one against whom judgment has been rendered without other service than by publication, may at any time within three years

Where a defendant applies to have a judgment rendered upon service by publication opened, and asks to be let in to defend, he must bring himself clearly within the provisions of the statute.⁹²

have the judgment opened and be let in to defend. Held an absolute right, if the party bring himself within the statute; the court has no discretion. *Albright v. Warkentin*, 2 P. 614, 31 Kan. 442.

A defendant, served by publication only, is entitled, under Gen. St. 1901, § 4511, at any time within three years after the rendition of the judgment to have it reopened, and to be allowed to come in and defend. *McKee v. Covalt*, 81 P. 475, 71 Kan. 772; *Bucher v. Same*, *Id.*

⁹² *Durham v. Moore*, 29 P. 472, 48 Kan. 135.

Under Code Civ. Proc. § 83 (Gen. St. 1909, § 5676), a nonresident defendant is not entitled to have judgment rendered against him on publication service set aside until he shows that he had no actual notice in time to make defense. *Murphy Mortgage Co. v. Epp*, 162 P. 1170, 99 Kan. 706. Being under disability by reason of imprisonment is no sufficient reason, if before disability defendant had timely notice. *McLeod v. Palmer*, 173 P. 533, 103 Kan. 238.

Mere oversight and inadvertence of a party in failing to make his defense to an action of which he had actual notice does not justify the opening of the judgment, under Civ. Code, § 77 (Gen. St. 1901, § 4511; New Code, § 83), permitting a judgment without other service than by publication to be opened within three years. *Wood v. Cobe*, 103 P. 101, 80 Kan. 496.

On the hearing of a motion under Code Civ. Proc. § 83 (Gen. St. 1909, § 6448), by defendant to reopen a judgment on default on service by publication, it appeared that certain facts were communicated to defendant in time to enable her to defend, but that such facts were indefinite and might reasonably be understood by one unacquainted with business to refer to another proceeding involving the same property. Held, that whether defendant had actual notice was a question of fact for the court. *Parker v. Maslin*, 116 P. 227, 85 Kan. 130.

Gen. St. 1915, § 6974 (Code Civ. Proc. § 83) providing that an applicant to open a default judgment shall make it clear to the court's satisfaction by affidavit that during the pendency of the action he had no actual notice, etc., may be complied with by oral testimony in open court. *Wyatt v. Collins*, 105 Kan. 182, 180 P. 992.

A registry receipt, which an affidavit states was received by affiant, and which is attached to the affidavit as an exhibit, is admissible as part of the affidavit, under Code Civ. Proc. § 77 (Gen. St. 1901, § 4511), authorizing counter affidavits, on an application to open a judgment, that applicant knew of pendency of the action. *Chubbuck v. Beaty*, 104 P. 558, 80 Kan. 789. So, also, a verified deposition is an "affidavit." *Id.* Code Civ. Proc. § 77 (Gen. St. 1901, § 4511), providing that, on application to open a judgment on a showing that applicant had no notice or knowledge of pendency of the action in time to defend, the adverse party may present counter affidavits to show that applicant had such notice, does not prevent the hearing of any competent evidence, other than affidavits, to show such notice or knowledge. *Id.*

Where an application is made to set aside a judgment rendered upon service by publication only, for want of actual notice of the action in time to defend, expressly made a ground by Code Civ. Proc. § 83 (Gen. St. 1909, §

A judgment rendered by default against one who was not served with summons, and has not appeared or waived such service, is void, and may be set aside on motion at the term of court subsequent to the term at which it was rendered.**

Where the only issue presented by the statement of defense on

5676) and counter affidavits are presented in an attempt to bring actual notice to defendant by showing notice to his agent, the authority of the agent to represent defendant in the particular litigation in which notice was given must be established by clear and satisfactory proof. *Dunlap v. Denison*, 83 Kan. 757, 112 P. 598, 31 L. R. A. (N. S.) 1071.

Though a motion to vacate a judgment for a fatal defect in the affidavit for service by publication contained both jurisdictional and nonjurisdictional grounds, and the filing constituted a general appearance, the court should have vacated the judgment. *Griffin v. Jones*, 45 Okl. 305, 147 P. 1024. A judgment shown to have been rendered against defendants in default on service by publication which was fatally defective for want of a sufficient affidavit should be vacated. *Id.*

Defendant's motion to set aside the judgment upon the grounds provided for in Comp. Laws 1909, § 5617, which gives a right to move to set aside a judgment rendered on service by publication at any time within three years was properly overruled, where defendant had previously made a general appearance by moving to set aside the judgment for defects in the petition. *Willett v. Blake*, 39 Okl. 261, 134 P. 1109.

In order to open a judgment rendered upon service by publication, under Comp. Laws 1885, c. 80, § 77, notice of the intention to apply for vacation of the judgment must be given, and a full answer, with offer to pay costs, and an affidavit of want of actual notice of the pendency of the original action, must be filed, all within three years from the time when the judgment was rendered. *Satterlee v. Grubb*, 16 P. 475, 38 Kan. 234; *Dunlap v. Denison*, 83 Kan. 757, 112 P. 598, 31 L. R. A. (N. S.) 1071.

Under Code Civ. Proc. § 598 (Gen. St. 1909, § 6193), a judgment by default reciting service by publication only on a defendant whose name was not included in the affidavit for publication is a nullity, and there was no error in setting it aside on motion of a party holding, by conveyance, property which the judgment purported to bind. *Hetzer v. Koogler*, 123 P. 876, 87 Kan. 37.

A judgment rendered in an action on service by publication or personal service outside the state where there had been no affidavit for publication filed, as provided by Gen. St. 1901, §§ 4507, 4510, is void, and will be set aside on application by defendant. *Osborne v. Schlichenmeier*, 75 P. 474, 68 Kan. 421.

Defendant, against whom a judgment had been rendered on constructive service, alleged the tender of the amount due before suit brought, and that plaintiff failed to give in for taxation, for three successive years, the note on which the judgment was obtained. Held, that the judgment should be opened, under Code Civ. Proc. § 77, providing for an opening of a judgment rendered on service by publication, on showing that defendant had no actual notice

** *York Draper Mercantile Co. v. Hutchinson*, 43 P. 315, 2 Kan. App. 47.

the application to reopen a judgment is as to the condition of an account of defendants for receipts and disbursements, the court should proceed to take an accounting.⁹⁴

Any one whose rights are affected by a judgment rendered by publication is entitled to have it opened when he complies with the statute, whether named as defendant in the action or not.⁹⁵

of the action, and "filing a full answer." *Quinton v. Durein*, 51 P. 898, 59 Kan. 772.

Where a fraudulent grantee, whose title has been restored to the trustee of the grantor by a judgment on service by publication, afterwards has the judgment tentatively opened, so that he may defend, and answers that the grantor conveyed the land to defraud creditors, states no reason for setting aside the judgment. *Johnson v. Richardson*, 73 P. 113, 67 Kan. 521.

A judgment regular upon its face rendered by default, on publication service in action, where such a service is authorized by statute and approved by court, after adjournment of the term is not subject to attack by motion supported by affidavit upon ground of falsity of affidavit for publication. *Chaplin v. First Bank of Hitchcock (Okl.)* 181 P. 497.

⁹⁴ *Ross v. Noble*, 51 P. 792, 6 Kan. App. 361.

⁹⁵ *Board of Com'rs of Cheyenne County v. Walter*, 112 P. 599, 83 Kan. 743.

Under St. 1893, § 3955, providing that a party against whom a judgment or order has been rendered, without other service, than by publication, may within three years have the judgment or order opened, a petition to open the judgment may be made by the party to the judgment, or one to whom he has conveyed his interest in the subject-matter; section 3912 providing that, in case of transfer, the action may be continued in the name of the original party, or the person to whom the transfer is made may be made a party. *Brown v. Massey*, 76 P. 226, 13 Okl. 670.

On January 18th, application was made under Code Civ. Proc. § 83 (Gen. St. 1909, § 5676) to set aside a decree quieting title based on publication service. It was resisted by one who alleged he had purchased in reliance on the decree. The conveyance was dated January 11th and recorded February 8th. There was evidence that January 15th he stated to the applicant that he had then no interest in the property. Held, that the evidence justified the finding that the deed was not delivered before filing application. *Hill v. Miller*, 113 P. 1043, 84 Kan. 196.

A default judgment in ejectment against a nonresident, vacated under Code, § 77, cannot be relied on by a purchaser of the property, where the purchase was made in total ignorance of such judgment, and on the strength of a chain of title wholly independent of it. *Randall v. Barker*, 74 P. 240, 67 Kan. 774.

Four parties defendant having been served with summons, numerous other parties thereto not being served, but an unauthorized appearance by an attorney having been made for them, judgment having been rendered thereafter on default against all parties, including the parties not served, the parties served with summons having notice of such unauthorized appearance cannot be heard to complain that such judgment against the parties not served was

§ 1301. Excusable default

A mistake in the printed docket,⁹⁶ severe illness of defendant,⁹⁷ accidents for which defendant is not responsible,⁹⁸ and unavoidable casualties and misfortunes⁹⁹ have been held to excuse defaults.

void, and thereby have the same set aside as to all parties. *Wheatland Grain & Lumber Co. v. Dowden*, 110 P. 898, 28 Okl. 441.

⁹⁶ Where answer presents good defense, and failure of nonresident defendant to answer in time is excused by notation on printed docket indicating postponement of term of court, default judgment should be opened. *McSpadden v. Richardson*, 59 Okl. 124, 157 P. 1153.

⁹⁷ Severe illness on the day of trial, so as to confine a party to his house, is ground for setting aside the judgment rendered against him. *Gheer v. Huber*, 4 P. 290, 32 Kan. 319.

⁹⁸ Defendant, in another than the trial county, deposited in the United States post office, postage paid, an envelope addressed to the clerk of the court, containing a motion directed to plaintiff's petition. In due course of mail the motion would have reached its destination by the answer day, but because of a miscarriage of the mail arrived a day late, and while the case was on trial. Held, that the court erred in denying defendant the right to file the motion and be heard upon it, and in proceeding to render default judgment. *Chicago, K. I. & P. Ry. Co. v. Reese*, 110 P. 1071, 26 Okl. 613.

On the day before answer was due, defendant's counsel deposited in the mail in another county a motion directed to plaintiff's petition. In due and regular course of mail the motion would have reached its destination in time, but by reason of the miscarriage of the mail it arrived one day late. It actually arrived during the taking of the evidence as on defendant's default and prior to the rendition of judgment. Counsel for defendant prior to the conclusion of the trial asked leave to file the motion, which the court denied and rendered judgment as on default. Held that, since the failure to file the motion in time resulted from a mere accident for which defendant was in no way responsible, the court's refusal to permit the filing thereof when received and to give defendant its day in court was an improper exercise of discretion for which the judgment would be set aside. *Chicago, R. I. & P. Ry. Co. v. Eastham*, 110 P. 887, 26 Okl. 605, 30 L. R. A. (N. S.) 740.

⁹⁹ Petitioner's counsel from Wichita, Kan., wrote the clerk of the court in which the case was pending at Hobart, Okl., requesting advice of the day the case had been set for trial, on May 13, 1907, which was the day court convened for the term. Receiving no reply on the 15th or 16th, petitioner received a letter from a third person, advising him that the case would be reached the latter part of the next week. Petitioner immediately wired his informant to wire him the day the case was set for trial, and on the 18th received a telegram "Your case is set for the first." Petitioner took the letter to his attorney in Wichita, and they, construing it to mean "June 1st," prepared for trial on that day. On May 23d petitioner received a letter from his informant that judgment had been rendered against him by default on the 21st, and an investigation showed that the telegram as filed stated that the case had been set for "the 21st," and that a mistake had occurred in transmission, which caused the default. Held, that, petitioner and his counsel having exercised ordinary diligence, petitioner was entitled to have the de-

A judgment will not be vacated on the ground that unavoidable casualty prevented appearance, unless the facts alleged show that no reasonable diligence could have prevented trial or judgment, and that one petitioning for vacation was not guilty of laches.¹

That defendant's attorney was absent from his office and understood that cause would not be assigned for trial at certain term was not sufficient to authorize vacation of default judgment after term had expired.²

It is not sufficient ground upon which to vacate default judgment that plaintiffs or their attorneys were not notified by clerk of time that case was set for trial.³

fault vacated for unavoidable casualty or misfortune. *McLaughlin v. Nettleton*, 105 P. 662, 25 Okl. 319.

In an action to vacate a default judgment it appeared that defendant, with his family, left the state a few days before summons was served at his residence, on a vacation which lasted several weeks; that neither he nor his family knew of the commencement of the action until he was requested to pay the judgment; that the note on which the judgment was rendered was not signed by him individually, and that he did not know that he was to be held personally thereon. Held, that he was precluded from defending the action through unavoidable casualty or misfortune, within Gen. St. 1889, par. 4669, subd. 7, and the judgment was hence properly vacated. *Schnitzler v. Fourth Nat. Bank*, 42 P. 496, 1 Kan. App. 674.

Refusal to vacate default judgment for negligence of agent of defendant corporation in misplacing copy of summons and not notifying defendant of service held not an abuse of discretion; such negligence not being "unavoidable casualty or misfortune," etc., within Rev. Laws 1910, § 5267, subd. 7. *Missouri, K. & T. Ry. Co. v. Ellis*, 53 Okl. 264, 156 P. 226, L. R. A. 1916E, 100.

Under Rev. Laws 1910, § 5267, defendants' attorney abandoning the case without notice held unavoidable casualty, and ground for setting aside a default judgment. *McLaughlin v. Nettleton*, 47 Okl. 407, 148 P. 987.

The negligence of an attorney in unnecessarily permitting a judgment by default to be rendered against his client, and the fact that such attorney is insolvent, cannot be considered, generally, such an "unavoidable casualty or misfortune" (Code, § 568) as entitles the client to be let in to defend. *Weich v. Challen*, 3 P. 314, 31 Kan. 696.

¹ *Baker v. Hunt & Co.* (Okl.) 166 P. 891.

² *Continental Gin Co. v. Arnold* (Okl.) 167 P. 613, L. R. A. 1918B, 511.

³ *Baker v. Hunt & Co.* (Okl.) 166 P. 891; *Uncle Sam Oil Co. v. Richards* (Okl.) 176 P. 240.

Where default is taken, answer not being filed within time, it is no ground upon which to vacate default that defendant's attorney was informed by clerk of court that contested motions would not be heard on day such judgment was rendered, as, in absence of answer, no contest was pending against motion for default judgment. *Harn v. Amazon Fire Ins. Co.* (Okl.) 167 P. 473.

Where a party or his counsel writes letters to clerk of court inquiring

While a judgment may be vacated and a new trial had for fraud practiced by the successful party in obtaining it, it is such fraud as is collateral and extrinsic to the issues involved in the action and on which the judgment was founded, and the party against whom judgment in default is rendered is not entitled to have it set aside and the issues retried because the allegations in the petition which constitute the merits of the case are untrue.⁴

The fraud relied on must be clearly stated and shown,⁵ and must be unmixed with fraud or negligence of the complaining party.⁶

about status of a case, and, though receiving no reply, allows two months to pass without further inquiry, and a default is entered, he cannot attack default for neglect or omission of clerk. *Pulaski Oil Co. v. Conner*, 62 Okl. 211, 162 P. 464, L. R. A. 1917C, 1190.

That after a member of the plaintiff partnership has agreed to continue the cause and later have it dismissed a default judgment is taken in defendant's absence does not render the judgment void. *Ponca Milling Co. v. Stevens*, 147 P. 815, 94 Kan. 745.

Petition held not to state facts sufficient to justify vacation of judgment on ground of fraud practiced by successful party in obtaining judgment. *Citizens' Bank & Trust Co. v. City of Pryor Creek (Okl.)* 168 P. 208.

Under Wilson's Rev. & Ann. St. 1903, § 4760, authorizing district courts to vacate a judgment where fraud is practiced in obtaining it, where a defendant waives service of summons, and has full opportunity to make any proper defense, but neglects to appear, such negligence is no ground for setting aside the judgment. *Williamson v. Williamson*, 83 P. 718, 15 Okl. 680.

⁴ *Garrett Biblical Institute v. Minard*, 108 P. 80, 82 Kan. 338.

It is not fraud under Code Civ. Proc. § 596 (Gen. St. 1915, § 7500) practiced by successful party for plaintiff to sue on note and mortgage defective for want of signature of defendant's wife, nor to obtain judgment thereon by default. *Gooden v. Lewis*, 101 Kan. 482, 167 P. 1133. Under Code Civ. Proc. § 596 (Gen. St. 1915, § 7500), attachment affidavit is not fraudulent so as to vitiate proceedings pursuant thereto merely because if attachment had been resisted it might have been shown that allegations of affidavit were false. *Id.*

⁵ When fraud practiced by successful party to judgment is alleged, facts showing such fraud must be stated clearly and concisely, and fraudulent acts and proceedings must be clearly shown. *Lindsey v. Goodman*, 57 Okl. 408, 157 P. 344. Facts showing unavoidable casualty or misfortune as ground for vacation of judgment must be so stated as to make it appear that no reasonable diligence could have prevented trial or judgment, and that complaining party is not guilty of laches. *Id.*

Affidavits.—A petition to vacate a judgment for unavoidable casualty or misfortune, preventing a party from prosecuting or defending, must be veri-

⁶ Fraud of prevailing party alleged to have prevented presentation of defense relied upon to vacate judgment must be unmixed with fraud or negligence of petitioner or his agent. *Citizens' Bank & Trust Co. v. City of Pryor Creek (Okl.)* 168 P. 208.

Neither ignorance, mistake, nor misapprehension of an attorney not occasioned by the adverse party is ground for vacating a judgment.⁷

§ 1302. Pleading—Form

A default judgment, having been duly rendered and entered of record, and the term at which it was rendered having passed, can be vacated or set aside only at the times and in the manner provided by law.⁸

A judgment regular upon its face rendered by default and upon publication service in an action where such service is authorized, after the adjournment of the term, is not subject to attack by motion supported by affidavit upon the ground of falsity of the affidavit for publication.⁹

Where a default judgment is rendered without summons or upon fatally defective process, defendant, during that term, may appear by motion and have the judgment vacated on that ground.¹⁰

But a default judgment which is not void cannot be set aside on motion at a subsequent term five years after rendition on the ground that the petition did not state a cause of action.¹¹

filed by affidavit setting forth the judgment or order, the grounds for vacating or modifying the same, or the defense or defenses to the action. *McLaughlin v. Nettleton*, 105 P. 662, 25 Okl. 319.

An application to open a judgment obtained by publication service held not void merely because the supporting affidavit was verified by defendant's attorney on information and belief, where it recited all the facts prescribed by Civ. Code, § 83 (Gen. St. 1909, § 5676). *Young v. Martin*, 153 P. 542, 96 Kan. 748. Where an application to open a judgment obtained by publication of service, and the supporting affidavit, verified on information and belief, are filed within time, the affidavit may be amended by a positive verification after the time to open the judgment would otherwise have expired. *Id.*

⁷ *Lindsey v. Goodman*, 57 Okl. 408, 157 P. 344.

For statute, see post, § 1305.

⁸ *Johnson v. Jones*, 51 P. 224, 58 Kan. 745.

If a final decree or judgment is rendered and the term expires, there must be a substantial compliance with the statute in order to give the court further jurisdiction over the decree or judgment. *Arnold v. Burks*, 63 Okl. 273, 164 P. 970.

⁹ *Lausten v. Union Nat. Bank of Bartlesville* (Okl.) 173 P. 823.

¹⁰ *Fried v. First Nat. Bank* (Okl.) 178 P. 909.

Where, on default, a judgment is rendered which is void for want of jurisdiction of the person, it should be set aside on motion; defendant making a special appearance for that purpose only. *Foster v. Cimarron Valley Bank*, 76 P. 145, 14 Okl. 24.

¹¹ *Gibson v. Dizney* (Okl.) 178 P. 124.

On a motion to vacate a judgment by default, the court will not exact that strict particularity of pleading in the original action that might otherwise be required on demurrer.¹²

A motion to quash service by publication and set aside a default judgment at the same term because of falsity of the affidavit for publication may be granted, though it does not show that movant has any defense or statutory ground for the motion.¹³

Where a motion is filed to set aside a default judgment and plaintiff appears and contests the motion on nonjurisdictional grounds, service of notice of the motion is waived.¹⁴

On filing a petition to open judgment, no new summons need be issued to a defendant who has permitted the judgment to be taken against him by default.¹⁵

APPLICATION FOR OPENING DEFAULT JUDGMENT ON SERVICE BY PUBLICATION

(Caption.)

State of Oklahoma, }
County of ———. } ss.:

C. D., of lawful age, being first duly sworn, on oath says: That he is the defendant in the above entitled action; that on the ——— day of ———, 19—, judgment was entered in this cause against said defendant, by default, in favor of the plaintiff, A. B., for the sum of \$——; that no service was ever had upon this defendant in said cause other than by publication in a newspaper; that during the pendency of said action your affiant had no actual notice thereof in time to appear in court and make his defense, nor did he ever have any personal knowledge of the same prior to the rendition of said judgment; that your affiant has a good and valid defense to the cause of action alleged in the plaintiff's petition herein, and that he submits and files herewith a full answer to said petition; that your affiant offers to pay all costs accrued in this cause if the court require them to be paid.

Wherefore affiant moves the court to open the judgment herein,

¹² Thompson v. Caddo County Bank, 82 P. 927, 15 Okl. 615.

¹³ Richardson v. Howard, 51 Okl. 240, 151 P. 887.

¹⁴ Cahill-Swift Mfg. Co. v. Hayes, 156 P. 735, 97 Kan. 740, rehearing denied 157 P. 1169, 98 Kan. 269.

¹⁵ Wetmore State Bank v. Courter, 155 P. 27, 97 Kan. 178.

and that he be let in to defend against the cause of action alleged in plaintiff's petition.

C. D.

(Jurat.)

§ 1303. Valid defense—Excuse—Petition—Effect of motion

To vacate a default judgment rendered on a petition stating a cause of action on which legal summons had been served the defendant must show a valid defense.¹⁶

¹⁶ *Harn v. Amazon Fire Ins. Co. (Okl.)* 167 P. 478.

A petition under Code Civ. Proc. § 600 (Gen. St. 1909, § 6195), after expiration of the term, on the ground that the judgment was taken contrary to an agreement between counsel, held insufficient, where it failed to set forth the judgment and facts showing a valid defense. *State v. Soffetti*, 136 P. 260, 90 Kan. 742.

A defendant in an action to foreclose liens of material men and mechanics, who is personally served with summons, and allows judgments to go against him by default, is not entitled, nearly six months thereafter, and at a subsequent term of the court, and after the property has been sold at sheriff's sale, to have the judgments vacated, on motion or petition, without showing that he has a defense to the whole or a part of the action in which the judgments are rendered. *Coffey v. Carter*, 27 P. 128, 47 Kan. 22.

Full answer.—An answer filed with an application to open a judgment in a suit to quiet title, which expressly denies the facts pleaded in the petition, is a "full answer," within Code Civ. Proc. § 83 (Gen. St. 1915, § 6974), relating to opening of defaults. *Wyatt v. Collins*, 105 Kan. 182, 180 P. 789.

Gen. St. 1897, c. 95, § 78, provides that judgments rendered on notice by publication may be set aside by pursuing a certain procedure, which includes the filing of a full answer. On an application to set aside a judgment canceling a mortgage, the answer so filed contained a general denial, and allegations that the mortgage was made to secure a loan, made by a building and loan company of which defendant was a receiver, and that it was to be paid in monthly installments, and that it was partially paid, but that there was \$1,000 due and unpaid. Held, that the answer was sufficient as a defense and that it was error to refuse to open up the judgment, the statute being complied with in other respects. *Hale v. Hoagland*, 61 P. 314, 9 Kan. App. 885.

Issues and petition.—Where default is rendered upon petition against an oil and gas lessee for injuries to surface rights, held that, where petition alleged plaintiff's sole ownership, and there was nothing contrary in record, it will be presumed that issue of ownership was determined by default judgment, and it cannot be set aside for defects of parties. *Pulaski Oil Co. v. Conner*, 62 Okl. 211, 162 P. 464, L. R. A. 1917C, 1190.

Where the record showed a finding, on argument and consideration, that a motion to set aside a default judgment should be sustained, this implied that adjudication of a valid cause of action which is essential to the right to set aside a judgment under Code Civ. Proc. §§ 596, 602 (Gen. St. 1909, §§ 6191, 6197). *Spottsville v. Western States Portland Cement Co.*, 146 P. 356, 94 Kan. 258.

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But a default judgment will not be vacated unless it appears that the party having a meritorious defense was prevented from making timely presentation thereof on some grounds named by the statute for granting such relief.¹⁷

Where judgment on default is wholly without the pleadings or within supplemental pleadings filed without notice, substantially changing the original claim, judgment may be set aside by any person affected without showing a valid defense to the action.¹⁸

A general denial in a proffered answer attached to a motion to set aside the judgment is not sufficient to warrant vacation of the judgment.¹⁹

A motion to set aside a default judgment does not suspend the effect of the judgment.²⁰

Where defendants have allowed judgment to be taken by default, and afterwards make a general appearance, it is too late to object to the judgment because the petition upon which it was rendered contains more than one cause of action, not separately stated and numbered, or that the judgment ought not to have been against part of the defendants as principals, but only as sureties.²¹

§ 1304. Discretion of court

An application to vacate or modify a judgment is addressed to the discretion of the court,²² but such discretion must be exercised without abuse.²³

¹⁷ *Western Coal & Mining Co. v. Green*, 64 Okl. 53, 166 P. 154.

¹⁸ *Hirschman v. Forster*, 59 Okl. 178, 158 P. 1177.

¹⁹ *Lindsey v. Goodman*, 57 Okl. 408, 157 P. 344.

²⁰ *Price & Miller v. Ratcliffe*, 47 Okl. 370, 148 P. 153.

²¹ *Kaw Valley Life Ass'n v. Lemke*, 19 P. 337, 40 Kan. 142, judgment affirmed 20 P. 512, 40 Kan. 661.

²² *Stainbrook v. Meskill*, 52 Okl. 196, 152 P. 820.

A trial court has a wide discretion in setting aside judgments and decrees rendered in its own court when it does so at the same term at which it is rendered. *Arnold v. Burks*, 63 Okl. 273, 164 P. 970.

Where a default judgment had been opened at the instance of parties who have a valid defense, Gen. St. 1915, § 6974 (Code Civ. Proc. § 83), relating to procedure, should receive a liberal construction. *Wyatt v. Collins*, 105 Kan. 182, 180 P. 992.

A trial court may, in the exercise of its discretion, set aside a judgment rendered in the absence of defendant, and allow a new trial, especially where the application immediately follows the rendition of the judgment, though

²³ See note 23 on following page.

Unless a default is caused by the gross laches of defendant's attorney, he should be permitted to answer on terms at any time be-

the showing in support of the motion, and the motion, are not strictly in conformity with the provisions of the statute. *Wilson & Toms Inv. Co. v. Hill-yer*, 31 P. 1064, 50 Kan. 446; *Id.*, 31 P. 1065, 50 Kan. 448.

A default judgment against abstractors was properly set aside, where it included the amount of a lien not disclosed by the abstract, but previously held invalid by a final judgment of which plaintiff alone knew. *Walker v. Bowman*, 44 Okl. 759, 145 P. 1130.

²³ Evidence held to show that a refusal to set aside a default judgment was an abuse of discretion, where it appeared that both defendant and his attorney were too sick to attend court when the judgment was rendered, and that defendant had a meritorious defense. *Stainbrook v. Meskill*, 52 Okl. 196, 152 P. 820.

Where the president of a defendant board of education, who alone was served with summons, forgot to notify the board of the service, as a result of which a default judgment was entered for plaintiff, and the defendant board, at the term at which judgment was rendered, moved to vacate the same, supporting its motion by affidavit, and tendered a verified answer showing a complete defense, it was an abuse of discretion to refuse to vacate the default. *Board of Education of City of Hutchinson v. National Bank of Commerce*, 46 P. 36, 4 Kan. App. 438.

Refusal to open a default judgment held an abuse of discretion, where the defendant showed a reasonable excuse for his absence, and presented a good defense, and no substantial prejudice would result from sustaining the motion. *Hodges v. Alexander*, 44 Okl. 598, 145 P. 809.

Evidence held to support a finding that defendant had actual notice of pendency of an action in time to appear and make defense, so that a default will not be set aside. *Garrett Biblical Institute v. Minard*, 100 P. 55, 79 Kan. 470.

A defendant who applies to the court within a few days after the time for answer has expired, and before judgment is rendered against him by default, for leave to file an answer, and is told by the court that the case would not be reached at that term, and that time would be given him to answer, and in a few days thereafter a judgment is rendered against him, and an execution issued thereon, is entitled on a proper showing, and such terms as may be just, to have the judgment set aside, and leave given him to file an answer, and have the case tried on its merits. *Sanders v. Hall*, 15 P. 197, 37 Kan. 271.

Overruling motion to set aside judgment rendered in absence of defendant's attorney and denying a new trial held erroneous, although absence was occasioned by attorney's negligence. *Patterson v. Uncle Sam Oil Co.*, 165 P. 661, 101 Kan. 40.

It being apparent that the omission of parties to plead to a cross-petition, or to appear and defend, was not intentional, they should be granted a new trial. *Johnson v. Ware*, 73 P. 99, 67 Kan. 840.

Defendants having, after dilatory motions carrying the case over a term, withdrawn the motions and obtained permission to answer in 20 days, and then obtained an extension of 20 days for answer, "not to delay trial" at the next term, and then made no further appearance until judgment was entered.

fore judgment; and where a meritorious defense is apparent the court must permit the answer to be filed.²⁴

at such term, were guilty of such negligence as to justify refusal to set aside the judgment. *Lawson v. Rush*, 101 P. 1009, 80 Kan. 262.

Where, on a petition for a new trial after judgment by default, it appeared that defendants did not know when the case was set for trial, though they knew of its pendency, and that their attorneys knew of the setting, and one defendant claimed that a year or so previously plaintiff's attorney had led him to believe he did not desire a judgment against him, the petition was properly denied. *Bigsby v. Eppstein*, 39 Okl. 466, 135 P. 934.

An action was brought in W. county against the maker and guarantor of two notes. Personal service was had on the guarantor in W. county and on the maker in F. county, where they respectively resided, and judgment by default was rendered against the maker alone. Thereafter the maker moved to vacate the judgment, alleging that the guarantor was induced to indorse the notes solely to permit the action to be brought away from the maker's residence, and the judgment was vacated accordingly. During the next term judgment was rendered against both defendants, without the appearance of either. Held, that the maker's motion to vacate the latter judgment, as against him for want of jurisdiction, was properly overruled. *Minnick v. Matchett*, 63 P. 276, 10 Kan. App. 177.

Pending hearing of a motion to vacate a judgment by default on constructive service, plaintiff on leave filed amended proof of publication showing notice of pendency of the action was published for the required time, though the proof of publication originally filed showed that it had not been made for the requisite time. Held, that the amended proof was properly allowed, and, due publication having been shown, the motion to vacate the judgment should have been overruled. *Morris v. Hardie*, 113 P. 308, 84 Kan. 9.

The fact that one moving, under Code Civ. Proc. § 83 (Gen. St. 1909, § 5676), to open up a judgment may have challenged the validity of the service and the jurisdiction to render any judgment will not justify denial of his application to have the judgment opened. *Board of Com'rs of Cheyenne County v. Walter*, 112 P. 599, 83 Kan. 743.

Default judgment, in action on coupons clipped from school district bond, cannot be set aside for misunderstanding of defendant as to whether the action involved outlawed coupons. *Vall v. School Dist. No. 1, Grant County*, 122 P. 885, 86 Kan. 808.

²⁴ *St. Louis & S. F. R. Co. v. Zumwalt*, 31 Okl. 159, 120 P. 640.

After a default judgment has been opened it is within court's discretion to permit an amended answer to be filed. *Wyatt v. Collins*, 105 Kan. 182, 180 P. 789.

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ARTICLE VI

REVERSING, VACATING OR MODIFYING

DIVISION I.—AUTHORITY TO REVIEW

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- 1306. During term.
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DIVISION I.—AUTHORITY TO REVIEW

§ 1305. Jurisdiction and power

"The district court shall have power to vacate or modify its own judgments or orders, at or after the term at which such judgment or order was made—

"First. By granting a new trial for the cause, within the time and in the manner prescribed in section 5035.

"Second. By a new trial granted in proceedings against defendants constructively summoned, as provided in section 4728.

"Third. For mistake, neglect or omission of the clerk, or irregularity in obtaining a judgment or order.²⁵

²⁵ Irregularities in the proceedings in a suit on notes and to foreclose a mortgage held to authorize the court to vacate the judgment on timely motion filed therefor under Rev. Laws 1910, § 5274. *Griffin v. Jones*, 45 Okl. 305, 147 P. 1024.

"Fourth. For fraud, practiced by the successful party, in obtaining the judgment or order.

"Fifth. For erroneous proceedings against an infant, or a person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings."²⁶

"Sixth. For the death of one of the parties before the judgment in the action.

"Seventh. For unavoidable casualty or misfortune, preventing the party from prosecuting or defending.

"Eighth. For errors in a judgment, shown by an infant in twelve months after arriving at full age, as prescribed in section 5142.

"Ninth. For taking judgments upon warrants of attorney for more than was due to the plaintiff, when the defendant was not summoned or otherwise legally notified of the time and place of taking such judgment."²⁷

To justify vacation, a substantial compliance with the statute must appear.²⁸

An "irregularity," within the statute, is some departure from prescribed procedure in the trial or in the determination of an action which is not evidenced by ruling or order.²⁹

The jurisdiction to set aside judgments of county courts, fraudulently obtained, is possessed by the district and superior courts.³⁰

The district court of a county in which a transcript of a judgment from another county has been filed does not have authority to vacate the judgment if the judgment is regular on its face and within the jurisdiction of the court that rendered it.³¹

²⁶ Rev. Laws 1910, § 5267, subd. 5, giving the district court power to revoke or modify its own judgments for erroneous proceedings against an infant, where the infancy and the error do not appear on the record, does not authorize action when the errors do appear on the record. *Sawyer v. Ware*, 128 P. 273, 36 Okl. 139.

²⁷ Rev. Laws 1910, § 5267.

Comp. Laws 1909, § 6094, subd. 8, authorizing the district court to vacate or modify its own judgments, for errors shown by an infant within 12 months after arrival at full age, as prescribed by section 5935, does not authorize the district court in an original proceeding to correct errors of record which may be corrected by direct appeal. *Sawyer v. Ware*, 128 P. 273, 36 Okl. 139.

²⁸ *Allen v. Gaston* (Okl.) 189 P. 183.

²⁹ *Hatfield v. Hatfield*, 59 Okl. 132, 158 P. 942.

³⁰ *In re Johnson* (Okl.) 179 P. 605; *Wray v. Howard*, 79 Okl. 223, 192 P. 584.

³¹ Code Civ. Proc. § 432 (St. 1893, § 4310), as amended by Comp. Laws 1909,

A motion for vacation of a judgment rendered without service of process is exclusive of relief in equity.³²

An application to amend or correct a judgment is addressed to the sound discretion of the court wherein it was entered.³³

Thus the court may act on any evidence satisfactory to it, and it is for it to decide the kind and amount of evidence requisite to show that an amendment should be made, though, where there is no record or quasi record evidence, it should act with great caution.³⁴

The amendment of a mistake in entry of judgment or order may be based on any competent evidence, parol as well as written; ³⁵ hence a district court, on the personal knowledge of the judge as to what took place at the time of its rendition, can correct the entry of a judgment, so as to cause it to speak the truth, after the expiration of the term at which it was rendered.³⁶

Where there is a denial of a motion under the statute upon reasonable notice to the adverse party or his attorney, in a proceeding to correct a mistake or omission of the clerk or irregularity in obtaining a judgment, the remedy of the party aggrieved is not by renewing it, or asking for a rehearing thereof, but by appeal.³⁷

An order of revivor, made on an unauthorized waiver of notice and consent to the revivor by an attorney, under a misapprehension as to his authority to appear in the matter, may be set aside on motion by the district court.³⁸

§ 5941, considered in connection with Comp. Laws 1909, § 540, giving to judgment creditors the right to have transcripts of judgments filed in counties other than wherein rendered, does not give to the district court of the latter counties jurisdiction to vacate the judgment, where regular on its face and within the jurisdiction of the court rendering it. *Hudson v. Ely*, 129 P. 11, 36 Okl. 576.

³² *Pettis v. Johnston*, 78 Okl. 277, 190 P. 681.

³³ *Co-wok-ochee v. Chapman*, 76 Okl. 1, 183 P. 610. An order of county court overruling a motion, filed after the term, to correct entry of a judgment formerly entered therein, held not an abuse of county court's discretion. *Id.*

³⁴ *Co-wok-ochee v. Chapman*, 76 Okl. 1, 183 P. 610. Evidence in district court held not to have sufficient weight and cogency to warrant a reversal of county court's overruling of a motion, filed after term, to correct entry of a judgment formerly entered in that court.

³⁵ *Jones v. Gallagher*, 64 Okl. 41, 166 P. 204, 10 A. L. R. 518.

³⁶ *Christlisen v. Bartlett*, 84 P. 530, 73 Kan. 401, rehearing denied 85 P. 594, 73 Kan. 401.

³⁷ *Co-wok-ochee v. Chapman*, 76 Okl. 1, 183 P. 610.

³⁸ *Mendenhall v. Robinson*, 44 P. 610, 56 Kan. 633.

The court may vacate a judgment on the pleadings for misapprehension as to their allegations.³⁹

Perjury alone is not sufficient ground for vacating a judgment.⁴⁰

Fraud will authorize vacation, but it must be extrinsic or collateral to the issues, thereby preventing a party from having a trial thereon.⁴¹

However, obtaining a judgment by willful perjury is obtaining it by fraud, and where the unsuccessful party has been prevented by fraud and perjury from exhibiting fully his case, and there has never been a real contest, the judgment may be set aside.⁴²

An attorney acting for his client is bound to the most scrupulous good faith, and, if he corruptly sells out his client's interest to the other side the judgment may be set aside for fraud.⁴³

After trial and verdict, motion for new trial, and judgment, a proceeding should not be disturbed and litigation reopened except

³⁹ *Cooper v. Rhea*, 107 P. 799, 82 Kan. 109, 29 L. R. A. (N. S.) 930, 136 Am. St. Rep. 100, 20 Ann. Cas. 42.

⁴⁰ *Electric Plaster Co. v. Blue Rapids City Tp.*, 106 P. 1079, 81 Kan. 730, 25 L. R. A. (N. S.) 1237; *Thigpen v. Deutsch* (Okl.) 166 P. 901.

Before a judgment rendered on perjured testimony will be vacated under Rev. Laws 1910, § 5267, it must appear that the injured party has presented the matter with due diligence, and is clearly entitled to the relief sought, that the question of perjury could not have been litigated at the trial, or the relief sought obtained therein by the use of due diligence. *El Reno Mut. Fire Ins. Co. v. Sutton*, 137 P. 700, 41 Okl. 297, 50 L. R. A. (N. S.) 1064.

⁴¹ *Thigpen v. Deutsch* (Okl.) 166 P. 901.

A judgment procured by false or perjured testimony is not open to a direct attack on that ground, when the testimony relates to an issue raised by the pleadings and tried out at the hearing. *McCormick v. McCormick*, 107 P. 546, 82 Kan. 31.

⁴² Where plaintiff had removed the insured goods from the state before the fire, and recovered on her testimony that they had been burned, and the defendant, relying on plaintiff's allegations, sought only to minimize the amount of plaintiff's loss, plaintiff's perjured testimony constituted a fraud authorizing vacation of the judgment under Rev. Laws 1910, § 5267, subd. 4. *El Reno Mut. Fire Ins. Co. v. Sutton*, 137 P. 700, 41 Okl. 297, 50 L. R. A. (N. S.) 1064.

⁴³ *Haverty v. Haverty*, 11 P. 364, 35 Kan. 438.

If a plaintiff is guilty of so influencing the attorney of the defendant, by the payment of money, without the knowledge or consent of his client, as to make it the interest of the attorney that plaintiff should obtain a judgment against his client, and such attorney, in the absence of his client, does not make any resistance to the rendition of the judgment in favor of the plaintiff, the judgment may be set aside. *Haverty v. Haverty*, 11 P. 364, 35 Kan. 438.

on a clear showing that rights of the defeated party have been lost by unavoidable casualty or misfortune.⁴⁴

A party seeking to vacate a judgment for unavoidable casualty or misfortune must show that he is not himself negligent in permitting the default and that no reasonable diligence could have prevented the trial or judgment.⁴⁵

A judgment will not be vacated because the defendant or his attorney was not notified of the time the case was set for trial.⁴⁶

The negligence of the attorney cannot be considered such un-

⁴⁴ *Lindsey v. Goodman*, 57 Okl. 408, 157 P. 344.

Where a party and his attorney are absent at time set for hearing cause, because of unavoidable casualty, an adverse judgment should be set aside on proper terms as to costs and another trial had, when casualty is duly shown to court, together with showing of meritorious cause of action or defense. *Cohen v. Cochran Grocery Co.* (Okl.) 178 P. 642.

⁴⁵ *Forest v. Appelget*, 55 Okl. 515, 154 P. 1129; *Gooden v. Lewis*, 101 Kan. 482, 167 P. 1133.

An application and affidavits for a continuance were received by mail on the same day a case was assigned for trial, but after a judgment had been rendered, in the absence of defendants, and it appeared that the term of court convened on the first Monday in September, and the case was assigned for trial on the 24th day of that month. Held, that while the showing was sufficient to have entitled defendants to a continuance, if presented in proper time, they did not exercise due diligence in presenting such application, especially when the cause for a continuance was known at or near the commencement of the term of court; and the court did not abuse its discretion in refusing to grant defendants a new trial. *Knauber v. Watson*, 32 P. 349, 50 Kan. 702.

Where judgment has been rendered against a defendant, and after its rendition, and at the same term, a motion for a new trial is granted, conditioned that defendant shall pay the costs then accrued, and the defendant gives the money to her attorney, with directions to pay the costs, and such attorney fails to pay the same within the time fixed by the court, and the judgment becomes final, and afterwards a petition is filed to vacate such judgment under section 588 of our Code of Civil Procedure, held, the negligence of the attorney cannot be considered such unavoidable casualty or misfortune as prevented the party from defending, and that a demurrer to such petition was properly sustained by the trial court. *Wynn v. Frost*, 50 P. 184, 6 Okl. 89.

Allegations in petition to vacate judgment held not to show unavoidable casualty or misfortune preventing party from defending within Code Civ. Proc. § 596 (Gen. St. 1915, § 7500), relating to district court's power to vacate judgment. *Gooden v. Lewis*, 101 Kan. 482, 167 P. 1133.

⁴⁶ *Tracy v. State*, 60 Okl. 109, 159 P. 496.

Information was obtained at the clerk's office that led defendant to believe his case had not been assigned for trial. Plaintiff's counsel knew defendant denied all liability. Plaintiff had received \$400 on the account while the suit was pending, but no allowance was made therefor when judgment was ren-

avoidable casualty or misfortune as prevented the party from defending.⁴⁷ When a judgment is sought to be vacated under subdivision 4 of the statute, the defense on the part of the defendant so applying must be affirmatively alleged in the petition; but, where the judgment or order is to be vacated under the provisions of subdivision 3 of such section, an affirmative averment as to the defense is not necessary.⁴⁸

§ 1306. — During term

Judgments or orders of the court are under control of the court, pronouncing them, during the term at which they are rendered or entered, and may be set aside, vacated, or modified by the court.⁴⁹

rendered against defendant in his absence. Held, that the judgment should be set aside. *Nash v. Denton*, 51 P. 896, 59 Kan. 771.

It is not error to overrule a motion to set aside a judgment on the ground that defendant was surprised because court convened at 9 o'clock a. m., instead of 9:30, as his attorneys supposed. *Savage v. Dinkler*, 72 P. 366, 12 Okl. 463.

⁴⁷ *Wagner v. Lucas*, 79 Okl. 231, 193 P. 421.

⁴⁸ *Leforce v. Haymes*, 105 P. 644, 25 Okl. 190.

⁴⁹ *Harn v. Boyd* (Okl.) 170 P. 505; *Sylvester v. Riebolt*, 164 P. 176, 100 Kan. 245; *Simpkins v. Parsons*, 50 Okl. 786, 151 P. 588; *J. R. Watkins Medical Co. v. Lizar*, 78 Okl. 302, 190 P. 552; *Phillip Carey Co. v. Vickers*, 38 Okl. 643, 134 P. 851; *Todd v. Orr*, 44 Okl. 459, 145 P. 393; *North v. Hooker* (Okl.) 172 P. 77; *Phillip Carey Co. v. Vickers*, 38 Okl. 643, 134 P. 851; *Simpkins v. Parsons*, 50 Okl. 786, 151 P. 588; *Parks v. Haynes*, 52 Okl. 63, 152 P. 400; *Spottsville v. Western States Portland Cement Co.*, 146 P. 356, 94 Kan. 258.

This rule will not be applied so as to enable a party to take advantage of his own negligence or misconduct, to the injury of other parties. *Cornell University v. Parkinson*, 53 P. 138, 59 Kan. 365.

Courts of general jurisdiction have inherent power to set aside a judgment and grant a new trial for prejudicial error, at the same term at which the judgment is rendered. *Scanland v. Board of Com'rs of Ottawa County*, 56 Okl. 56, 155 P. 898.

A district court can, during term, set aside any judgment rendered at the term, and render such judgment as should have been rendered. *Brown v. Walker* (Okl.) 174 P. 1050.

Judgments, decrees, or other orders of court, however conclusive, are under control of the court which pronounces them during term at which they are rendered or entered of record, and may during that time be set aside or vacated. *North v. Hooker* (Okl.) 172 P. 77.

During the term at which a judgment is rendered the court has power to amend it, either in form or substance, to the extent that the facts may warrant and justice require. *Chapman v. Western Irrigation Co.*, 90 P. 284, 75 Kan. 765. After term, a judgment against one defendant cannot be modified by

The court has a wide discretion,⁵⁰ and such action may be taken by the court though no written motion has been filed therefor.⁵¹ Where the question submitted is one of law upon which the argument has been heard, the court may, on setting aside an erroneous judgment on its own motion render the proper judgment without rehearing the case.⁵²

After special findings are filed and judgment rendered, the pow-

substituting another corporation as defendant and entering judgment against it under the guise of an amendment. *Id.*

District court has no power to vacate or modify its judgment for "an irregularity in obtaining a judgment or order" under Rev. Laws 1910, § 5267, subd. 3, on motion filed after adjournment of term at which judgment was rendered and entered. *McCornack v. Fleming* (Okl.) 172 P. 952; *McAdams v. Latham*, 96 P. 584, 21 Okl. 511.

After a final judgment has been rendered, and the term expires, there must be a substantial compliance with the statute, in order to give the court further jurisdiction over the same. *McAdams v. Latham*, 96 P. 584, 21 Okl. 511.

⁵⁰ The district court in the furtherance of justice has a wide discretion in the matter of opening judgments and modifying proceedings had before it, if done at the same term, and if all the parties are present and no advantage is taken of either party. *Hogan v. Bailey*, 110 P. 890, 27 Okl. 15; *Barnes v. Bruce*, 63 Okl. 270, 165 P. 405; *Wood v. Stell*, 112 P. 1004, 27 Okl. 595.

The setting aside of certain orders and judgments in a suit to restrain the collection of taxes, made on application filed at the term at which they were made and entered, held proper. *Blake v. Baker* (Okl.) 167 P. 329.

Where judgment was rendered for defendant on the pleadings for failure of plaintiff's attorney to file a verified reply required to make an issue on a receipt attached by copy to defendant's answer in a personal injury case, and on the following day plaintiff appeared by newly employed counsel and moved that the judgment be vacated and a new trial granted, held, that the court did not abuse its discretion in granting the motion. *Phillip Carey Co. v. Vickers*, 38 Okl. 643, 134 P. 851.

⁵¹ The court on its own motion may set aside an erroneous judgment during the term at which it was rendered. *Georgia Home Ins. Co. v. Halsey*, 133 P. 202, 37 Okl. 678.

A judgment of a court of general common-law jurisdiction may be set aside, vacated, or modified by the court during the term, though no written motion is filed therefor. *Barker v. National Oil & Development Co.*, 49 Okl. 782, 154 P. 518.

Defendants in attachment having offered to confess judgment for the debt, the court rendered judgment therefor, and also sustained the attachment proceedings. Held that, his attention being called to the matter, he could, in his discretion, set aside the judgment as to the attachment, and let the rest stand. *Jaffray v. Wolf*, 1 Okl. 312, 33 P. 945.

⁵² *Georgia Home Ins. Co. v. Halsey*, 133 P. 202, 37 Okl. 678.

er of the court is exhausted, except that it may at any time before the close of the term grant a new trial.⁵³

Where service is had on a nonresident defendant by publication, and the affidavit for publication fails to state that the property therein described has been attached,⁵⁴ or the affidavit purports to have been made on information and belief, it may, after judgment, be amended to show the truth.⁵⁵

A proof of publication may be amended.⁵⁶

Where a defendant has been properly served with summons, he is in court for every purpose connected with the action, and must take notice of an answer and cross-petition filed by a defendant who, on his own application, was made a party after the answer day named in the summons, and he cannot have a judgment on the cross petition vacated on the ground that the summons did not show the cross petitioner to be a party.⁵⁷

§ 1307. — After term

Courts of general common-law jurisdiction have control of all judgments, and may vacate them during the term at which they are rendered, and a motion invoking such power filed during such term gives the courts full power to act at a subsequent term.⁵⁸

⁵³ *Brown v. Capital Townsite Co.*, 96 P. 587, 21 Okl. 586.

⁵⁴ Where the affidavit for service by publication on a nonresident defendant fails to state expressly that the property therein described has been attached and is sought to be subjected to plaintiff's debt, as provided by Code Civ. Proc. § 72, but it may be inferred from what is stated, the affidavit is only voidable, and may be amended, even after judgment, so as to embody such statement, and when so amended it will relate back to the commencement of the action. *Long v. Fife*, 25 P. 594, 45 Kan. 271, 23 Am. St. Rep. 724.

⁵⁵ An affidavit for publication was correct, except that, at its close, it purported to have been made on information and belief. Held, that this qualified the positive declarations, and made the affidavit defective, but not void, and, after judgment, it might be amended. *Harrison v. Beard*, 2 P. 632, 30 Kan. 532.

⁵⁶ Where service is made by publication, in an action under Comp. Laws 1879, § 72, c. 80, and the notice is regular in form, but it appears from the proof of publication that the notice was first published only 37 days before judgment, such proof may, after judgment, be amended, in order to show that the notice was in fact first published 44 days before date of judgment. *Hackett v. Lathrop*, 14 P. 220, 36 Kan. 661.

⁵⁷ *Curry v. Janicke*, 29 P. 319, 48 Kan. 168.

⁵⁸ *Blake v. Baker* (Okl.) 167 P. 329; *Phillip Carey Co. v. Vickers*, 38 Okl. 643, 134 P. 851.

The district court held to be without jurisdiction at a subsequent term to

Where the trial court, having jurisdiction both of the parties and the subject-matter, regularly renders a judgment, it is without power, after the expiration of the term, to set such judgment aside because of an error.⁵⁹ It has no jurisdiction to set aside on motion a final order or decree after the expiration of the term at which

vacate a judgment or order of voluntary dismissal and reinstate the cause under Rev. Laws 1910, § 5267, subd. 3, without a substantial compliance with section 5268 (section 6095), relative to proceedings to correct mistakes, omissions or irregularities by motion on notice. *Rollow v. Frost & Saddler*, 54 Okl. 578, 154 P. 542. Where an action to quiet title and cancel a conveyance is dismissed on plaintiff's application pending a demurrer to the petition, such dismissal is a judgment or order, within Rev. Laws 1910, § 5267, authorizing the district court to vacate or modify its own judgments or orders. *Id.* Where the district court at a subsequent term made an attempted order vacating a judgment of voluntary dismissal and reinstating the cause, without written notice or application and reasonable notice to the adverse party, held, that there was not a substantial compliance with Rev. Laws 1910, § 5268, and that the order was therefore void. *Id.*

Under Rev. Laws 1910, § 5267, subd. 3, the district court has no power to modify its judgment on account of an irregularity upon a motion filed after adjournment of the term at which judgment was rendered and entered. *Guy v. Guy*, 50 Okl. 233, 150 P. 1058.

Under Rev. Laws 1910, § 5267, subd. 3, the district court has no power to vacate its judgment on account of an irregularity upon a motion filed after adjournment of the term at which judgment was rendered and entered. *Guy v. Guy*, 50 Okl. 233, 150 P. 1058; *Continental Gin Co. v. Arnold* (Okl.) 167 P. 613, L. R. A. 1918B, 511.

The discretionary power of the court to vacate its own judgment held not lost by continuance of the motion to vacate, until the term of court next after that at which the judgment was rendered and the motion filed. *Parks v. Haynes*, 52 Okl. 63, 152 P. 400.

After final adjournment of term at which final judgment is rendered, compliance with Rev. Laws 1910, §§ 5267-5269, must be shown to give court jurisdiction to vacate judgment. *Maston v. Chandler Building & Loan Ass'n*, 61 Okl. 230, 157 P. 366. Under Rev. Laws 1910, § 5268, motion which does not seek to correct mistakes or irregularities of clerk or irregularities in obtaining judgment and that is not made within first three days of next succeeding term after judgment was rendered is without merit. *Id.*

Under Wilson's Rev. & Ann. St. 1903, § 4760, the district court has power to vacate or modify its judgments at or after the term at which such judgment or order was made, and where allegations to vacate are based on chapter 66, § 562, division 3, for irregularity in obtaining the judgment, and a motion to vacate is made at the same term at which the judgment is rendered, on reasonable notice, the court has jurisdiction, though the motion is not decided until a subsequent term. *Stark Bros. v. Glaser*, 91 P. 1040, 19 Okl. 502.

⁵⁹ *National Surety Co. v. S. H. Hanson Builders' Supply Co.*, 64 Okl. 59, 165 P. 1136.

it was rendered unless steps to secure such action have been taken during the term.⁶⁰

In the absence of specific statutory authority, a judge of a court of record has no jurisdiction, sitting in chambers to set aside a judgment.⁶¹

A county court has only such power to review or vacate its orders as is conferred by statute.⁶²

Where the special findings require the entry of a judgment thereon notwithstanding the general verdict, a judgment entered on such general verdict is irregular and may be set aside at a subsequent term.⁶³

After the term, mistakes in descriptions and names of parties and the like, in a judgment may be corrected and record of the judgment changed to conform with the decision originally made, but after the expiration of the term, a judgment actually rendered must stand until it is vacated or set aside in a proceeding for that purpose.⁶⁴

⁶⁰ Philip Carey Co. v. Vickers, 38 Okl. 643, 134 P. 851.

Where a motion to vacate a judgment was filed in the superior court during the term at which the judgment was rendered, and the court continued the motion to the next term, it had jurisdiction to pass upon and sustain same. Philip Carey Co. v. Vickers, 38 Okl. 643, 134 Pac. 851.

A judgment not void cannot be set aside on motion after expiration of the term, unless attacked in due time pursuant to some express statutory procedure. Schultz v. Stiner, 155 P. 1073, 97 Kan. 555, rehearing denied 157 P. 265, 98 Kan. 45.

⁶¹ Releford v. State, 45 Okl. 433, 146 P. 27.

A district judge at chambers has no jurisdiction to set aside a judgment theretofore rendered. W. L. Moody & Co. v. Freeman & Williams, 104 P. 30, 24 Okl. 701. Jurisdiction cannot be conferred by agreement of the parties on a district judge at chambers to set aside a judgment theretofore rendered. Id.; In re Rex, 78 P. 404, 70 Kan. 221.

⁶² Ozark Oil Co. v. Berryhill, 143 P. 173, 43 Okl. 523; Rev. Laws 1910, §§ 5267, 5275.

An order of county court at a subsequent term vacating a judgment rendered at a former term, without complying with Rev. Laws 1910, §§ 5267-5269, in regard thereto, is void. W. T. Rawleigh Medical Co. v. Eggers (Okl.) 178 P. 108.

The county court having authority to set aside its judgments on statutory grounds at a subsequent term, the same may be set aside by consent of parties. Harrison v. Osborn, 31 Okl. 103, 114 P. 331.

⁶³ Seeds v. American Bridge Co., 75 P. 480, 68 Kan. 522.

⁶⁴ Chapman v. Western Irrigation Co., 90 P. 284, 75 Kan. 765.

A district court can correct the entry of a judgment, so as to cause it to

Where a judge discovers that his judgment is void, he may render any other judgment warranted by the law and evidence that will give the case a legal and final ending.⁶⁵

The court may correct its record by a nunc pro tunc entry of proceedings which through accident, mistake, or neglect were not entered of record.⁶⁶

§ 1308. Common-law powers

The inherent common-law power of courts over their judgments during the term and the common-law rights of parties to move to set same aside in nonjury cases is not impaired by Rev. Laws 1910, §§ 4728, 5267, 5269-5275, or by the statute prescribing grounds for new trials.⁶⁷

§ 1309. Want of jurisdiction

A motion to strike from records of district court an abstract of justice of the peace court involves a review of validity of judgment,

speaking the truth, after the expiration of the term at which it was rendered. *Christisen v. Bartlett*, 84 P. 530, 73 Kan. 401, rehearing denied 85 P. 594, 73 Kan. 401; *Locke v. Cope*, 136 P. 416, 94 Kan. 137; *Birmingham v. Leonhardt*, 43 P. 996, 2 Kan. App. 513; *Co-wok-ochee v. Chapman*, 76 Okl. 1, 183 P. 610; *Cubitt v. Cubitt*, 86 P. 475, 74 Kan. 353; *Jones v. Gallagher*, 64 Okl. 41, 166 P. 204, 10 A. L. R. 518.

It is the duty of the clerk of the district court to keep a journal in which to record the correct judgment rendered; and, in case of a dispute as to what was decided by the court, the court has the power to change or correct the record. *State v. Linderholm*, 135 P. 564, 90 Kan. 489.

Where one of the parties is improperly designated by the clerk in entering a judgment, it is competent for the court at a subsequent term to correct the entry so that it shall correspond with the name stated in the pleadings, and with the judgment actually rendered. *Southern Kan. Ry. Co. v. Brown*, 24 P. 1100, 44 Kan. 681.

An error, occasioned by the clerk wrongfully entering a judgment for a sum not found by the verdict nor warranted by the pleadings, may be cured by remittitur. *Redinger v. Jones*, 75 P. 997, 68 Kan. 627.

⁶⁵ *Dunn v. Carrier*, 40 Okl. 214, 135 P. 337.

⁶⁶ *Faler v. Culver*, 146 P. 333, 94 Kan. 123.

A claim against an estate was duly allowed, and ordered to be paid, but the probate judge neglected to make a complete entry of the allowance and order of payment. After payment had been made, and another probate judge had succeeded to the office, a nunc pro tunc order was made, authorizing the entry of the allowance and order for payment made by the former judge. Held, that the court had power to make such order. *Brooks v. Brooks*, 35 P. 215, 52 Kan. 562.

⁶⁷ *Richardson v. Howard*, 51 Okl. 240, 151 P. 887.

Art. 6) REVERSING, VACATING OR MODIFYING §§ 1309-1311

and a district court is without jurisdiction to determine the motion.⁶⁸

After judgment has been rendered it was competent for the court at the same term to set the judgment aside on its own motion, having ascertained that the complainant was mentally incompetent and that the court was without jurisdiction.⁶⁹

§ 1310. Other remedies

The power of the trial courts to vacate or modify their judgments or orders at or after the term does not authorize setting aside judgment or final order at subsequent term for errors of law reviewable on motion for new trial at former term.⁷⁰

A petition to vacate will not lie where the ground alleged is unavoidable casualty preventing a motion for new trial within three days, since unavoidable casualty is ground for filing a motion for new trial after expiration of three days from rendition of judgment.⁷¹

Defendants' remedy to reverse a judgment by proceedings in error and their remedy to proceed to open the judgment under Rev. Laws 1910, § 4728, being cumulative, the right to proceed under such section was not waived by the commencement of proceedings in error.⁷²

§ 1311. Errors—Irregularities

A refusal to set aside a judgment, rendered without trial, when the issues were not made up, whereby substantial rights of parties were adversely determined, is ground for reversal.⁷³

A judgment which is outside of the issues, and on a matter not submitted for determination is a nullity, and may be set aside at any time on motion of defendant.⁷⁴

A judgment void on its face—that is when its invalidity is shown by the judgment roll—may be vacated by the court rendering it on motion within or after three years.⁷⁵

⁶⁸ Boardman Co. v. Cobb, 62 Okl. 165, 162 P. 729.

⁶⁹ State v. Jehlik, 71 P. 572, 66 Kan. 301, 61 L. R. A. 265.

⁷⁰ McCornack v. Fleming (Okl.) 172 P. 952.

⁷¹ Aetna Building & Loan Ass'n v. Smith (Okl.) 175 P. 833.

⁷² Siddell v. McMillan, 45 Okl. 800, 146 P. 911.

⁷³ United States Fidelity & Guaranty Co. v. Fidelity Trust Co., 49 Okl. 398, 153 P. 195; General Electric Co. v. Sapulpa & I. Ry. Co., 49 Okl. 376, 153 P. 189.

⁷⁴ Gille v. Emmons, 48 P. 569, 58 Kan. 118, 62 Am. St. Rep. 609.

⁷⁵ Pettis v. Johnston, 78 Okl. 277, 190 P. 681.

Journal entries of judgment reciting service, filing of answers, setting for trial, and ordering of judgment for plaintiff, do not show that judgment was rendered on the pleadings, and relief cannot be granted for errors during the trial on motion to vacate the judgment.⁷⁶

A defendant, served with summons and failing to answer or appear at the trial for any purpose, cannot, after judgment, either on a motion or a petition, have the judgment set aside and vacated for alleged errors committed during the trial of the cause.⁷⁷

A judgment rendered in vacation upon a trial and submission at the preceding term should be set aside, and a judgment should be rendered at the next term.⁷⁸

Where the court after trial renders judgment and at the same term sets the same aside, it is error at a subsequent term to render judgment therein without another trial.⁷⁹

A judgment will not be set aside because plaintiff's cost bond is void, where the defendant made a general appearance.⁸⁰

§ 1312. — Law

The power of trial courts to vacate or modify their judgments at or after the term does not authorize the setting aside of a judgment at a subsequent term for mere errors of law which might have been corrected by motion for a new trial.⁸¹

§ 1313. — Pleading

Where a court had jurisdiction of the parties, subject-matter, and particular question adjudicated, its judgment will not ordinarily be

⁷⁶ Kaufman v. Grow, 59 Okl. 193, 158 P. 300.

⁷⁷ Sexton v. Rock Island Lumber & Mfg. Co., 30 P. 164, 49 Kan. 153.

⁷⁸ Nason v. Patten, 129 P. 138, 88 Kan. 472.

⁷⁹ Brown v. Capital Townsite Co., 96 P. 587, 21 Okl. 586.

⁸⁰ State Bank of St. John v. Gruver, 51 P. 915, 7 Kan. App. 695.

⁸¹ Clark v. Roman, 50 Okl. 780, 151 P. 479.

In a trial at which the defendant was represented by counsel, a judgment of a court having jurisdiction for plaintiff is not void for mistake of law, and will not be vacated on petition after term Haggerty v Terwilliger (Okl) 169 P. 872; Martindale v. Battey, 84 P. 527, 73 Kan. 92; Peirson v. Benedict, 48 P. 996, 5 Kan. App. 790.

The power given by Rev. Laws 1910, § 5274, to vacate or modify judgments, does not authorize the setting aside of a judgment at a subsequent term for mere errors of law subject to review on motion for new trial when judgment was rendered. Gill v. Executive Committee of Home Missions of Presbyterian Church, 52 Okl. 553, 152 P. 812.

set aside on the ground that the petition failed to state a cause of action, where no appeal was prosecuted therefrom and where the petition was amendable.⁸²

§ 1314. Operation and effect

Where an order or judgment is set aside at the term at which it is made, the parties are remitted to the remedies formerly had, as though the order or judgment had not been made.⁸³

The rights of one who purchases land on the faith of a judgment of a court of competent jurisdiction are not disturbed by a subsequent modification of such judgment.⁸⁴

DIVISION II.—PROCEEDINGS

§ 1315. Motion—Form

"The proceedings to correct mistakes or omissions of the clerk, or irregularity in obtaining a judgment or order, shall be by motion,

⁸² Bell v. Ford (Okl.) 173 P. 524.

In trial at which defendant was represented by counsel, a judgment of a court having jurisdiction for plaintiff is not void for amendable defect or insufficiency of petition, and will not be vacated on such grounds on petition after term. Haggerty v. Terwilliger (Okl.) 169 P. 872.

Where defendant was duly summoned, it was compelled to take notice of all subsequent proceedings, and, if aggrieved by the court's action, to appeal, as it could not wait until all remedy by appeal had become unavailable, and then ask the court to set the judgment aside because the complaint was demurrable for want of facts. Board of Com'rs of Wyandotte County v. Equitable Inv. Trust Co., 103 P. 996, 80 Kan. 492.

⁸³ Todd v. Orr, 44 Okl. 459, 145 P. 393.

A judicial order setting aside a judgment cannot be attacked by motion filed more than three years afterwards, where no objection was made or appeal taken. Error in vacating a judgment, which the court has jurisdiction to do, cannot be availed of by a litigant, unless it be appealed from or otherwise legally reviewed. Todd v. Orr, 44 Okl. 459, 145 P. 393.

⁸⁴ Pritchard v. Madren, 2 P. 691, 31 Kan. 38.

Where plaintiff obtained judgment in action to quiet title, and no motion for new trial was filed, and the term adjourned, and judgment became final, and then conveyed to a purchaser for value without notice, vacation of judgment in subsequent independent action under Rev. Laws 1910, § 5269, did not divest purchaser's title in view of sections 4728, 5176, and 5271. Van Noy v. Jackson (Okl.) 171 P. 462.

Rights of bona fide purchaser of realty who, in good faith for valuable consideration and in reliance on a judgment quieting his grantor's title, acquires the realty by warranty deed, are protected by Code Civ. Proc. § 83 (Gen. St. 1909, § 5876), although judgment may be opened for further consideration as to rights of original parties. Whiteman v. Cornwell, 164 P. 280, 100 Kan. 234.

upon reasonable notice to the adverse party or his attorney in the action. The motion to vacate a judgment, because of its rendition before the action regularly stood for trial, can be made only in the first three days of the succeeding term." ⁸⁵

Both at common law and under statutes providing that a void judgment may be vacated at any time on motion of a party or any person affected thereby, a court at any time during the term at which any void judgment is rendered may set it aside without no-

⁸⁵ Rev. Laws 1910, § 5268.

After the action has been disposed of, and the term has ended, special notice is necessary on a motion to amend the record by filing a new proof of publication. *Hammerslough v. Hackett*, 1 P. 41, 30 Kan. 57.

When a motion is made to vacate or modify an order 20 days after the order was made, and no service of such motion had upon the opposite party, it is no error to overrule such motion. *Byington v. Call*, 13 P. 738, 36 Kan. 455.

A motion, filed more than nine years after an order approving a receiver's final report, to set aside such order because receiver fraudulently failed to account for certain assets, which did not comply with Rev. Laws 1910, § 5269, was properly denied. *Farmers' Hardware & Implement Co. v. Parlin & Orendorff Co.* (Okl.) 176 P. 888.

This statute applies to a motion to vacate as void a decree in foreclosure and a sale thereunder. *Harding v. Gillett*, 107 P. 665, 25 Okl. 199.

Motion to vacate judgment held properly denied. *Baker v. Stonebraker*, 121 P. 255, 32 Okl. 88.

By the express provisions of Code Civ. Proc. §§ 535, 568, 569, 575, a judgment irregularly obtained or a void judgment may be corrected or vacated on motion, on reasonable notice to the adverse party or to his attorney of record in the action. *First Nat. Bank v. Wm. B. Grimes Dry Goods Co.*, 26 P. 56, 45 Kan. 510.

On an application for a writ of coram nobis, the court will not weigh conflicting evidence. *Dobbs v. State*, 65 P. 658, 83 Kan. 321. The application for a writ of error coram nobis must show that, if the facts on which the error is predicated had been presented to the trial court, the judgment complained of could not have been entered. *Id.* Newly-discovered material evidence cannot be made the basis for a writ of coram nobis. *Id.* The writ of coram nobis cannot be made the foundation for the examination of an alleged error of fact, where, by the exercise of all reasonable diligence, such fact might have been presented to the court on the trial, or on a motion for a new trial. *Id.*

After the close of the term at which a sheriff's sale was confirmed it is error for a court to set aside the order of confirmation on motion without notice to the opposite party. *Alliance Trust Co. v. Barrett*, 50 P. 465, 6 Kan. App. 689.

Service of notice of application to open judgment under Code Civ. Proc. § 83 (Gen. St. 1909, § 5676), which under section 558 (section 6153) must be in writing, may be by registered letter mailed to plaintiff's attorney of record, and his signature on the return card acknowledging receipt thereof will be considered prima facie proof of such service. *Taylor v. Woodbury*, 120 P. 367, 86 Kan. 236.

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tice, and may do so at any time after the term, upon reasonable notice given to the parties affected by the order.⁸⁶

Where the defendant incorporates nonjurisdictional grounds in a motion to set aside a judgment for defective service, he places himself in the same position as though he had appeared at the trial.⁸⁷

MOTION TO VACATE JUDGMENT

(Caption.)

Comes now the above named defendant, C. D., appearing specially and for the purpose of this motion only, and moves the court to vacate and set aside the judgment rendered herein on the —— day of ——, 19——, for the following reasons, to wit:

1. The court had no jurisdiction of the subject-matter of this action.

2. The court had no jurisdiction of the person of this defendant.

3. This defendant never appeared in said action, and the summons in said action was served upon them in —— county, Oklahoma, as will fully appear from the records and files in said cause.

4. Said judgment is absolutely void upon the face of the record, as no appearance was ever made in said cause or summons served upon said defendant in —— county, Oklahoma, as appears fully from the record in said cause.

X. Y., Attorney for Defendant,

For the Purpose of This Motion Only.

§ 1316. Petition—Form

"The proceedings to vacate or modify the judgment or order, on the grounds mentioned in subdivisions four, five, six, seven, eight and nine, of the second preceding section, shall be by petition, verified by affidavit, setting forth the judgment or order, the grounds to vacate or modify it, and the defense to the action, if the party applying was defendant. On such petition, a summons shall issue and be served as in the commencement of an action."⁸⁸

⁸⁶ *Harding v. Gillett*, 107 P. 665, 25 Okl. 199.

⁸⁷ *Schultz v. Stiner*, 155 P. 1073, 97 Kan. 555, rehearing denied 157 P. 265, 98 Kan. 45.

⁸⁸ Rev. Laws 1910, § 5269.

Where an action is brought under Wilson's Rev. & Ann. St. 1903, § 4760, to vacate or modify a judgment in the same court, and between the same parties, as the original action, and is given the same title, the fact that the clerk

A petition, seeking to vacate a judgment may be filed in the original action in which the judgment was rendered.⁸⁹

An answer filed in connection with an application to open a judgment rendered on service by publication need not present a defense coextensive with the entire demand, or with every demand of the petition, but the defense must be complete and perfect, so as to overcome at least the portion of plaintiff's claim against which it is directed.⁹⁰

of the court designates the action by a different number than that given the original action does not prevent the court from determining the same, though paragraph 4762 is susceptible of the construction that the papers should be filed with those of the original action. *Holt v. Holt*, 102 P. 187, 23 Okl. 639.

If plaintiff was defrauded in the assignment of alimony because her husband had transferred property before the divorce, her remedy was to set aside the judgment awarding the divorce and alimony, and not to sue his grantee to set aside the conveyance. *Kessinger v. Schrader*, 98 P. 236, 79 Kan. 23.

Where a petition to vacate a judgment and for a new trial under section 4464, St. 1893, states, as a defense to an award of damages in the sum of \$400 for withholding possession of land and waste committed thereon, that the real damage for waste was but \$25, and the sum awarded as damages for withholding possession is not shown, and such award was made by a referee, and the findings of fact of the referee are not attached to or set up in the petition for a new trial, the petition does not state such facts as will justify a court in vacating the judgment, as the court should presume that the principal award of damages grew out of the withholding of the premises. *Provins v. Lovi*, 50 P. 81, 6 Okl. 94.

Verification.—Petition which does not describe judgment to be vacated, and is not verified, does not comply with Rev. Laws 1910, § 5269. *Maston v. Chandler Building & Loan Ass'n*, 61 Okl. 230, 157 P. 366; *Jenkins v. Brown*, 46 Okl. 132, 148 P. 697; *Crowley-Southerland Commission Co. v. Husband*, 140 P. 1144, 42 Okl. 77; *Allen v. Gaston* (Okl.) 189 P. 183.

Defense necessary.—Application to vacate under Wilson's Rev. & Ann. St. Okl. 1903, §§ 4760-4763, inclusive, for unavoidable casualty or misfortune, must set forth a valid defense. *Atchison, T. & S. F. Ry. Co. v. Schultz*, 103 P. 756, 24 Okl. 365.

A defendant to vacate a judgment must set up a valid defense. *Tracy v. State*, 60 Okl. 109, 159 P. 496.

Fraud.—A motion is not the proper method by which to seek vacation of a judgment alleged to have been obtained by fraud. *Thompson v. Caddo County Bank*, 82 P. 927, 15 Okl. 615.

To vacate a judgment on the ground of fraud, the applicant should set forth the judgment, and should show that the applicant had then an existing and meritorious defense by stating the facts constituting his defense. *Sanford v. Weeks*, 31 P. 1088, 50 Kan. 339.

⁸⁹ *Roberts v. Hope*, 39 Okl. 173, 134 P. 434.

⁹⁰ *Williams v. Board of Com'rs of Kiowa County*, 88 P. 70, 74 Kan. 693.

PETITION TO VACATE JUDGMENT

(Caption.)

Comes now the said plaintiff, A. B., and respectfully represents and shows to the court:

1. That on the ——— day of ———, 19—, said defendant, C. D., filed a petition in the district court of ——— county, state of Oklahoma, in which said defendant, C. D., was plaintiff, and this plaintiff, A. B., was defendant, praying for judgment for the sum of ——— dollars; that a copy of said petition is hereto attached, marked Exhibit A, and made a part hereof.

2. That process was duly issued in said cause and served upon this plaintiff, the defendant in said action.

3. That, immediately upon being served with summons in said action, plaintiff went to the office of one X. Y., an attorney at law, in the city of ———, and practicing in all of the courts of said state, and retained and engaged said attorney to represent him in said action, and stated to said attorney his defense to said cause of action; that said X. Y. accepted said employment, and promised plaintiff herein that he would attend to said action, and would represent plaintiff therein, and would do all things necessary to be done to protect and care for the rights and interests of the plaintiff in said action; that several times following said agreement with said X. Y., and prior to the rendition of judgment in said action, he was informed by said X. Y. that he had made investigation of the facts of said action, and had prepared and filed an answer in said action, and had done all other things necessary to protect the rights and interests of this plaintiff in said action.

4. Plaintiff further alleges that on the ——— day of ———, 19—, being one of the days of the ———, 19—, term of said district court, the above named defendant procured a judgment of default to be entered against this plaintiff in said action, and, further, a judgment against this plaintiff in the sum of ——— dollars, and costs of suit, all without the knowledge and consent of this plaintiff; that a copy of said judgment is hereto attached, marked Exhibit B and made a part hereof.

5. Plaintiff further alleges that said ———, 19—, term of said court came to an end on the ——— day of ———, 19—; that he

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was not informed, nor did he know, that judgment had been entered in said cause until several days thereafter, to wit, about the ——— day of ———, 19—; that he then also learned that said X. Y. had not made any appearance whatever in said action on the part of this plaintiff, nor had he prepared or filed any answer in said action for this plaintiff, but had wholly failed and neglected to perform any part of his duties as attorney for this plaintiff in said action.

6. Plaintiff further alleges that he relied wholly and implicitly upon the agreement made with said X. Y. to represent him in said action, and to interpose his defense therein, and relied upon the statement made to him by said X. Y., prior to the rendition of judgment in said action, that he had done all things necessary for the protection of the rights of this plaintiff therein.

7. Plaintiff further alleges that he has a good and valid defense to the cause of action alleged in the petition in said action; that he submits and files herewith a full and complete answer to said petition; that a copy of said answer, containing his said defense, is hereto attached, marked Exhibit C, and made a part hereof.

Wherefore plaintiff herein prays that the said judgment herein may be declared fraudulent and void, and that the same may be vacated and set aside, and said cause reinstated as fully as if said order and judgment had not been made and rendered, and that plaintiff be permitted to file his answer to said petition herein and to interpose his said defense to said petition.

G. H., Attorney for Petitioner.

(Verification.)

(Attach, as exhibits, copies of petition, judgment, and answer.)

§ 1317. Hearing

Mere irregularities in the method of obtaining the vacation of a judgment wrongfully obtained, and to which no objections were made, will not defeat the order vacating such judgment.⁹¹

It is not necessary that the trial court should set aside the judgment within the term, but it is necessary that it make some disposition of it.⁹²

⁹¹ Boston Loan & Trust Co. v. Organ, 36 P. 733, 53 Kan. 386.

⁹² Gooden v. Lewis, 101 Kan. 482, 167 P. 1133.

§ 1318. — Evidence

On a motion to vacate a judgment where the record shows an appearance by an attorney, but no service of summons upon the defendant, it may be shown by parol that the attorney was unauthorized to make the appearance.⁹³

In an action to set aside a judgment quieting title because obtained by fraud the defendant may show good faith by evidence as to information on which he based his claim of title, although not admissible to prove the title.⁹⁴

§ 1319. Trial of ground of review

"The court may first try and decide upon the grounds to vacate or modify a judgment or order before trying or deciding upon the validity of the defense or cause of action."⁹⁵

In a proceeding to set aside a judgment and to secure a new trial for newly discovered evidence, it is not error to sustain a demurrer to plaintiff's petition, where no diligence is shown, or the alleged evidence will be incompetent, or where the facts were within the knowledge of the plaintiff at the time of the trial.⁹⁶

§ 1320. Defense must be shown

"A judgment shall not be vacated on motion or petition, until it is adjudged that there is a valid defense to the action on which the judgment is rendered; or, if the plaintiff seeks its vacation, that there is a valid cause of action; and where a judgment is modified, all liens and securities obtained under it shall be preserved to the modified judgment."⁹⁷

It is a condition precedent to the vacation of a judgment for irregularities that it be determined there is a valid defense to the action or a valid cause of action.⁹⁸ However, a meritorious defense

⁹³ Wheatland Grain & Lumber Co. v. Dowden, 110 P. 898, 26 Okl. 441.

⁹⁴ Page v. Sawyer, 101 Kan. 612, 168 P. 878.

⁹⁵ Rev. Laws 1910, § 5270.

⁹⁶ Robbins v. Bank of Commerce of Walters, 118 P. 258, 29 Okl. 535.

⁹⁷ Rev. Laws 1910, § 5271.

⁹⁸ Holt v. Spicer (Okl.) 166 P. 149.

A motion by plaintiff to set aside a judgment against him was unavailing, under Code, § 568 (Gen. St. 1901, § 5054), where no showing was offered and no adjudication was made that plaintiff had a valid cause of action, as required by section 572 (section 5058). Brown v. Dann, 97 P. 862, 78 Kan. 211.

It is error to vacate a judgment until the defendant has presented to the

is not necessary on a motion to vacate a judgment void on its face, and vacation must be unconditional.”

§ 1321. Suspending proceedings—Bond—Forms

“The party seeking to vacate or modify a judgment or order, may obtain an order suspending proceedings on the whole or part thereof; which order may be granted by the court, or any judge thereof, upon its being rendered probable, by affidavit, or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified. On the granting of any such order, the court, or judge, may require the party obtaining any such order to enter into an undertaking to the adverse party to pay all damages that may be caused by granting of the same.”¹

**BOND TO SUSPEND PROCEEDINGS PENDING HEARING OF PETITION TO
VACATE JUDGMENT**

(Caption.)

Know all men by these presents, that we, A. B., as principal, and E. F. and G. H., as sureties, are held and firmly bound unto C. D., in the penal sum of ——— dollars, for the payment of which sum, well and truly to be made, we do bind ourselves and each of us, our heirs, executors and administrators, jointly and severally by these presents.

The condition of the above obligation is such that, whereas, in the district court of ——— county, in the above entitled cause, on the ——— day of ———, 19—, it was ordered, adjudged, and decreed by the court that (set forth judgment); and whereas, the above named principal has filed his petition in said cause praying that said judgment be vacated and set aside, and gives this undertaking in order that execution of said judgment shall be stayed and all proceedings thereon suspended, pending the determination of said cause on said petition to vacate and set aside said judgment:

Now, therefore, if the said above named principal shall pay all costs and damages that may be awarded against him by reason of such stay of execution and suspension of proceedings on said judg-

court a complete answer to the action on which the judgment was rendered. *Schuler v. Fowler*, 64 P. 1035, 63 Kan. 98.

⁹⁹ *Pettis v. Johnston*, 78 Okl. 277, 190 P. 681.

¹ Rev. Laws 1910, § 5272.

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ment, then this obligation to be void; otherwise, to remain in full force and effect.

Witness our hands this ——— day of ———, 19—.

A. B.

E. F.

G. H.

(Qualification of sureties.)

§ 1322. — Premature judgment

"When the judgment was rendered before the action stood for trial, the suspension may be granted, as provided in the last section, although no valid defense to the action is shown; and the court shall make such orders, concerning the executions to be issued on the judgment, as shall give to the defendant the same rights of delay he would have had if the judgment had been rendered at the proper time." ²

§ 1323. Time for application

"Proceedings to vacate or modify a judgment or order, for the causes mentioned in subdivisions four, five and seven, of Section 5267, must be commenced within two years after the judgment was rendered or order made, unless the party entitled thereto be an infant, or a person of unsound mind, and then within two years after removal of such disability. Proceedings for the causes mentioned in subdivisions three and six of the same section, shall be within three years, and in subdivision nine, within one year after the defendant has notice of the judgment. A void judgment may be vacated at any time, on motion of a party, or any person affected thereby." ³

² Rev. Laws 1910, § 5273.

³ Rev. Laws 1910, § 5274.

To vacate a judgment on the ground of fraud, the petition must be filed within two years from the rendition of the judgment, unless the petitioner is under disability. *Sanford v. Weeks*, 31 P. 1088, 50 Kan. 339; *Duphorne v. Moore*, 107 P. 791, 82 Kan. 159.

Where a real estate mortgage is foreclosed against the husband and others, and the land is sold to the judgment creditor for more than enough to satisfy the judgment and costs, and the sale is confirmed, and a sheriff's deed executed to the purchaser, and he sells and conveys the property by warranty deed to another, and afterwards it is ascertained that the title is in the wife, and an additional judgment is rendered that the surplus money shall

It is reversible error to strike from the files a petition to vacate a judgment on the ground that it was not filed within three days after judgment was rendered, or during the term at which judgment was rendered, or because it was filed in the original action.⁴

be paid to the wife, and that she shall be barred and estopped from ever claiming any right, title, or interest in or to the property, a motion by the wife, made nine years afterwards, to vacate the judgment, on the ground that the attorney was not authorized to appear for her, should be denied; the wife testifying that the attorney had no authority, and the attorney testifying that he had. *O'Flanagan v. Case*, 21 P. 96, 41 Kan. 183.

A void judgment may be vacated at any time on motion by a party or other person affected thereby. *Wheatland Grain & Lumber Co. v. Dowden*, 110 P. 898, 26 Okl. 441; *Choi v. Turk*, 55 Okl. 499, 154 P. 1000; *Nicoll v. Midland Savings & Loan Co. of Denver*, 96 P. 744, 21 Okl. 591; *Stumpff v. Price* (Okl.) 177 P. 109; *Caulk v. Lowe* (Okl.) 178 P. 101; *First Nat. Bank v. Wm. B. Grimes Dry Goods Co.*, 26 P. 56, 45 Kan. 510; *Nicholson v. Midland Savings & Loan Co. of Denver, Colo.*, 96 P. 747, 21 Okl. 598; *Phoenix Bridge Co. v. Street*, 60 P. 221, 9 Okl. 422.

A judgment may be vacated at any time without setting up a meritorious defense. *Wheatland Grain & Lumber Co. v. Dowden*, 110 P. 898, 26 Okl. 441.

A judgment which is irregular, but not void, will not be set aside on a motion filed four years after the judgment was rendered, but will be enforced. *School Dist. No. 63 v. Chicago Lumber Co.*, 21 P. 599, 41 Kan. 618.

Where defendant appeared and participated in the trial of an action, of the subject-matter of which the court had jurisdiction, and judgment was rendered against him, and he afterwards brought error, and his petition was dismissed, he cannot set aside the judgment obtained therein, on motion made several years thereafter, on the ground that it was invalid, since as to him it was res judicata. *Manley v. Chandler*, 63 P. 298, 10 Kan. App. 577.

District court had jurisdiction of action for mandatory injunctive relief to restrain defendant therein from interfering with plaintiff's possession of land, his improvements and cultivation, and for a writ of possession, and its judgment in plaintiff's favor was not void, and motion to vacate was properly denied. *Dickson v. Lowe* (Okl.) 163 P. 523.

⁴ *Roberts v. Hope*, 39 Okl. 173, 134 P. 434; Rev. Laws 1910, § 5035.

Where a motion was filed, during the term at which a judgment was rendered, to vacate the judgment because of its rendition before the action regularly stood for trial, and the motion was continued by order of the court to the next term, it was error for the court to refuse to hear such motion because notice thereof was not served within the first three days of such succeeding term. *Babcock Hardware Co. v. Farmers' & Drovers' Bank*, 32 P. 377, 50 Kan. 648.

Where petition alleges covenant of warranty and existence of paramount title, and answer admits execution of deed and sets up defensive matter, judgment reciting service and filing of answers and ordering recovery by plaintiffs is not void, and will not be set aside on motion more than three days after rendition on ground that petition does not state cause of action. *Kaufman v. Grow*, 59 Okl. 193, 158 P. 300.

(1298)

§ 1324. Applicable to what courts

"The provisions of this article shall apply to all the courts of record of the state, so far as the same may be applicable to the judgments or final orders of such courts." ⁵

⁵ Rev. Laws 1910, § 5275.

(1299)

ARTICLE VII

OPERATION, CONSTRUCTION, ENFORCEMENT, AND SATISFACTION

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Sections

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DIVISION I.—IN GENERAL

§ 1325. Establishes claim

"A judgment rendered against an executor or administrator, in the district court or before a magistrate, upon any claim for money against the estate of his testator or intestate, only establishes the claim in the same manner as if it had been allowed by the executor or administrator, and the judge of the county court, and the judgment must be that the executor or administrator pay, in due course of administration, the amount ascertained to be due. A certified transcript of the judgment must be filed in the county court. No execution must issue upon such judgment, nor shall it create any lien upon the property of the estate, or give to the judgment creditor any priority of payment."⁶

§ 1326. Death after verdict

"A judgment rendered against a decedent, dying after verdict or decision on an issue of fact, but before judgment is rendered thereon, is not a lien on the real property of the decedent, but is payable in due course of administration."⁷

§ 1327. For recovery of land

"In all cases where there is a recovery of land or any interest therein, adverse to any warranty deed thereto, the judgment by which such recovery is had shall not be effective or become the basis of an action against previous grantors, other than those who are parties thereto or have been notified in writing of the pendency thereof twenty days before such judgment is entered."⁸

A decree against a mortgagor, who before the institution of the foreclosure proceeding had conveyed his title to a third person, although it be in fraud of creditors, does not foreclose the rights of the grantee if such grantee is not made a party to the proceeding by valid service.⁹

⁶ Rev. Laws 1910, § 6350.

⁷ Rev. Laws 1910, § 6352.

⁸ Rev. Laws 1910, § 1165.

⁹ *Harding v. Gillett*, 107 P. 665, 25 Okl. 199.

A junior mortgagee, not made a party to a suit to foreclose a prior mortgage, is not affected by the decree therein.¹⁰

§ 1328. Surety

"Notwithstanding the recovery of judgment by a creditor against a surety, the latter still occupies the relation of surety."¹¹

§ 1329. Joint defendants

A personal judgment against two defendants is a joint and several obligation which the plaintiff may enforce against either at his option.¹²

§ 1330. Interpretation—Interest

A judgment open to two interpretations should be given that which will make it valid, rather than that which will make it invalid.¹³

In ascertaining what was determined by a judgment, the inquiry is not limited to the formal judgment, but extends to the pleadings, verdict, or findings.¹⁴

¹⁰ *Horr v. Herrington*, 98 P. 443, 22 Okl. 590, 20 L. R. A. (N. S.) 47, 132 Am. St. Rep. 648.

¹¹ Rev. Laws 1910, § 1054.

¹² *Richardson v. Painter*, 102 P. 1099, 80 Kan. 574, 133 Am. St. Rep. 224.

¹³ *Sharp v. McColm*, 101 P. 659, 79 Kan. 772.

A recital in the record in ejectment that a judgment on a first trial was vacated for good cause shown on application of the unsuccessful party, on notice, shows, in the absence of anything to the contrary, that the judgment was vacated as a matter of right. *Bank of Topeka v. Sadler*, 131 P. 585, 89 Kan. 321.

A journal entry reciting that the obligation sued on was contracted for erection of improvements on a home held to show a judgment that the homestead was not exempt under Const. art. 15, § 9, from sale for its payment. *Wichita Acetylene Mfg. Co. v. Haughton*, 155 P. 1078, 97 Kan. 528.

A money judgment either for \$800 or for \$694, as the plaintiff might elect, is not an "alternative judgment," which is one that by its terms might be satisfied by doing either of several acts at the election of the party or parties against whom the judgment is rendered and from whom performance is by the judgment required. *Henderson v. Arkansas* (Okl.) 176 P. 751.

A judgment rendered against "A. A., administrator of the estate of Z. T. A., deceased," is not a personal judgment, but a judgment against him in his official capacity. *Collier v. Gannon*, 137 P. 1179, 40 Okl. 275.

¹⁴ *Barnett v. Worrell*, 46 Okl. 60, 148 P. 133; *Sharp v. McColm*, 101 P. 659, 79 Kan. 772.

Where a judgment is so obscure or ambiguous as not to express the final determination of the court with sufficient accuracy, reference may be had to the pleadings and entire record. *Reaves v. Turner*, 94 P. 543, 20 Okl. 492;

"All judgments of courts of record and justices of the peace shall bear interest from the day on which they are rendered at the rate of six per cent. per annum: Provided, that when a rate of interest is specified in any contract, that rate shall continue until full payment is made, and any judgment rendered on any such contract shall bear the same rate of interest mentioned in the contract, which rate shall be specified in the judgment; but in no case shall such rate exceed the legal contract rate at the date of such obligation."¹⁵

§ 1331. Conclusiveness

A decree is final and conclusive as to all parties unless an appeal is taken or it is set aside or reversed in direct proceedings.¹⁶

Hale v. Independent Powder Co., 46 Okl. 135, 148 P. 715; *Clay v. Hildebrand*, 9 P. 466, 34 Kan. 694.

Decree held sufficient, when considered with recommendations of referee confirmed by the court, to set aside the contract of copartnership attacked in the petition. *Kelly v. West*, 48 Okl. 274, 149 P. 902.

Though a judgment purports to be against defendants, without naming them, only one is bound if it appears from the context that he only was meant, or from the return that he was the only defendant served, but where the word "defendant" is written in the body of the judgment, it will be construed as referring to and including all defendants named in the caption. *Hale v. Independent Powder Co.*, 46 Okl. 135, 148 P. 715.

Where the record of the court recited that there is due plaintiff from defendants \$193.30, with interest, and that wherefore it is ordered and adjudged that plaintiff recover judgment from defendant for the sum of \$193.30 and costs, judgment was rendered only for the amount of damages, exclusive of interest. *Swisher v. Ellsworth*, 71 P. 810, 66 Kan. 783.

¹⁵ Rev. Laws 1910, § 1008.

¹⁶ Where a decree of distribution construing a will was not appealed from, it was conclusive as to the rights of the parties under the will. *Luscomb v. Fintzelberg*, 123 P. 247, 162 Cal. 433.

A judgment not appealed from is conclusive, although based on a mistake of law. *Dennis v. Kelly* (Okl.) 197 P. 442.

An incidental award of alimony for a gross sum payable in three installments, declared to be in full of all claims for alimony or on any other account, is final and conclusive. *Bassett v. Waters*, 103 Kan. 853, 176 P. 663.

Alimony decreed to a wife upon a divorce is as much a debt, until decree is recalled or modified, as any judgment for money is. *Stanfield v. Stanfield* (Okl.) 168 P. 912.

A discharge in bankruptcy, until set aside or reversed in direct proceedings, is conclusive on all parties, and cannot be collaterally attacked. *First Nat. Bank v. Masterson*, 116 P. 162, 29 Okl. 76.

On appeal from a judgment of discharge in bankruptcy over the objection that the bankrupt did not keep proper books of account, and purposely mutilated the same and refused to account for all his property, where on the hearing for discharge 30 witnesses were examined, and the question is one

The judgment and proceedings in an attachment upon the property of a nonresident who is served by publication are conclusive upon the parties and their privies, so far as the attached property is concerned which is seized and sold; the action after publication and service proceeding as one in rem.¹⁷

Where one of the defendants appears personally and makes application to set aside a judgment in a cause in which notice was served by publication, such appearance does not have the effect of changing the original judgment in rem into a personal judgment.¹⁸

When a demurrer is overruled, and the defendant elects to stand upon and abide by his demurrer, the submission of the case is a final submission, and the judgment thereupon is final.¹⁹

DIVISION II.—ENFORCEMENT

§ 1332. Judgments before death

"When any judgment has been rendered for or against the testator or intestate in his lifetime, no execution shall issue thereon after his death, except:

"First. In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interests.

"Second. In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon.

"A judgment against the decedent for the recovery of money, must be presented to the executor or administrator, like any other claim. If the execution is actually levied upon any property of the decedent before his death the same may be sold for the satisfaction

exclusively of fact, and the witnesses appeared personally before the referee, and the referee recommends the discharge and the evidence is conflicting, the judgment of the trial court will not be disturbed. *In re Sullivan*, 78 P. 85, 14 Okl. 400.

A judgment of the Supreme Court rendered under Act April 17, 1908 (Laws 1907-08, c. 31, art. 4) §§ 16, 17, wherein the county seat, under an election to permanently locate the same in Delaware county, was determined to be at the place of Jay is self-executing. *Fluke v. Canton*, 123 P. 1049, 31 Okl. 718.

¹⁷ *National Bank of St. Joseph v. Peters*, 32 P. 637, 51 Kan. 62.

¹⁸ *Smith v. Kreager*, 51 P. 813, 6 Kan. App. 271.

¹⁹ *Potter v. Hall*, 65 P. 841, 11 Okl. 173, judgment reversed 23 S. Ct. 545, 189 U. S. 292, 47 L. Ed. 817.

thereof, and the officer making the sale must account to the executor or administrator for any surplus in his hands.”²⁰

§ 1333. Guaranty companies

If any surety company doing business under the provisions of article 10, c. 15, Rev. Laws 1910, “shall neglect or refuse to pay any final judgment or decree rendered against it upon any such recognition, stipulation, bond or undertaking made or guaranteed by it” under the provisions of said article, “from which no appeal, writ of error or supersedeas has been taken for sixty days after the rendition of such judgment or decree, it shall forfeit all right to do business” under said article.²¹

§ 1334. Conveyance ordered—Form of order

“When a judgment shall be rendered for a conveyance, release or acquittance, in any court of this state, and the party against whom the judgment shall be rendered does not comply therewith by the time appointed, such judgment shall have the same operation and effect, and be as available, as if the conveyance, release or acquittance had been executed conformably to such judgment; or the court may order such conveyance, release or acquittance to be executed in the first instance by the sheriff; and such conveyance, release or acquittance, so executed, shall have the same effect as if executed by the party against whom the judgment was rendered.”²²

Such conveyance need be executed by the party against whom judgment is rendered only upon the terms and conditions as ordered by the court.²³

²⁰ Rev. Laws 1910, § 6351.

²¹ Rev. Laws 1910, § 1349.

²² Rev. Laws 1910, § 5129.

²³ A husband, who is adjudged to execute a conveyance on the request of the wife, is not compelled to execute such instrument until so requested, and a person who makes request for her should state by whose authority he acts, if the husband asks for such information. *Butler v. Butler*, 82 Kan. 130, 107 P. 540.

ORDER THAT SHERIFF EXECUTE CONVEYANCE UPON FAILURE OF DEFENDANT TO CONVEY AFTER JUDGMENT

(Caption.)

This cause coming on to be heard on this ——— day of ———, 19—, on the application of the plaintiff, A. B., for an order of court requiring the sheriff of ——— county, Oklahoma, to make, execute and deliver to plaintiff a good and sufficient deed conveying to plaintiff the following described real estate: (Describe same), said plaintiff appearing by his attorney, X. Y.; and it appearing to the court that by the order and judgment of this court made and entered herein on the ——— day of ———, 19—, the above named defendant, C. D., was ordered to convey said premises to the plaintiff by good and sufficient deed within ——— days from the date of said judgment, and it further appearing that said defendant has failed and refused to comply with said order for more than ——— days, and that said order and judgment has not been superseded, and the court being fully advised in the premises;

It is ordered, adjudged and decreed by the court that the sheriff of ——— county, Oklahoma, be, and he is hereby commanded to make, execute and deliver to said plaintiff a good and sufficient warranty deed for said defendant, conveying to plaintiff said above described property; and it is further ordered that said deed of conveyance, when so executed, shall have the same effect as if executed by said defendant in his own proper person.

———, Judge.

§ 1335. Alimony

An award of alimony, declared to be in full of all claims, is enforceable in the same manner as an ordinary judgment for debt.²⁴ Pending an appeal by the defendant from a decree granting divorce and alimony, the plaintiff should apply to the trial court for enforcement of the allowance of temporary alimony.²⁵

Under the terms of the original judgment and decree of the trial court, absence from the jurisdiction of the wife to whom alimony had been awarded on a divorce, did not excuse the husband from

²⁴ Bassett v. Waters, 103 Kan. 853, 176 P. 663.

²⁵ Where plaintiff wife was granted divorce and alimony and husband appealed, plaintiff, as to enforcement of allowance for alimony should seek redress in trial court. Kelly v. Kelly, 105 Kan. 72, 181 P. 561.

payments of installments of alimony falling due during her absence.²⁶

The court may strike the defendant's answer from the files and hold him in default for refusing to comply with an order to pay temporary alimony;²⁷ but willful refusal to pay alimony cannot be the basis of a prosecution by the state.²⁸

DIVISION III.—PAYMENT, SATISFACTION, AND DISCHARGE

§ 1336. Dormant judgments

"If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered, in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on the estate of the judgment debtor: Provided, that this section shall not apply to judgments against municipalities."²⁹

²⁶ Stanfield v. Stanfield (Okl.) 168 P. 912.

²⁷ Maharry v. Maharry, 47 P. 1051, 5 Okl. 371.

In divorce the district court can punish a refusal to pay alimony as a contempt by striking the defendant's answer from the record or refusing to permit him to plead further in the case, where he has voluntarily absented himself to avoid contempt proceedings for failure to pay such alimony, and punishment for contempt cannot be otherwise inflicted. Bennett v. Bennett, 81 P. 632, 15 Okl. 286, 70 L. R. A. 864.

²⁸ Bridgess v. State, 9 Okl. Cr. 450, 132 P. 503.

²⁹ Rev. Laws 1910, § 5153; Beadles v. Fry, 82 P. 1041, 15 Okl. 428, 2 L. R. A. (N. S.) 855 (see 28 S. Ct. 522, 209 U. S. 393, 52 L. Ed. 849); Killen v. Nebraska Loan & Trust Co., 78 P. 159, 70 Kan. 83.

This statute applies to judgments against school districts, notwithstanding Wilson's Rev. & Ann. St. 1903, § 6196 (Rev. Laws 1910, § 7832). Wenner v. Board of Education of City of Perry, 106 P. 821, 25 Okl. 515.

Execution is not insufficient to prevent judgment from becoming dormant under Rev. Laws 1910, § 5153, because in direction to sheriff name of person whose land was to be seized is omitted, when name appears in execution as judgment debtor whose goods are to be seized thereunder. Kale v. Humphrey (Okl.) 170 P. 223.

Code Civ. Proc. § 445, providing that, if execution be not sued out within five years from the date of the judgment, it shall become dormant, has reference to general executions against the property of the debtor, and not to special executions provided for by Gen. St. 1901, § 4994. Watson v. Keystone Iron Works Co., 74 P. 269, 70 Kan. 43, judgment affirmed 78 P. 156, 70 Kan. 61.

A municipality cannot assert the dormancy of certain judgments against it for failure to issue executions thereon within five years, where during most of

An execution may be issued and levied under a judgment against the property of one or more joint judgment debtors, though the judgment is dormant as to another of the judgment debtors.³⁰

A municipality is estopped to assert that judgments against it are dormant for failure to issue executions thereon within five years, where, during a large part of that period, it has been making payments on the judgments out of the judgment fund under arrangement with its judgment creditors.³¹

§ 1337. Revival

"If a judgment become dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment."³²

An action will lie to revive a dormant judgment within a year after it has become dormant. The statutory provision for reviving by motion and notice within said year is cumulative.³³

It has been held that a judgment can be revived without the consent of the judgment debtor only when the order of revivor is made within a year after the judgment becomes dormant, and when it has been dormant for more than a year there is no power in the judge or court to revive it, although a proceeding to revive was begun before the year of dormancy had expired.³⁴

that period the municipality was carrying out its contract arrangement with its judgment creditors to pay such judgments in the order of their rendition out of the judgment fund, the effect of which was to prevent the judgment creditors from taking such steps as the law permitted to collect their judgments of execution or mandamus. *Beadles v. Smyser*, 28 S. Ct. 522, 209 U. S. 393, 52 L. Ed. 849, reversing 87 P. 292, 17 Okl. 162.

An agreement between all of the judgment creditors of a city that it shall pay their judgments in the order of priority of the date thereof a resolution of the city council which refers to such agreement did not change the status of the city towards such creditors, or excuse any creditor from suing out an execution within five years of the date his judgment was rendered. *Beadles v. Fry*, 82 P. 1041, 15 Okl. 428, 2 L. R. A. (N. S.) 855.

³⁰ *Winter v. Dunlap*, 114 P. 1057, 84 Kan. 519.

³¹ *Beadles v. Smyser*, 209 U. S. 393, 28 S. Ct. 522, 52 L. Ed. 849, reversing 17 Okl. 162, 87 P. 292.

³² Rev. Laws 1910, § 5300.

Revivor of action, see Rev. Laws 1910, §§ 5283-5299.

³³ *Baker v. Hummer*, 2 P. 808, 31 Kan. 325; *Sneary v. Nichols & Shepard Co.* (Okl.) 173 P. 366; Rev. Laws 1910, § 5293.

³⁴ *Reeves v. Long*, 66 P. 1030, 63 Kan. 700; Rev. Laws 1910, § 5293; *Newton v. Arthur*, 55 P. 466, 8 Kan. App. 358.

Under *Wilson's Rev. & Ann. St.*, 1903, c. 66, art. 19, a dormant judgment can

(1308)

The revivor of a judgment against a corporation is unnecessary in order to maintain suit to collect the amount thereof from a stockholder; it being evidence of the validity, character, and amount of the creditor's claim, though not enforceable against the judgment debtor.³⁵

§ 1338. — Necessity

No action can be maintained on a judgment which has been permitted to remain dormant for more than a year.³⁶

While an action is pending on a judgment there is no necessity to issue an execution on such judgment nor to obtain a revivor of the judgment to preserve the cause of action.³⁷

Where a judgment debtor was convicted and confined in the penitentiary, an execution and order of sale issued on judgment after conviction, without revival of the judgment, are void.³⁸

Where a judgment has been assigned by a corporation which is subsequently dissolved, no revivor in the name of the assignee is necessary, but the judgment may be kept alive by execution issued in the name of the plaintiff corporation after its dissolution.³⁹

only be revived by an order of the court or a judgment thereof. *Neal v. Le Breton*, 78 P. 376, 14 Okl. 538.

The bringing of a suit by the defendant in a foreclosure case to quiet his title against deed void because the judgment was not revived on the death of plaintiff, before execution was issued thereon, is not in any sense a revivor of such judgment. *Havens v. Pope*, 62 P. 538, 10 Kan. App. 299.

An action cannot be maintained under Comp. Laws, p. 607, on a dormant domestic judgment, or a revivor of the same had, when more than three years have elapsed from the death of the judgment creditor and the appointment of an administrator of his estate. *Mawhinney v. Doane*, 17 P. 44, 40 Kan. 676.

Under Code, §§ 433, 440, the period within which an order reviving a dormant judgment may be made without consent is one year from the time it could have been first made; and, where a notice is given two days before the expiration of the year that an application to revive a judgment will be presented to the court 28 days after the year has elapsed, an order of revivor made upon that notice at the date fixed, or at a subsequent date, without the consent of the adverse party, is a nullity. *Tefft v. Citizens' Bank*, 13 P. 783, 36 Kan. 457.

³⁵ *Douglass v. Loftus*, 119 P. 74, 85 Kan. 720, L. R. A. 1915B, 797, Ann. Cas. 1913A, 378.

³⁶ *Brown v. Akesson*, 86 P. 299, 74 Kan. 301.

³⁷ *Treat v. Wilson*, 70 P. 893, 65 Kan. 729.

³⁸ *Ashmore v. McDonnell*, 16 P. 687, judgment reversed on rehearing, 18 P. 821, 39 Kan. 669.

³⁹ *Gilmore v. Harpster*, 133 P. 726, 90 Kan. 405.

§ 1339. — Death of party

A judgment becomes dormant upon the death of the judgment creditor,⁴⁰ or upon the death of one of the members of a firm in whose favor a judgment has been rendered.⁴¹

Where a judgment has become dormant by the death of the judgment creditor, and no proceedings to revive it have been taken within one year after the death of plaintiff, an execution issued thereon is void and may be enjoined.⁴²

An executor of a wife's estate may maintain proceedings to revive a judgment granting alimony.⁴³

⁴⁰ A judgment becomes dormant on the death of the judgment creditor, though the action was prosecuted by one having no beneficial interest therein, and the judgment belongs to another. *Updegraff v. Lucas*, 93 P. 630, 76 Kan. 456, 13 Ann. Cas. 860, rehearing denied 94 P. 121, 76 Kan. 456, 13 Ann. Cas. 860.

⁴¹ On the death of one of the members of a firm in whose favor a judgment has been recovered, the judgment becomes dormant, and no execution can issue until the judgment is revived as provided by law. *Newhouse v. Hellbrun*, 74 Kan. 282, 86 P. 145, 10 Ann. Cas. 955.

⁴² *Updegraff v. Lucas*, 93 P. 630, 76 Kan. 456, 13 Ann. Cas. 860, rehearing denied 94 P. 121, 76 Kan. 456, 13 Ann. Cas. 860.

Under Comp. Laws, p. 607, providing that an order to revive an action on the death of either party cannot be made after the expiration of one year, without the consent of the opposite party, when the petition in an action on a judgment shows that the judgment creditor has been dead more than three years, and does not allege that the judgment was ever revived, and plaintiffs demur to the defense that it was never revived, the judgment will be held to be dormant, and it is immaterial that plaintiffs, the children of the judgment creditor, are minors, where their petition recites the appointment of an administrator for her estate, of which the judgment was a part. *Mawhinney v. Doane*, 20 P. 488, 40 Kan. 681.

An order to revive a judgment in the name of representatives or successors of the plaintiff cannot be made without defendant's consent, after one year from the time the order might first have been made. *Jones v. Nye*, 56 Okl. 578, 156 P. 332, L. R. A. 1916E, 735; *Neal v. Le Breton*, 78 P. 376, 14 Okl. 538.

Under Rev. Laws 1910, §§ 5291, 5293, 5299, an order to revive a judgment against representatives or successors of defendants without their consent must be made within one year from time the order might have been first made, except where defendant's death is not known, or for other unavoidable reasons. *Jackson v. Scott* (Okl.) 173 P. 70.

⁴³ *Chumos v. Chumos*, 143 P. 420, 93 Kan. 33.

That an executor of a wife's estate, who was not guardian of or responsible for the care of her child, knew or consented to the removal of the child to another country, held insufficient ground for refusing his application to revive a divorce judgment awarding alimony and adjusting the property rights of the deceased wife. *Chumos v. Chumos*, 143 P. 420, 93 Kan. 33.

The fact that one of two judgment debtors dies, and there is no revivor as to his estate, does not extinguish the liability of the other or bar a proceeding to revive the judgment as against the surviving debtor.⁴⁴

§ 1340. — Proceedings—Forms

Where an application to revive a judgment is made by a proper party in due form within the time prescribed by law, the revivor must be granted as a matter of right.⁴⁵

Where a party consents or fails to object to a revival of a judgment in the name of the heirs at law, instead of the personal representatives of a decedent, and no appeal is taken from the order, the defect, if any, is waived, and he cannot thereafter complain because judgment was not revived in the name of the personal representatives.⁴⁶

A summons issued on the application for an order of revivor, containing substantially all that is required to be stated in the statutory notice of a motion to revive, and served a reasonable time before hearing, is sufficient notice to uphold the order of revivor.⁴⁷

Service on a nonresident defendant by publication is sufficient in a proceeding to revive a judgment.⁴⁸

⁴⁴ *Richardson v. Painter*, 102 P. 1099, 80 Kan. 574, 133 Am. St. Rep. 224.

⁴⁵ *Chumos v. Chumos*, 143 P. 420, 93 Kan. 33.

⁴⁶ *Zollinger v. Durham (Okl.)* 179 P. 752.

⁴⁷ *Schultz v. Hine*, 18 P. 221, 39 Kan. 334; *Kansas & T. Coal Co. v. Carey*, 70 P. 589, 65 Kan. 639.

In a proceeding to revive a dormant judgment in the name of the executor of the deceased judgment creditor, a notice properly entitled in the case, containing the matters required to be contained in a notice of an application of revivor, signed by the clerk of the court, and attested by the seal of the court, and containing a command to the sheriff to serve the same upon the defendants therein named, is a sufficient notice, and is sufficiently signed. *Selders v. Boyle*, 49 P. 320, 5 Kan. App. 451.

On a motion to revive a judgment in the name of the administratrix of one deceased, an execution returned after the statutory period of 60 days is competent as evidence of the issuance of such execution. *Alford v. Hoag*, 54 P. 1105, 8 Kan. App. 141.

Civ. Code, §§ 59-61, require summonses to be served by the sheriff. Section 42 provides that notice of an application to revive a dormant judgment must be served in the same manner as a summons. Held, that a notice of such application, served and returned by an attorney of record, is void. *Willson v. McCornack*, 61 P. 1068, 10 Okl. 180.

⁴⁸ *Hartz v. Flitts*, 132 P. 1187, 89 Kan. 751; *Ow v. Dalhoff*, 133 P. 569, 90 Kan. 329.

An action to recover the amount of a judgment, with interest, in which a summons is issued and served as on a money demand, is an action on the judgment, and not to revive it.⁴⁹

APPLICATION TO REVIVE JUDGMENT ON DEATH OF PARTY

(Caption.)

Comes now the above named plaintiff, and respectfully shows to the court:

1. That on the —— day of ——, 19——, said plaintiff A. B., recovered a judgment in the above entitled action against the defendant, C. D., for the sum of \$——, with interest thereon at the rate of —— per cent., and costs of said action.

2. That execution was duly issued on said judgment on the —— day of ——, 19——, which execution was returned unsatisfied, and that no part of said judgment has been paid, but the same remains wholly due and unpaid.

3. That on or about the —— day of ——, 19——, said defendant, A. B., died intestate, a resident of —— county, Oklahoma; and that letters of administration upon his estate were duly made and issued, on the —— day of ——, 19——, by the county court of —— county, Oklahoma, to G. H., who has duly qualified and entered upon his duties as such administrator.

4. That your petitioner is desirous of continuing the said action and the judgment aforesaid against said G. H., as administrator of the estate of C. D., deceased.

Wherefore plaintiff moves the court that said G. H., as administrator of the estate of C. D., deceased, be made a party to the above entitled action, and to the aforesaid judgment, and that this plaintiff have judgment against said G. H., as such administrator, for said sum of \$—— and interest and costs of this action, and that execution may issue thereon.

X. Y., Attorney for Plaintiff.

§ 1341. — Effect of revival

A revivor in the name of the representative of a party to a judgment, who has died, restores the judgment to full force, and gives it effect for the ensuing period of five years to the same extent

⁴⁹ Mawhinney v. Doane, 20 P. 488, 40 Kan. 681.

as a revivor in the case of a judgment that has become dormant for want of execution.⁵⁰

An order purporting to revive a judgment made by a judge who has no authority to entertain the application or grant the order is a nullity, and the judgment will stand as though no step had been taken or order made.⁵¹

§ 1342. Mode of payment

A partial satisfaction of a judgment against one joint debtor and release of same will operate only as payment pro tanto of indebtedness of the other debtors.⁵²

A cause of action against several, founded on a tort, when reduced to judgment becomes as to all a joint indebtedness, which may be discharged as to one, without releasing the others for the unpaid balance.⁵³

Where one of several joint debtors pays the judgment, the taking of an assignment of the judgment to himself did not satisfy it against the other judgment debtors.⁵⁴

A deposit made as security for the ultimate payment of a judgment cannot be regarded as a payment of the judgment.⁵⁵

⁵⁰ *Manley v. Mayer*, 75 P. 550, 68 Kan. 377, 1 Ann. Cas. 825; *Same v. Osborne*, 76 P. 1130, 68 Kan. 815.

⁵¹ *Berkley v. Tootle*, 64 P. 620, 62 Kan. 701.

⁵² *City of Topeka v. Brooks*, 164 P. 285, 99 Kan. 643.

⁵³ *Missouri, K. & T. Ry. Co. v. Haber*, 44 P. 619, 56 Kan. 717.

⁵⁴ *Honce v. Schram*, 85 P. 535, 73 Kan. 368.

A petition by one of several judgment debtors for injunction against an execution sale set forth that the judgment, after being assigned to defendant W., was fully paid. The answer alleged an assignment of the judgment by W. to S., and denied payment. Held, that it was error to sustain a demurrer to a reply alleging that, if S. paid the money to W. for the assignment, he did so in behalf of plaintiff's cojudgment debtor, who was a defendant in the action, for the fraudulent purpose of enabling the latter to control the judgment, and compel plaintiff to pay him the entire amount thereof. *Worden v. Jones*, 40 P. 1071, 1 Kan. App. 501.

⁵⁵ A deposit, made by a guarantor of notes on which judgment has been taken, intended as a security for the ultimate payment of the debt, and which it was stipulated should not operate as a payment of the debt, cannot be regarded as a payment of the judgment. *Steffins v. Gurney*, 59 P. 725, 61 Kan. 292.

§ 1343. Set-off of judgments

The mere existence of mutual judgments, though rendered in the same court and about the same time, does not entitle a party to an order or judgment setting one of them off against the other.⁵⁶

The power to set off mutual judgments is discretionary,⁵⁷ and before one judgment is set off against another there must be mutuality in those judgments and no contravening equities.⁵⁸

§ 1344. Merger

A second judgment on the same debt, though for a less amount than that recovered in the first, is a waiver of the remainder, and an entire extinguishment of the first judgment.⁵⁹

§ 1345. Release

For a joint judgment debtor to be released by the payment of a subsequent judgment by his joint tort-feasor, he must show that

⁵⁶ *Schuler v. Collins*, 65 P. 662, 63 Kan. 372; *Lorton v. Same*, *Id.* In an application to set off judgments, the court is not bound by legal rules to do so, even when the judgments are in the same right and between the same parties, but the application is addressed to the discretion of the court, and will not be granted where it clearly appears that injustice will be done thereby. *Id.* Where the right of set-off was not asserted for more than three years after the judgments were rendered, nor until other rights had intervened, and where the party had neglected to avail himself of the special security decreed to him, the ruling of the court refusing to adjudge a set-off will not be reversed. *Id.*

⁵⁷ *Arn v. Elms*, 59 Okl. 235, 158 P. 1150. The court can set off mutual judgments in same court between same parties, either in equitable proceeding or on motion. *Id.*

⁵⁸ *Alexander v. Clarkson*, 164 P. 294, 100 Kan. 294, L. R. A. 1917F, 1006. Where attorney's lien was properly served on plaintiff in former litigation, and subject to it the successful defendant therein assigned his judgment against plaintiff to secure his indebtedness, plaintiff acquiring assignment of a judgment against his judgment creditor and proceeding against debtors and attorneys holding lien could not, in view of contravening equities, set off judgments. *Id.*

Where a judgment debtor moved to set off against the judgment a judgment in a justice's court, and before the motion was passed on an attorney's lien attached to plaintiff's judgment, under Comp. Laws 1909, § 261, subd. 4, for 50 per cent. thereof, held, that the lien was not in the way of a set-off of 50 per cent. *Patchell v. Harper*, 139 P. 985, 40 Okl. 530.

Where a claim for usury against a national bank has been reduced to judgment, it may be set off against a judgment on the note, on which the usury was paid. *Lloyd v. First Nat. Bank*, 47 P. 575, 5 Kan. App. 512.

⁵⁹ *Price v. First Nat. Bank*, 64 P. 637, 62 Kan. 735, 84 Am. St. Rep. 419.

the latter judgment was recovered for the same wrong litigated in the former action.⁶⁰

A judgment of a court of a sister state, shown to have been paid in full, is completely satisfied, and cannot thereafter be made the basis of an action in this state.⁶¹

§ 1346. Compelling satisfaction

It is error for the court to order the satisfaction of a judgment in a cause, upon motion filed therein, where the facts claimed to justify such satisfaction arise outside of the court, and are disputed, and where the parties are interested in the judgment who were not parties to the original action, and who are not served with notice, and do not appear upon the hearing of said motion.⁶²

In a judgment debtor's action to recover damages for the judgment creditor's failure to acknowledge satisfaction of a judgment, it is a competent defense to show a controversy as to whether said judgment had been fully paid.⁶³

§ 1347. Vacating satisfaction—Forms

The district court has the power to set aside an entry of satisfaction of a judgment, on motion, where the satisfaction has been fraudulently obtained,⁶⁴ a receipt has been given by mistake,⁶⁵ or the release is made without authority.⁶⁶

⁶⁰ *Story v. Lang*, 137 P. 795, 91 Kan. 323.

⁶¹ *Southern Pine Lumber Co. v. Ward*, 85 P. 459, 16 Okl. 181, judgment affirmed 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420.

⁶² *Mayer v. Sparks*, 45 P. 249, 3 Kan. App. 602.

⁶³ *First State Bank of Indianola v. Carr* (Okl.) 180 P. 856.

⁶⁴ *Chapman v. Blakeman*, 3 P. 277, 31 Kan. 684.

⁶⁵ Where a receipt acknowledging satisfaction of a judgment rendered by a district court was given by the judgment creditor to the defendant while an execution under the judgment was in the hands of the sheriff, and where the latter thereupon returned the execution with a statement of that fact indorsed thereon, together with the satisfaction receipt, and where it appeared that the giving of such receipt was by mistake, and that a large part of the judgment remained unpaid, the court properly inquired into the matter on motion to correct the record. *McNeal v. Hunt*, 50 P. 63, 6 Kan. App. 670.

⁶⁶ *Sneary v. Nichols & Shepard Co.* (Okl.) 173 P. 366; *Rounsaville v. Hazen*, 5 P. 422, 33 Kan. 71.

A sheriff who levies an execution upon personal property at the suit of a judgment creditor, and who subsequently recovers a judgment in his own name against a person for damages for unlawfully taking the property away from him, is not the owner of such judgment for damages, and has no

The jurisdiction of a county court to vacate a satisfaction of a judgment may be invoked by motion and notice.⁶⁷

MOTION TO EXPUNGE SATISFACTION OF JUDGMENT

(Caption.)

Now comes the above named plaintiff and alleges that of the judgment in favor of the plaintiff and against the above named defendant on the — day of —, 19—, for the sum of \$—, no part thereof has ever been paid, except the sum of \$— paid on the — day of —, 19—, as the gross proceeds of a sale of chattels under an order of sale made in accordance with a judgment of foreclosure in the above entitled cause, which sum, after having been applied to the payment of the said costs and to additional costs and to the interest then accrued on said judgment, at the rate of 6 per cent. per annum, left a balance of \$— then due upon said judgment; that on the — day of —, 19—, a general execution was issued upon said judgment, which execution was returned wholly unsatisfied, and that no executions have ever since been levied upon said judgment, and said balance of \$— is now due and wholly unpaid on said judgment; that what appears to be an entry of satisfaction of said judgment appearing upon the regular judgment docket of this, the said district court, on page — of said docket, and appearing to have been entered under date of —, 19—, was so entered through a mistake of the then clerk of this court.

Wherefore plaintiff hereby makes application to this, the said district court; and moves for an order that the entry of satisfaction of such judgment heretofore mentioned be set aside and expunged from the judgment docket of this court, in order that such judgment may no longer appear satisfied upon the records of this court.

X. Y., Attorney for Plaintiff.

(Verification.)

right, as against the execution creditor who caused him to make the levy, to satisfy the judgment for a small portion of its amount; and, in case he does so satisfy it, the entry of satisfaction may be summarily vacated on motion by the creditor, the real owner of the judgment. *Bowersock v. Wickery*, 80 P. 317, 61 Kan. 632.

⁶⁷ *Leonard v. Ross*, 56 Okl. 118, 155 P. 885.

ORDER

(Caption.)

Now, on this — day of —, 19—, this cause coming on to be heard upon the motion and application of the plaintiff for an order of court expunging the entry of satisfaction of judgment herein, the plaintiff being present by his attorney, X. Y., and the defendant being present by his attorney, G. H.; and the court, having heard all the evidence offered by both the plaintiff and defendant, and having examined the records of this court, finds from such evidence and records that in said suit in which said judgment was rendered the plaintiff obtained a judgment and order of foreclosure foreclosing a certain chattel mortgage given to secure the notes upon which such judgment was rendered, and that on the — day of —, 19—, an order of sale was issued in accordance with such judgment of foreclosure directing the sheriff of — county, Oklahoma, to sell the chattels described in such mortgage and directing that the proceeds of such sale be applied to the payment of said judgment. And the court further finds that the said sheriff did, in accordance with the commands of said order of sale, sell such chattels for the sum of \$— on the — day of —, 19—, and that on the — day of —, 19—, said sheriff did make due return of such order of sale to the office of the then clerk of this court, having stated in his return thereon that he had sold said chattels for the said sum of \$—. And the court further finds that the then clerk of this court ought to have then entered a credit of \$— upon said judgment, as the proceeds of such sale by said sheriff, instead of having entered what appears to have been a full satisfaction of such judgment. And the court further finds that such entry of satisfaction of such judgment is incorrect, and that the plaintiff should not be bound thereby. And the court finds that said plaintiff is entitled to recover upon said judgment the sum of \$— as a balance due upon said judgment, together with interest thereon from the — day of —, 19—, at the rate of six per cent. per annum.

It is therefore by the court ordered, adjudged, and decreed that said entry of satisfaction of such judgment be and the same is hereby set aside and expunged from the judgment docket of this court, and the clerk of this court is ordered to correct said judgment dock-

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et so as to show a credit thereon on the ——— day of ———, 19—, of the said sum of \$——, and so as to show a balance due on said judgment of the sum of \$——, and interest thereon at the rate of ——— per cent. from the ——— day of ———, 19—, the date of the entry of such judgment, and for all costs accrued on behalf of the original action, and for all costs of this proceeding, and that the plaintiff may have execution thereon for said sums.

———, Judge.

DIVISION IV.—JUDGMENT LIENS

§ 1348. Statutory regulations—Lien on real estate

"The lien of a judgment is regulated by civil procedure." **

"Judgments of courts of record of this state, except county courts, and of courts of the United States rendered within this state, shall be liens on the real estate of the debtor within the county in which the judgment is rendered from and after the time the judgment is entered on the judgment docket. An attested copy of the journal entry of any such judgment, together with a statement of the costs taxed against the debtor in the case may be filed in the office of the clerk of the district court of any county and such judgment shall be a lien on the real estate of the debtor within that county from and after the date of filing and entering such judgment on the judgment docket. The clerk shall enter such judgment on the appearance and judgment dockets in the same manner and within the same time after such judgment is filed in his office as if rendered in the court of which he is clerk. Execution shall only be issued from the court in which the judgment is rendered or in which a transcript of a county court judgment is first filed." **

** Rev. Laws 1910, § 3857.

** Rev. Laws 1910, § 5148.

County Court judgments.—A judgment rendered in a probate court after March 7, 1893, and prior to March 5, 1895, did not, between said dates, operate as a lien on the real estate of the judgment debtor in the county wherein such judgment was rendered, unless a transcript or abstract thereof was filed in the office of the clerk of the district court, as required by St. 1893, p. 1191. *Spencer v. Rippe*, 56 P. 1070, 7 Okl. 608. It has been held that a judgment of a probate court, in another county, was a lien on the judgment debtor's real estate in that county, giving the judgment creditor the right to execution in such county. *Lowenstein v. Young*, 57 P. 164, 8 Okl. 216.

A judgment rendered in a probate court prior to March 7, 1893, was a lien on the land of the debtor in the county wherein such judgment was rendered, and continued to be a lien for 60 days after that date, but ceased

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§ 1349. Nature of lien

The lien creates no estate, interest, or right of property in the realty bound for its satisfaction; it merely gives a right to levy on the lands to the exclusion of adverse interests subsequent to the judgment.⁷⁰ A judgment ordinarily is not a specific lien upon specific realty, but is a general lien upon all the judgment debtor's property.⁷¹ Its loss does not necessarily impair the validity of the

to operate as a lien on land after the expiration of 60 days from March 7, 1893, unless the judgment creditor caused to be filed in the office of the clerk of the district court a transcript of his judgment recovered in the probate court, as required by St. 1893, p. 1191. *Spencer v. Rippe*, 56 P. 1070, 7 Okl. 608.

Where plaintiff obtained a judgment in the probate court of L. county, and thereafter filed a transcript of the judgment in the office of the district clerk of O. county, the judgment became a lien on all real estate in the latter county. *Lowenstein v. Young*, 57 P. 164, 8 Okl. 216.

Judgments of justices of the peace.—The clerk of the district court of a county in which a judgment was rendered by a justice of the peace sent a certified copy of an abstract of the same on file in his office to another county, where it was filed in the office of the clerk of the district court, and entered of record. Held, that the certified abstract created no lien on lands of the debtor in the latter county, since, to create a lien in such case, a certified transcript must be filed in such district court. *Hubbard v. Jones*, 60 P. 743, 61 Kan. 722.

Where words "judgment rendered 24 Oct., 1898" followed justice's signature to judgment, it is sufficient evidence of its date, and authorizes transcript thereof to be filed in district court to preserve lien provided by Rev. Laws 1910, § 5218, when transcript is filed as required by section 5217. *Kale v. Humphrey* (Okl.) 170 P. 223. Entry of case, together with abstract of justice's judgment upon judgment docket, as required by Rev. Laws 1910, § 5217, together with entry showing several executions thereon, when not objected to, is sufficient to show that transcript was filed as of date of such entry of case and abstract upon judgment docket. *Id.* As against collateral attack of third party, execution issued out of district court upon evidence of filing of transcript of justice's judgment, held valid, even though the transcript had then been destroyed, lost, or mislaid, and had not been substituted. *Id.* That case and abstract of justice's judgment was entered in district court in chronological order with index under title "Judgment Debtor," and under first letter of defendant's surname instead of alphabetically, etc., held not to render such entry void, or insufficient evidence of filing transcript on date of entry. *Id.*

Where a judgment from a justice of the peace is attempted to be transferred by an abstract filed under section 119 of the Justice's Act, said abstract is not necessarily void for uncertainty on account of the omission of the dollar marks before the amount of the debt and costs, nor on account of the omission of accurate punctuation points in denoting dollars and cents. *Dickens v. Crane*, 6 P. 630, 33 Kan. 344.

⁷⁰ *Swarts v. Stees*, 2 Kan. 236, 83 Am. Dec. 588.

⁷¹ *Mansfield v. Gregory*, 11 Neb. 207, 9 N. W. 87.

judgment as personal security, since it is merely an incident of the judgment.⁷² Furthermore, as the lien of a judgment is purely statutory, the kind or extent of a lien of a particular judgment, or the property to which the lien shall attach, cannot be prescribed by the court rendering judgment.⁷³

§ 1350. Debtor's realty

Before the issuance and levy of an execution the lien of a judgment, as a general rule, attaches only to the lands, tenements, and hereditaments.⁷⁴

The lien of a judgment is confined to the limits of the particular county in which rendered, and can attach to lands lying in another county by the filing of a transcript there.⁷⁵ It should be noted that the statute gives a lien upon the filing of the transcript, and not upon the making of the entry by the clerk.⁷⁶

§ 1351. — Extent of lien

A judgment becomes a lien on the judgment debtor's realty from the first day of the term at which it is rendered;⁷⁷ but where a bona fide purchaser of land pays the price, and obtains a title bond and possession from the grantor prior to the filing of an abstract of a judgment rendered against the grantor, the judgment is no lien or incumbrance on the land.⁷⁸ Such lien attaches only to the actual interest of the judgment debtor.⁷⁹

⁷² Esterly's Appeal, 109 Pa. 222.

⁷³ Hadwin v. Flisk, 1 La. Ann. 43; Castro v. Illies, 13 Tex. 229.

⁷⁴ McFarren v. Knox, 5 Colo. 217.

⁷⁵ Metz v. State Bank of Brownsville, 7 Neb. 165.

⁷⁶ Bliss v. Brown, 96 P. 945, 78 Kan. 467.

⁷⁷ Cramer v. Iler, 66 P. 617, 63 Kan. 579.

⁷⁸ Elwell v. Hitchcock, 21 P. 109, 41 Kan. 130.

A judgment obtained by a third person against the vendor after the execution of a valid contract of sale of land, but prior to its complete performance, cannot defeat the vendee's equitable interest. *Adams v. White*, 139 P. 514, 40 Okl. 535.

A landowner died intestate, leaving a widow and four children. Pending partition D., one of the children, conveyed his "one-eighth interest in" the land to W. A judgment was afterwards rendered in the partition suit giving the intestate's widow a life estate in the land and awarding the remainder in fee to the four children, and soon after this a judgment in another action was rendered against D. and became a lien on the land. Held, that D., having conveyed only a one-eighth interest to W., still owned the other one-eighth subject to the lien of the judgment. *Winter v. Dunlap*, 114 P. 1057, 84 Kan. 519.

⁷⁹ Postlethwaite v. Edson, 171 P. 769, 102 Kan. 104, L. R. A. 1918D, 983;

A judgment lien does not reach the mere legal title of property in the debtor, when the equitable title is in another.⁸⁰

§ 1352. Lien of corporation commission

"All judgments or fines assessed against any corporation, person or firm, for the violation of any order or regulation" of the corporation commission, "shall be a first lien on all property of such corporation, person or firm within this state, and it shall be the duty of the corporation commission, if such judgment or fine is not paid within thirty days after the rendition of such judgment or fine, to issue an execution, directed to the marshal of the corporation com-

Gilbreath v. Smith, 50 Okl. 42, 150 P. 719; *Guaranty State Bank of Okmulgee v. Pratt* (Okl.) 180 P. 376; *Oklahoma State Bank of Wapanucka v. Burnett* (Okl.) 162 P. 1124, 4 A. L. R. 430; *Lunn v. Kellison* (Okl.) 153 P. 1136; *Holden v. Garrett*, 23 Kan. 98; *Hawley v. Smeiding*, 3 Kan. App. 159, 42 P. 841.

Where testator merely directs his executors to sell his land and divide the proceeds among his children, a judgment lien against a child will attach to his portion of the land upon the testator's death. *Smith v. Hensen*, 132 P. 997, 89 Kan. 792.

Where one mistakenly believes that he owns an interest in land and deeds same to his son as a gift, a title afterwards acquired by him will pass to the son only in subjection to the lien of any judgment existing against the grantor at time of acquiring the title. *Leslie v. Harrison Nat. Bank*, 154 P. 209, 97 Kan. 22.

Filing of a justice's judgment held to create no lien on property the title to which had passed from the judgment debtor prior to the date of such filing. *Gilbreath v. Smith*, 50 Okl. 42, 150 P. 719.

⁸⁰ *Farmers' State Bank of Ada v. Keen* (Okl.) 167 P. 207; *Guaranty State Bank of Okmulgee v. Pratt* (Okl.) 180 P. 376.

A transitory seisin of lands by a judgment debtor in trust for another will not subject them to the lien of the judgment. *Guaranty State Bank of Okmulgee v. Pratt* (Okl.) 180 P. 376.

Where a judgment debtor has transferred his entire equitable estate in land to a third person before rendition of the judgment and retains merely the legal title, the judgment is not a lien on the land. *Emery v. Farmers' State Bank of Washington*, 155 P. 34, 97 Kan. 231. A judgment lien attaches to no interest greater than that possessed by the judgment debtor when the judgment was entered. *Id.*; *J. I. Case Threshing Mach. Co. v. Walton Trust Co.*, 136 P. 769, 39 Okl. 748.

The fact that property actually purchased by another was conveyed to a judgment debtor for the benefit of the purchaser did not render it subject to the judgment, under St. 1890, § 4188, providing that the right of an incumbrancer of real property for value shall not be prejudiced by an implied or resulting trust, of which there was no notice. *Baird v. Williams*, 44 P. 217, 4 Okl. 173.

mission, commanding him to seize sufficient property of such corporation, person or firm, to satisfy the fine or judgment. And it shall be the duty of the marshal to sell or dispose of properties levied on by reason of an execution issued by the commission, in like manner as now required of sheriffs of this state for the sale of property levied on by virtue of an execution issued on a judgment of a district court." ⁸¹

§ 1353. Homestead

A judgment lien does not attach to premises impressed with the homestead character and subject to the homestead use.⁸²

§ 1354. Osage Indian lands

The issuance of a certificate of competency to an Osage Indian under the Osage Allotment Act, and the filing of a transcript of a judgment against the Indian in the county where his surplus lands are located, does not remove the restrictions on alienation so as to subject such surplus lands to the judgment.⁸³

§ 1355. Alimony

An order for the payment of alimony in monthly installments does not of itself constitute a lien on the land of the defendant within the county.⁸⁴

An allowance of permanent alimony, payable in installments, does not create a lien on the husband's property, unless the record affirmatively discloses that the court so intended.⁸⁵ It has been held, however, that where a wife sues for divorce and alimony, and specifically describes certain real estate, and seeks to prevent its alienation, asking that it be subjected to her claim for alimony, and she is granted judgment awarding her property, her claim is superior to the lien of an attaching creditor perfected after the wife's suit.⁸⁶

⁸¹ Rev. Laws 1910, § 1197.

⁸² *Gerlach Bank v. Allen*, 51 Okl. 736, 152 P. 399.

⁸³ *Neilson v. Alberty*, 129 P. 847, 36 Okl. 490.

Surplus lands allotted to an Osage Indian under Act Cong. June 28, 1906, c. 3572, 34 Stat. 539, to whom a certificate of competency had been issued pursuant to section 2, par. 7, held not subject to a judgment lien. *Snyder v. Worten*, 47 Okl. 253, 147 P. 1010.

⁸⁴ *McGill v. McGill*, 101 Kan. 324, 166 P. 501.

⁸⁵ *Scott v. Scott*, 103 P. 1005, 80 Kan. 489, 25 L. R. A. (N. S.) 132, 133 Am. St. Rep. 217, 18 Ann. Cas. 564.

⁸⁶ *Germania Nat. Bank v. Duncan*, 62 Okl. 144, 161 P. 1077,

§ 1356. Animals

Where in proceedings to enforce a lien for feeding, grazing, herding and breeding, judgment is rendered for the lienor "it shall be for the sum found due, with costs of suit, and that the lien be enforced against the property by execution and sale as in ordinary sales under execution; but if such finding be for the defendant, judgment shall be entered in his favor as in ordinary actions of replevin."⁸⁷

§ 1357. Judgments against counties

"When a judgment shall be rendered against the board of commissioners of any county, or against any county officer in any action prosecuted by or against him in his official name, where the same should be paid by the county, no execution shall issue upon the said judgment, but a tax sufficient to pay same shall be levied and collected in like manner as other county taxes, and when collected shall be paid by the county treasurer on the delivery of a proper receipt and the signing of an acknowledgment on the court record of said judgment, by the party in whose favor the judgment was rendered or by his attorney of record, that same has been satisfied."⁸⁸

§ 1358. Receipt by clerk

"Where there is no execution outstanding, the clerk of the court in which the judgment was rendered may receive the amount of the judgment and costs, and receipt therefor, with the same effect as if the same had been paid to the sheriff on an execution; and the clerk shall be liable to be amerced in the same manner and amount as a sheriff for refusing to pay the same to the party entitled thereto, when requested, and shall also be liable on his official bond."⁸⁹

§ 1359. Priorities

A judgment creditor has not the protection of a bona fide purchaser.⁹⁰ Therefore the statute providing that no mortgage of realty shall be valid as against third persons, unless recorded and acknowledged, the third person refers to an innocent purchaser for

⁸⁷ Rev. Laws 1910, § 184.

⁸⁸ Rev. Laws 1910, § 1502.

⁸⁹ Rev. Laws 1910, § 5327.

⁹⁰ *Gilbreath v. Smith*, 50 Okl. 42, 150 P. 719; *Fitzgerald v. Fitzgerald*, 155 P. 791, 97 Kan. 408.

value or an incumbrancer, and not to judgment creditor with a lien.⁹¹

Where two judgments were rendered against the same person, but no execution was levied within a year on the judgment debtor's land under either judgment, the judgment creditor who first caused an execution to be thereafter issued and levied obtained a priority of lien, though his judgment was not first docketed.⁹²

The levying of a writ of execution, though the appraisement is erroneous, will preserve the priority of the judgment first rendered.⁹³

§ 1360. — Judgment and conveyances

It has been held that, where a judgment debtor makes a warranty deed to land of which he is not the owner, but which he acquires subsequently, the grantee will take the property subject to the lien of the judgment.⁹⁴

When one defendant, having no interest in or lien on certain land, buys it while it is incumbered by mortgages and judgments, and, as a part of the price, agrees to pay the mortgages, and does pay one of them, he is not entitled to enjoin a sheriff's sale of the land under execution issued on such judgments subject only to the unpaid mortgages.⁹⁵

§ 1361. — Prior unrecorded deed

A judgment lien is inferior to an unrecorded deed of the judgment debtor executed before rendition of the judgment;⁹⁶ and this is true, although the judgment creditor did not have notice of the deed.⁹⁷

⁹¹ *Oklahoma State Bank of Wapanucka v. Burnett* (Okla.) 162 P. 1124, 4 A. L. R. 430.

⁹² *Winter v. Dunlap*, 114 P. 1057, 84 Kan. 519.

⁹³ *Excelsior Mfg. Co. v. Boyle*, 26 P. 408, 46 Kan. 202.

⁹⁴ *Bliss v. Brown*, 96 P. 945, 78 Kan. 467.

⁹⁵ *Kuhn v. National Bank of Holton*, 87 P. 551, 74 Kan. 456, 118 Am. St. Rep. 332.

⁹⁶ *McCalla v. Knight Inv. Co.*, 94 P. 126, 77 Kan. 770, 14 L. R. A. (N. S.) 1258.

A judgment plaintiff held not a "third person" within Rev. Laws 1910, § 1154, providing that deeds shall not be valid as against third persons unless acknowledged and recorded. *Lunn v. Kellison* (Okla.) 153 P. 1136.

⁹⁷ An unrecorded conveyance of land by a debtor, of which a creditor has no notice, will prevent a judgment subsequently docketed by the latter from becoming a lien upon such land. *Smith v. Savage*, 43 P. 847, 3 Kan. App. 556.

§ 1362. — Receivership

The priority of a judgment lien is not affected when property passes into the custody of the receiver, nor is it impaired by the fact that an execution thereon has not been taken out and levied before the expiration of one year next after its rendition: Provided, no other judgments have been rendered against the same judgment debtor before the receiver is appointed.⁹⁸

§ 1363. Duration of lien

The judgment of a court of record becomes a lien on the real estate of the debtor from the first day of the term at which it is rendered; and it does not become dormant, or cease to operate as a lien, until the expiration of five years after its rendition.⁹⁹ This rule does not apply to a decree for the sale of specific real property,¹ or to judgments for the enforcement of mortgage liens, so as to give subsequent general judgment creditors prior liens on the mortgaged property, where orders of sale are not issued in such foreclosure proceedings within one year after the rendition of the foreclosure judgment.²

A judgment foreclosing the lien after five years is invalid, though the proceedings to foreclose were begun within five years.³

§ 1364. Postponement of lien

A stay of execution on a judgment does not operate to suspend the lien of the judgment so that a third person can purchase land from the debtor during the stay free from the lien.⁴

⁹⁸ Cramer v. Iler, 66 P. 617, 63 Kan. 579.

⁹⁹ Cramer v. Iler, 66 P. 617, 63 Kan. 579; Rev. Laws 1910, § 5153.

A domestic judgment, which has been rendered for more than six years, and upon which no execution has ever been issued, and which has not been revived, is so far extinguished that no action can be maintained upon it. Smalley v. Bowling, 68 P. 630, 64 Kan. 818.

¹ Gen. St. 1901, § 4895, providing that, when a judgment becomes dormant, it shall cease to operate as a lien on the estate of a judgment debtor, does not apply to a decree for the sale of specific real property. Watson v. Keystone Iron Works Co., 74 P. 269, 70 Kan. 43, judgment affirmed 78 P. 156, 70 Kan. 61.

² Jackson v. King, 62 P. 655, 62 Kan. 850, reversing judgment 58 P. 1013, 9 Kan. App. 160.

³ Under Comp. Laws 1909, § 5969, relating to dormancy of judgments, a judgment ceases to operate as a lien five years after rendition, when no valid execution is issued within that time, and a judgment foreclosing the lien after five years is invalid though the proceedings to foreclose were begun within the five years. McGinnis v. Selbert, 134 P. 396, 37 Okl. 272.

⁴ Lisle v. Cheney, 13 P. 816, 36 Kan. 578.

ARTICLE VIII

ASSIGNMENT OF JUDGMENT

Sections

- 1365. In general.
- 1366. Consideration and validity.
- 1367. Setting aside assignment.
- 1368. Effect of transfer.
- 1369. Rights of parties.
- 1370. As to each other.

§ 1365. In general

A judgment may be transferred by parol.⁵

An incidental award of alimony for a gross sum, declared to be in full of all claims for alimony or on any other account, is assignable.⁶

§ 1366. Consideration and validity

If a judgment is assigned as security for a bona fide antecedent indebtedness, the consideration for such assignment is sufficient.⁷

The assignment of a judgment is not rendered invalid by being made subject to a lien claimed by the attorneys who obtained it.⁸

§ 1367. Setting aside assignment

The jurisdiction of a county court to strike an assignment of a judgment for fraud may be invoked by motion and notice.⁹

Where a mortgagee purchases what he thinks is the mortgaged premises and takes in addition a deficiency judgment and assigns this judgment for an inconsiderable consideration and later learns that he acquired no legal title to the mortgaged premises, such assignor may, on tendering back to the assignee, who purchased with knowledge of all the circumstances, the amount paid for the judgment, have the assignment rescinded as fraudulently obtained.¹⁰

⁵ Chicago Lumber Co. v. Cox, 147 P. 67, 94 Kan. 563.

⁶ Bassett v. Waters, 103 Kan. 853, 176 P. 663.

⁷ Alexander v. Clarkson, 164 P. 294, 100 Kan. 294, L. R. A. 1917F, 1006.

⁸ Walburn v. Chenault, 23 P. 657, 43 Kan. 352.

⁹ Leonard v. Ross, 56 Okl. 118, 155 P. 885.

¹⁰ Thayer v. Knote, 52 P. 433, 59 Kan. 181.

§ 1368. Effect of transfer

The assignment of a judgment transfers all of the judgment creditor's interest therein, and the credit could not thereafter be garnished or appropriated by a creditor of the judgment creditor.¹¹

The assignment of a judgment only does not transfer to the assignee a right of action on a stay bond given in the proceeding.¹²

§ 1369. Rights of parties

A judgment assigned by parol may be enforced by the assignee in the name of the original plaintiff.¹³

Where a judgment is assigned, the assignee is the only party who can maintain an action thereon, or enforce it by execution.¹⁴

When an assignment of a judgment has been recorded in the court where entered, or where it has been sent on appeal, or other legal transfer, it transfers both the legal and equitable title to the assignee, and the assignor has no greater right therein than any other stranger to the record.¹⁵

A plea of *res judicata*, good against a judgment creditor, is good against a party to whom the judgment has been assigned, and who seeks to enforce it against the pleader.¹⁶

§ 1370. — As to each other

In an action by a surety, who had paid part of the note in consideration of the holder's agreement to assign part of a judgment against the maker, a direction that payment be made out of the proceeds of the renewal note in satisfaction of the judgment, when such notes should be paid, was proper.¹⁷

The assignment of a note to one who knew that it had passed into judgment, with indorsement "Assigned with recourse," does not make the assignor a guarantor of the payment, as the words "with recourse," read into the assignment of the judgment, create no liability other or different from that of the assignor.¹⁸

¹¹ *Ives v. Addison*, 17 P. 797, 39 Kan. 172.

¹² *Crist v. McDaniel*, 82 P. 991, 15 Okl. 469.

¹³ *Gilmore v. Harpster*, 133 P. 726, 90 Kan. 405.

¹⁴ *Stein v. Scanlan*, 127 P. 483, 34 Okl. 801, 42 L. R. A. (N. S.) 895.

¹⁵ *Stein v. Scanlan*, 127 P. 483, 34 Okl. 801, 42 L. R. A. (N. S.) 895.

¹⁶ *Porter v. Bagby*, 31 P. 1058, 50 Kan. 412.

¹⁷ *Magee v. Snyder*, 108 Kan. 558, 175 P. 597.

¹⁸ *Redden v. First Nat. Bank*, 71 P. 578, 66 Kan. 747.

ARTICLE IX

COLLATERAL ATTACK

DIVISION I.—JUDGMENTS IMPEACHABLE COLLATERALLY

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DIVISION I.—JUDGMENTS IMPEACHABLE COLLATERALLY

§ 1371. In general

Every intendment will be indulged to support a judgment collaterally attacked.¹⁹

A judgment of a court having jurisdiction of the parties and of the subject-matter cannot be attacked collaterally.²⁰

¹⁹ Pettis v. Johnston, 78 Okl. 277, 190 P. 681.

²⁰ Pritchard v. Madren, 2 P. 691, 31 Kan. 38.

Where court has jurisdiction of subject-matter of an action and of the
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§ 1372. Particular courts—County court—District court

The judgment of a county court, being that of a court of general jurisdiction, is not subject to collateral attack, and may not be impeached by evidence aliunde.²¹

A judgment of the district court is not subject to collateral attack unless for want of jurisdiction.²²

§ 1373. — Federal court

A decree of a federal court in a cause of which it had jurisdiction, being final when not appealed from, cannot be reviewed in a collateral proceeding.²³

§ 1374. Nature of subject-matter

Where the judgment of a domestic court of competent jurisdiction expressly finds service of process upon a garnishee, such finding cannot be attacked in a collateral proceeding.²⁴

parties, its order and judgments as to all matters involved are final and conclusive, unless corrected or modified on appeal. *Rennolds v. Guthrie*, 108 Kan. 829, 177 P. 359.

The judgment of a court having jurisdiction of the subject-matter and the parties cannot be impeached collaterally in an action between the same parties, or their privies in law, upon a point put in issue and decided; but the party desiring to avoid the judgment must apply to the court which pronounced it to have it vacated. *McCormick v. McCormick*, 107 P. 546, 82 Kan. 31.

Where a journal entry shows that the plaintiff in the action "moves the court here to dismiss this action, without prejudice to a future action, at cost of plaintiff, which is accordingly done," and afterwards an execution is issued to recover the costs, and real estate of the plaintiff is levied upon and sold for that purpose, and the sale confirmed by the court, and a sheriff's deed executed, and the purchaser takes possession of the real estate, such journal entry is a sufficient judgment, when collaterally attacked, to uphold the sheriff's deed, and the other proceedings had under it. *Houston v. Clark*, 13 P. 739, 36 Kan. 412.

²¹ *King v. Mitchell* (Ok.) 171 P. 725; *Welch v. Focht* (Ok.) 171 P. 730, L. R. A. 1918D, 1163.

An order, made by the county court within its jurisdiction on appeal in tax proceedings under Rev. Laws 1910, § 7449, cannot be attacked in subsequent proceedings to enjoin the levying of a tax warrant, though it is grossly erroneous. *Rogers v. Duncan*, 57 Okl. 20, 156 P. 678.

Where no appeal was taken from the probate in county court of the will of a full-blood Indian, who disinherited her spouse, the probate proceedings

²² *McDougal v. Rice*, 79 Okl. 303, 193 P. 415.

²³ *Bowen v. Carter*, 144 P. 170, 42 Okl. 585.

²⁴ *Wheatland Grain & Lumber Co. v. Downing* (Ok.) 173 P. 956.

A judgment adjudicating the title to realty in an action in which the court had jurisdiction of the parties cannot be attacked collaterally in a subsequent ejectment action between the same parties, where the judgment is part of the chain of title of one party.²⁶

DIVISION II.—GROUNDS OF ATTACK

§ 1375. Invalidity—In general

A void judgment or order of the trial court may be collaterally attacked.²⁶

A judgment against a deceased defendant, who had been duly served with process, is void,²⁷ as is also a judgment rendered against a national bank which has gone into voluntary liquidation, and to dissolve which proper steps have been taken.²⁸ But a judgment which is voidable only cannot be attacked in a collateral proceeding.²⁹

The fact that the term at which a void judgment was rendered has expired does not give the judgment validity, and it may be attacked at any time upon motion or collaterally.³⁰

could not be collaterally attacked, in subsequent proceedings to partition land, on the ground that the will was void for noncompliance with the federal statute. *Homer v. McCurtain*, 138 P. 807, 40 Okl. 406.

²⁶ *Davis v. Davis*, 101 Kan. 395, 166 P. 515.

A judgment quieting title of a tax deed holder rendered by a court having jurisdiction cannot be impeached in a collateral action of ejectment, nor can the validity of the tax deed be relitigated in such an action, no matter how vulnerable it might have been if it had been properly assailed. *Caldwell v. Bigger*, 90 P. 1095, 76 Kan. 49.

²⁶ *Yawitz v. Hopkins* (Okl.) 174 P. 257.

The county court's void decree, attempting to partition restricted Indian lands, may be attacked collaterally, though the records of the partition proceedings do not show that such lands are restricted. *Lewis v. Gillard* (Okl.) 173 P. 1136.

²⁷ A judgment for money, and for the foreclosure of a mortgage upon real estate, against a deceased defendant, who had theretofore been duly served with process, is void, and hence may be collaterally impeached, because thereof by the heirs of the deceased, if not made parties to the foreclosure proceeding, in an action brought by them for the recovery of the land sold and conveyed in satisfaction of the judgment. *Kager v. Vickery*, 59 P. 623, 61 Kan. 342, 49 L. R. A. 153, 78 Am. St. Rep. 318.

²⁸ *Hodgson v. McKinstrey*, 3 Kan. App. 412, 42 P. 929.

²⁹ *Morris v. Robbins*, 111 P. 470, 83 Kan. 335.

A decision on a record and case-made, regular, and clearly showing jurisdiction, but defective for want of jurisdiction, is merely voidable and not subject to collateral attack. *Edwards v. Smith*, 142 P. 302, 42 Okl. 544.

³⁰ Under Rev. Laws 1910, § 5274, authorizing vacation of a void judgment

§ 1376. — Default judgment

A default judgment rendered before garnishees were required by statute to file their answer is voidable but not void, and unless attacked in some manner provided by law will be upheld.²¹

§ 1377. Want of jurisdiction

A judgment rendered without jurisdiction, being void, is subject to collateral attack.²²

Jurisdiction of any court exercising authority over any subject, including both domestic and foreign judgments, may be inquired into in every court when proceeding is relied on before such other court by a party claiming the benefit of the proceeding.²³

at any time on motion of any interested party, fact that term at which it was rendered has expired does not give it validity and it may be attacked at any time upon motion or collaterally. *Continental Gin Co. v. Arnold* (Okl.) 167 P. 613, L. R. A. 1918B, 511.

²¹ *Wheatland Grain & Lumber Co. v. Downing* (Okl.) 173 P. 956.

A default judgment is not void on collateral attack, even if the petition on which it was rendered did not state a cause of action. *Brunbaugh v. Wilson*, 82 Kan. 53, 107 P. 792.

²² *First State Bank of Addington v. Latimer*, 48 Okl. 104, 149 P. 1009; *Clayton v. Clayton*, 4 Colo. 410; *Mortgage Trust Co. of Pennsylvania v. Redd*, 88 P. 473, 38 Colo. 458, 8 L. R. A. (N. S.) 1215, 120 Am. St. Rep. 132; *Kelso v. Norton*, 87 P. 184, 74 Kan. 442; *McMurray v. Same, Id.*; *Furgeson v. Jones*, 20 P. 842, 17 Or. 204, 3 L. R. A. 620, 11 Am. St. Rep. 808; *J. B. Watkins Land-Mortg. Co. v. Mullen*, 54 P. 921, 8 Kan. App. 705, judgment reversed 61 P. 385, 62 Kan. 1, 84 Am. St. Rep. 372.

A judgment rendered without jurisdiction of the person is null and void, and may be shown to be void in a collateral, as well as a direct, proceeding, by extrinsic evidence as well as by the record itself. *Jefferson v. Gallagher*, 56 Okl. 405, 150 P. 1071.

Where judgment is void because rendered without jurisdiction of person, it is supported by no presumptions, and may be impeached in any action. *Condit v. Condit* (Okl.) 168 P. 456. Judgment void because rendered without jurisdiction of person may be shown to be void in collateral, as well as direct proceeding, and by extrinsic evidence as well as by record itself. *Id.* Where judgment is void because rendered without jurisdiction of person, it is not necessary to take any steps to have it reversed, vacated, or set aside. *Id.* Judgment rendered without jurisdiction of person is a mere nullity as to plaintiff, defendant, and third persons. *Id.*

²³ *Sharp v. Sharp* (Okl.) 166 P. 175, L. R. A. 1917F, 562.

The jurisdiction of any court exercising authority over any subject may be inquired into in every court when the proceedings of the former are relied on and brought before the latter by a party claiming the benefit of such proceedings. *Southern Pine Lumber Co. v. Ward*, 85 P. 459, 16 Okl. 131, judgment affirmed 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420.

A court's jurisdiction over the subject-matter may be inquired into in ev-

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Where the record affirmatively discloses that the court is without power to make the order or decree it assumes to make, such order or decree is void and subject to collateral attack.³⁴

Parties not setting up a known disqualification of the judge cannot collaterally attack the judgment on account thereof.³⁵

§ 1378. — Want of service

A judgment rendered without service of process on defendant can be attacked collaterally.³⁶

Proceedings for the sale of property of one not a party to the action and not served in any way do not bind the owner and are subject to collateral attack.³⁷

§ 1379. — Service by publication

If an affidavit seeking service on a nonresident defendant by publication fails in any jurisdictional particular, and judgment is entered in the case, it will be void and subject to collateral attack.³⁸

every other court in which the proceedings are relied on. *In re Moore's Guardianship*, 51 Okl. 731, 152 P. 378.

³⁴ *Roth v. Union Nat. Bank of Bartlesville*, 58 Okl. 604, 160 P. 505; *Lee v. Tonsor*, 62 Okl. 14, 161 P. 804; *Winters v. Oklahoma Portland Cement Co.* (Okl.) 164 P. 965.

Where, in ejectment, defendant relied on a default judgment in a suit for specific performance entered in his favor against plaintiff's grantor prior to the execution of the deed to plaintiff, and the judgment showed that the suit was brought in the district where the land lay, and not where the defendants resided, contrary to Act Cong. March 1, 1895, § 7, construed with Act Cong. May 2, 1890, § 32, the judgment, nothing else appearing, was void on its face. *Welch v. Ladd*, 116 P. 573, 29 Okl. 93.

Where a judgment by default is rendered against defendant in a county other than that of his residence, summons having been served on him at his home, being colorably justified only because the action against him is joined with one against another defendant residing in the county where the suit is brought, a subsequent action on such default judgment cannot be defeated by showing that the petition disclosed on its face that the cause of action against the nonresident was one that could not properly be joined with that against the resident defendant. *Ayres v. Wm. Deering & Co.*, 90 P. 794, 76 Kan. 149.

³⁵ *Holloway v. Hall*, 79 Okl. 163, 192 P. 219.

³⁶ *Pray v. Jenkins*, 28 P. 716, 47 Kan. 599.

³⁷ *Davies v. Thompson*, 61 Okl. 21, 160 P. 75, L. R. A. 1917B, 395.

³⁸ *Chaplin v. First Bank of Hitchcock* (Okl.) 181 P. 497.

An affidavit for service by publication, if sworn to before an attorney for plaintiff might make the judgment rendered thereon voidable, but not void. *Harris v. Burbery*, 116 P. 206, 85 Kan. 201.

In an action to foreclose a mortgage based on service by publication only,

In obtaining service by publication, if there is a total failure to state in the notice any material matter required by statute, the service is void and subject to collateral attack, but where there is not such an entire omission of a material matter, and it is inferentially or insufficiently set forth, the service is merely voidable, and can be attacked only on a direct proceeding.³⁹

the affidavit to obtain the same alleged that personal service could not be made on defendant within the state, and "that this is an action brought for the recovery of real property under a mortgage situated in said county of Lyon." Held that, while the affidavit was imperfect in stating the nature of the action, it was not so defective as to render a judgment based thereon null and void, or subject to a collateral attack. *Shippen v. Kimball*, 27 P. 613, 47 Kan. 173.

³⁹ *Core v. Smith*, 102 P. 114, 23 Okl. 909.

In a suit to quiet title, the publication notice incorrectly stated the distances and bearings of lines in the metes and bounds description of the land, but correctly stated the point of beginning and return. By allowing the point of beginning and return to control the errors in distance and bearing, the description embraced the land sought to be described. Held, that a judgment on such notice was not subject to collateral attack. *Douglass v. Byers*, 53 P. 523, 59 Kan. 481.

A judgment was not rendered void, and hence subject to collateral attack, by the fact that the publication notice in the action in which it was rendered did not describe the land which had been attached in the action, where it indicated the amount of the judgment that would be taken, and that "certain real property attached" would be sold, since there was not an entire omission from the notice of any material matter required by Code Civ. Proc. § 74. *Garrett v. Struble*, 46 P. 943, 57 Kan. 508.

The failure of the publication notice to describe the land involved in an action in rem, or to state that the mortgage to be foreclosed is a real estate mortgage, or to state the amount of the note or debt secured by the mortgage, is not fatal to the judgment on collateral attack. *Pettis v. Johnston*, 78 Okl. 277, 190 P. 681.

A default decree by a tax deed holder quieting title against a mortgage describing mortgagees by their firm name only, upon service by publication, in an action in which mortgagees were referred to throughout merely by their firm name, is not open to collateral attack because of the failure of the publication notice and other portions of the record to name the mortgagees individually or describe them more definitely. *Neiswanger v. Ord*, 81 Kan. 63, 105 P. 17, 26 L. R. A. (N. S.) 287.

A notice of publication in an action against plaintiff's grantor, brought before plaintiff purchased, to quiet title, naming defendant therein as "Andrew V. Johnson," was sufficient on collateral attack of the judgment quieting title by plaintiff, though the record showed title to be in "Andrew U. Johnson" when plaintiff purchased in good faith, and hence the judgment bound him. *Hungate v. Hetzer*, 111 P. 183, 83 Kan. 265.

Service by publication of notice directed to "Mrs. Edward H. Williams"

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A decree upon service by publication in a case in which such service is authorized, reciting notice to the defendant for more than twenty days of the pendency of the action, when collaterally attacked is valid.⁴⁰

A decree of foreclosure rendered against a nonresident defendant on constructive service could not be attacked by him in a suit to quiet title brought by him after it was too late to have the decree opened up.⁴¹

A judgment in attachment, wherein service was by publication, which was so defective as to be void is void on collateral attack, and an intervener in the proceeding claiming the real estate attached may attack such judgment or service by motion to set the same aside.⁴²

§ 1380. — Presumption of jurisdiction

Jurisdiction of the person and of the subject-matter will be presumed in cases of domestic judgments of courts of general jurisdiction, on a collateral attack, where the record shows nothing to the contrary.⁴³

As every presumption is in favor of the validity of a judgment of a court of general jurisdiction, an affidavit for service by publication of a nonresident defendant, which has been destroyed, will be presumed to have been sufficient in a collateral attack on the judgment.⁴⁴

When the Supreme Court takes jurisdiction of a proceeding in error, it will be presumed thereafter, when the question is collaterally raised, that it had jurisdiction; and, if jurisdiction be denied

was sufficient, as against collateral attack, to give the court jurisdiction of "Jessie L. Williams, wife of Edward H. Williams." *Doyle v. Hays Land & Investment Co.*, 102 P. 496, 80 Kan. 209, 133 Am. St. Rep. 199.

⁴⁰ *Cushing v. Cummings* (Okl.) 179 P. 762; Rev. Laws 1910, § 4725 is complied with.

⁴¹ *Hartz v. Flitts*, 132 P. 1187, 89 Kan. 751.

⁴² *Ballew v. Young*, 103 P. 623, 24 Okl. 182, 23 L. R. A. (N. S.) 1084.

⁴³ *Head v. Daniels*, 15 P. 911, 38 Kan. 1.

Where an action has been prosecuted to judgment in a court of competent jurisdiction by procedure regular upon the face of the record, it will be presumed that the parties thereto were living when the action was commenced, and when the judgment was rendered. *Hillyard v. Banchor*, 118 P. 67, 85 Kan. 510.

⁴⁴ *Core v. Smith*, 102 P. 114, 23 Okl. 909.

upon the ground that the proceeding in error was not commenced within one year from final judgment, it will devolve upon those who make the denial to introduce the full record of the proceeding, and to show affirmatively by it that it is full and complete.⁴⁵

§ 1381. — Effect of recitals

Whenever the jurisdiction of a court depends upon a fact properly determined in the action, the judgment finding such fact is conclusive evidence of its existence and of the jurisdiction of the court, until the judgment is vacated or reversed in a direct proceeding.⁴⁶

Thus the recital of personal appearance of the defendant is conclusive in a collateral, but not in a direct attack.⁴⁷

A finding of the jurisdictional facts in a domestic judgment is conclusive in a collateral attack upon such judgment attempting again to put such facts in issue.⁴⁸

⁴⁵ *Gille v. Emmons*, 59 P. 338, 61 Kan. 217.

⁴⁶ *Miller v. Miller*, 130 P. 681, 89 Kan. 151.

The answer of defendant averred that one not a party had an interest in the subject-matter of the action. The journal entry of judgment recited an appearance by such party and an order as to his interest, responsive to the allegations of such answer. The record showed no pleadings by him, nor that he was named as a party in the place, nor that notice of process was served on him. Held, it will be presumed, as against a collateral attack on the judgment, that he made a voluntary appearance. *National Bank of America v. Home Security Co.*, 70 P. 646, 65 Kan. 642.

A judgment roll regular on its face, containing necessary jurisdictional averments, cannot be collaterally attacked. *Carolina v. Montgomery* (Okl.) 177 P. 612; *Blackwell v. McCall*, 54 Okl. 96, 153 P. 815; *Daugherty v. Feland*, 59 Okl. 122, 157 P. 1144.

A domestic judgment or decree by a court of competent jurisdiction, reciting that defendant was duly served, is conclusive on collateral attack. *Rice v. Woolery*, 38 Okl. 199, 132 P. 817; *Crist v. Cosby*, 69 P. 885, 11 Okl. 635.

Where a court expressly finds that defendant is present, such a finding is not subject to attack in a collateral proceeding. *Continental Gin Co. v. De Bord*, 123 P. 159, 34 Okl. 66.

⁴⁷ *McIntosh v. Holtgrave*, 79 Okl. 63, 191 P. 739.

⁴⁸ *Bruno v. Getzelman* (Okl.) 173 P. 850.

Where, in an action in the district court, attachment was levied on personal property belonging to defendant, and after return of the writ the court entered judgment for plaintiff, and adjudged that the property was not exempt from attachment on the ground that it was engaged in interstate commerce, such order and adjudication on the question of jurisdiction was binding on all parties interested, and cannot be questioned except in a direct proceeding. *Jessup v. Atchison, T. & S. F. Ry. Co.*, 100 P. 472, 79 Kan. 420.

Where garnishment and attachment proceedings have been instituted in a

§ 1382. — Extrinsic evidence

A party is not concluded by the decision of the court proceeding without jurisdiction of the subject-matter, and may show the want of jurisdiction, in order to show that he is not bound by the decision.⁴⁹

Where a judgment rendered by publication is offered in evidence in a collateral action in the same court, and the affidavit on file shows that the publication was insufficient, parol evidence is admissible to prove that due publication was in fact made.⁵⁰

Where the district court has jurisdiction of the parties and subject-matter of the action, and the journal of the court recites a trial and judgment in term time, the record imports absolute verity, and cannot, in a collateral proceeding, be overthrown by parol testimony tending to show that the trial was had and the judgment rendered in vacation.⁵¹

§ 1383. Errors and irregularities—In general

Where the court has jurisdiction of the subject-matter and the parties, its judgment, although irregular in form, or erroneous, is conclusive, so long as unreversed, and cannot be attacked collaterally.⁵²

suit, and the defendant has made a special appearance to contest the jurisdiction of the court over the subject-matter of the action, and an adverse ruling has been made, and there is sufficient in the record to show that the court had jurisdiction, the order of the court requiring the garnishee to answer, and the other proceedings in attachment, cannot be attacked collaterally, and are conclusive until reversed or set aside in a direct action. *Axman v. Dueker*, 25 P. 582, 45 Kan. 179, judgment affirmed 26 P. 946, 45 Kan. 745.

⁴⁹ *Ewing v. Mallison*, 70 P. 369, 65 Kan. 484, 93 Am. St. Rep. 299.

Although a recital, contained in a judgment, that service was made on the defendant, raises a strong presumption in favor of the truth of the recital and of the jurisdiction, yet the defendant may show by extrinsic evidence, if such be the fact, that no service was actually made. *Thorn v. Salmonson*, 15 P. 588, 37 Kan. 441.

⁵⁰ *Gordon v. Munn*, 125 P. 1, 87 Kan. 624, Ann. Cas. 1914A, 783, rehearing denied 127 P. 764, 88 Kan. 72, Ann. Cas. 1914A, 783.

⁵¹ *Mitchell v. Insley*, 7 P. 201, 33 Kan. 654.

⁵² *Bank of Santa Fé v. Haskell County Bank*, 32 P. 627, 51 Kan. 50.

In an action to foreclose a mortgage given by an owner of land jointly with the guardian of his insane wife, a judgment involving an erroneous decision as to whether the property was a homestead, and whether an instrument was with the joint consent of husband and wife, is not open to collateral attack, but is binding until corrected in a direct proceeding. *Clevenger v. Figley*, 75 P. 1001, 68 Kan. 699.

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A judgment, merely voidable for irregularities, cannot be attacked collaterally.⁵³

The fact that a judgment is excessive does not render it void. It is at most only voidable as to such excess.⁵⁴

Orders of a county court, though irregular and not in ordinary form, are valid against collateral attack, where their language clearly indicates their purpose and character.⁵⁵

§ 1384. — As to parties

A judgment in favor of a partnership in its own name only instead of in its favor as the party suing in the name of the individuals composing it, is not void or subject to collateral attack.⁵⁶

The decision that a resident defendant was rightly joined with a nonresident defendant, summoned in another county, may be reviewed on error, but the decision of the question by a court having jurisdiction of the subject-matter is not open to collateral attack.⁵⁷

§ 1385. — As to pleadings

Where a court had jurisdiction of an action and of the parties, and the petition was sufficient to challenge the court's action on the merits, it was sufficient to sustain a judgment as against collateral attack, though the petition was demurrable for failure to state facts sufficient to constitute a cause of action;⁵⁸ or because the petition showed upon its face that the action was barred by the statute of limitations.⁵⁹

⁵³ *Coblentz v. Cochran*, 44 Okl. 158, 143 P. 658.

A judgment of a court having jurisdiction of parties and subject-matter, foreclosing a mortgage on realty, which erroneously orders a sale and conveyance of the property without providing for redemption, is not a nullity, and cannot be successfully assailed in a collateral attack. *Ehrsam v. Smith*, 60 P. 740, 61 Kan. 699.

Though a judgment offered in evidence on the trial of a cause is not as formal and complete as it might be, as between the parties to it and those claiming under or through them in a collateral proceeding, it is not void. *Rhodes v. Spears*, 65 P. 228, 63 Kan. 218.

⁵⁴ *Lawton v. Nicholas*, 73 P. 262, 12 Okl. 550.

⁵⁵ *Lowery v. Parton* (Okl.) 165 P. 164.

⁵⁶ *Kale v. Humphrey* (Okl.) 170 P. 223.

⁵⁷ *Ex parte Luttgerding*, 83 Kan. 205, 110 P. 95.

⁵⁸ *Board of Com'rs of Wyandotte County v. Equitable Inv. Trust Co.*, 103 P. 996, 80 Kan. 492.

⁵⁹ *Head v. Daniels*, 15 P. 911, 38 Kan. 1.

§ 1386. — In proceedings

The judgment of a court having jurisdiction of the subject-matter and of the parties is not subject to collateral attack for errors or irregularity in the proceedings.⁶⁰

In defense to an action on a judgment by default rendered against the defendant in a county other than that in which he resided, it cannot be shown that the judgment was rendered while a demurrer filed by the resident defendant was still pending.⁶¹

§ 1387. Perjury

A party to a judgment cannot impeach it in a collateral proceeding on the ground that it was obtained by perjured testimony,⁶² nor can he maintain an action against the other party for damages suffered because of such perjury.⁶³

§ 1388. Fraud

Orders and judgments procured by fraud are void;⁶⁴ but the only fraud that can be relied on to avoid a judgment on a collateral attack is fraud which inheres in the judgment and which affects the jurisdiction.⁶⁵

Every judgment, obtained through fraud or otherwise, is valid and conclusive as to all parties thereto, and their privies, until re-

⁶⁰ *Moffet v. Jones* (Okl.) 169 P. 652; *Bradford v. Larkin*, 45 P. 69, 57 Kan. 90; *Smith v. Finger*, 79 P. 759, 15 Okl. 120.

A rule of the Secretary of the Interior requiring a contestant before township trustees appointed under Act Cong. May 14, 1890, § 1 (U. S. Comp. St. § 5029), to deposit \$32 with the treasurer of the board before cause will be heard, is a reasonable one, but a failure to comply therewith will not render void a judgment of the court of general jurisdiction which had jurisdiction of the subject-matter and of the parties to the action. *Thurston v. Washington*, 90 P. 16, 18 Okl. 362.

In a proceeding to revive a dormant judgment in the name of the executor of a deceased judgment creditor, the defendants cannot attack the validity of the judgment for the reason of any irregularity in the proceedings of the court rendering the same, it appearing that the court had jurisdiction of the parties defendant and the subject-matter. *Selders v. Boyle*, 49 P. 320, 5 Kan. App. 451.

⁶¹ *Ayres v. Wm. Deering & Co.*, 90 P. 794, 76 Kan. 149.

⁶² *Bleakley v. Barclay*, 89 P. 906, 75 Kan. 462, 10 L. R. A. (N. S.) 230.

⁶³ *Horner v. Schinstock*, 101 P. 996, 80 Kan. 136, 23 L. R. A. (N. S.) 134, 18 Ann. Cas. 21.

⁶⁴ *Winters v. Oklahoma Portland Cement Co.* (Okl.) 164 P. 965.

⁶⁵ *Weedman v. Fowler*, 113 P. 390, 84 Kan. 75.

versed, vacated, or perpetually enjoined by some proceeding instituted directly for that purpose.⁶⁶

§ 1389. Collusion

In defense to an action on a judgment by default rendered against a defendant in a county other than that in which he resided, it cannot be shown that joinder of the two defendants was collusive to enable plaintiff to sue a nonresident outside of the county where he resided, or that after judgment against him the action was dismissed as to the resident defendant.⁶⁷

§ 1390. Available defenses

A judgment cannot be collaterally attacked by setting up a defense which was or might have been raised in the original action.⁶⁸

DIVISION III.—PROCEEDINGS

§ 1391. Nature of attacks

A "direct attack" on a judicial proceeding is any attack within the issues to annul, vacate, or modify the effect of the proceeding, and questions raised and the effect of the attack are determined by the nature of the attack, the parties, grounds and the relief demanded.⁶⁹

A direct attack on a judicial proceeding is an attempt to avoid or correct it in some manner provided by law.⁷⁰

⁶⁶ *McCormick v. McCormick*, 107 P. 546, 82 Kan. 31.

A judgment against one of plaintiff's grantors, breaking his chain of title and starting a new line ending in defendant, cannot be collaterally attacked in ejectment on the ground that it was fraudulently obtained, since that question can only be litigated in a direct proceeding. *Morris v. Sadler*, 88 P. 69, 74 Kan. 892.

⁶⁷ *Ayres v. Wm. Deering & Co.*, 90 P. 794, 76 Kan. 149.

⁶⁸ *Snow v. Mitchell*, 15 P. 224, 37 Kan. 636, rehearing denied 16 P. 737, 37 Kan. 639.

Judgment by court having jurisdiction of parties and subject-matter is not open to collateral attack for illegality or intrinsic fraud which was open for consideration in trial, although judgment may have been taken by default or consent on day following bringing of original action. *Schenck v. School Dist. No. 34 of Hamilton County*, 164 P. 169, 100 Kan. 389, L. R. A. 1917D, 880.

⁶⁹ *Richardson v. Carr* (Okl.) 171 P. 476.

⁷⁰ *Griffin v. Culp* (Okl.) 174 P. 495; *Continental Gin Co. v. De Bord*, 123 P. 159, 34 Okl. 66.

An action to vacate judgments on the ground of fraud, under the language

A "collateral attack" on a judgment is an attempt to avoid or deny its force and effect in some incidental proceeding not provided by law for the express purpose of attacking it.⁷¹

§ 1392. Preventing enforcement

Where a summons was wrongfully issued to and served on a defendant in another county, he cannot, after allowing the case to go

of the petition and as shown by the records in the case, held a direct attack upon such judgments. *Jefferson v. Gallagher*, 56 Okl. 405, 150 P. 1071.

Petition by ward against former guardian and surety, charging that order approving final report of guardian and releasing surety was procured by fraud, is a direct attack on such order. *Brewer v. Dodson*, 60 Okl. 31, 159 P. 329.

Proceedings to destroy and modify judgment for all purposes, as by reversal, setting aside, etc., are direct proceedings, and proceedings for some other purpose in which effect of judgment arises are collateral proceedings. *Crosble v. Brewer* (Okl.) 158 P. 388.

Where an affidavit for publication is wholly insufficient in law, and application is made to set aside the constructive service and subsequent proceedings based thereon in the same case, and considered without objection, such application and proceeding constitutes a direct, and not a collateral, attack on the constructive service and subsequent proceedings; and hence it is immaterial whether such service and proceedings were absolutely void or only voidable. *Lieberman v. Douglass*, 64 P. 590, 62 Kan. 784, reversing judgment, *Douglass v. Lieberman*, 9 Kan. App. 45, 57 P. 254.

Where an action has been brought to foreclose a trust deed, and a defendant therein pleads a superior title in himself under and by force of a prior judgment in the same court, and a codefendant answers admitting the plaintiff's cause of action upon the trust deed, and shows that he was the party who executed the same and owned the property, and still is the owner of the equity therein subject to the plaintiff's right under said trust deed, and by way of cross-petition shows that his codefendant had acquired no title under and by force of such former judgment for the reason that the court rendering such prior judgment did not have jurisdiction of the parties, such pleading is a direct and not a collateral attack upon such prior judgment, and where in such case the rights of the parties depend upon the validity or invalidity of such prior judgment, the question thus presented may be tried and determined, and the rights of the parties duly adjudicated. *Southern Pine Lumber Co. v. Ward*, 85 P. 459, 16 Okl. 131, judgment affirmed (1908) 28 S. Ct. 239, 208 U. S. 126, 52 L. Ed. 420.

⁷¹ *Bruno v. Getzelman* (Okl.) 173 P. 850; *Pettis v. Johnston*, 78 Okl. 277, 190 P. 681; *Sockey v. Winstock*, 144 P. 372, 43 Okl. 758.

Action to establish title to certain lands and to set aside guardian's deed executed thereto, held a collateral attack upon probate proceeding in which such deed was executed. *Moffet v. Jones* (Okl.) 169 P. 652.

After judgment by stipulation of attorneys of record for defendant for possession of realty, offer by plaintiff therein in subsequent action between same

by default, have the sheriff enjoined from selling the property levied on under an execution on such judgment.⁷²

DIVISION IV.—PROBATE OF WILLS

§ 1393. In general

The determination of the question of the genuineness of an instrument purporting to be a will is exclusively for the court to which the proof of wills is confided, and its decision is final and conclusive, and, in the absence of a statute providing otherwise, not subject, except on an appeal to a higher court, to be questioned in any other court.⁷³

The order of a probate court admitting a will to probate, being fair, and no fraud being shown, cannot be collaterally attacked.⁷⁴

Where the executor or administrator with will annexed, as pro-

parties to prove that judgment was procured by fraud of her attorney was a "collateral attack." *Davis v. Davis*, 101 Kan. 395, 166 P. 515.

Mandamus to compel levy of tax to pay judgment against a county cannot be denied on the ground that judgment was based on a demand for which the county was not liable. *Equitable Inv. Trust Co. v. Board of Com'rs of Wyandotte County*, 121 P. 1097, 86 Kan. 708.

A suit for partition and an accounting wherein answer alleged devise of property to defendant, and judgment of county court closing estate, and wherein reply alleged fraud in securing probate, was a collateral attack on the judgment. *Lucas v. Lucas* (Okl.) 163 P. 943. The judgment of the county court probating a will, etc., regular and valid on its face, was not subject to "collateral attack." *Id.* Allegations of petition, reply, etc., in suit for partition and for accounting, setting up undue influence and fraud in procuring will, and fraud in judgment probating will under which defendant claimed as devisee, held insufficient to bring case within exception entitling plaintiff to collaterally attack the judgment. *Id.*

⁷² *Crist v. Cosby*, 69 P. 885, 11 Okl. 635; *First Nat. Bank v. Geneseo Town Co.*, 32 P. 902, 51 Kan. 215.

⁷³ *Tracy v. Muir*, 90 P. 832, 151 Cal. 363, 121 Am. St. Rep. 117.

A valid and effectual probate of a will operates to establish the will according to its tenor. *Del Campo v. Camarillo*, 98 P. 1049, 154 Cal. 647.

⁷⁴ *Cooper v. Newcomb* (Okl.) 174 P. 1029.

A judgment admitting a will to probate, from which an appeal was taken, and which had become final, could not be collaterally attacked by motion to strike on the ground that it was not a will. *In re Ryan's Estate*, 177 Cal. 598, 171 P. 297.

Where the probate court having jurisdiction of the probate of a will admits it to probate, and its judgment becomes final, it cannot be collaterally attacked in ejectment in the district court in a suit by the heirs to dispossess the devisee under the will. *Ward v. Board of Com'rs of Logan County*, 70 P. 378, 12 Okl. 267.

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ponents, and the contestants, are made parties on appeal to the district court, the district court's judgment has the same effect as if all parties interested in establishing the will were made formal parties to the proceedings, and while such judgment remains in force it is conclusive on the world.⁷⁵

Where property was devised to trustees for the benefit of a third person, and the court, in an action to probate the will, distributed the estate to the trustees, as directed in the will, the decree was an adjudication of the validity of the trust and the rights of the trustees in the property.⁷⁶

A decree setting aside the probate of a will, at the suit of an heir arrived at full age, will not inure to the benefit of other heirs, who permit the time allowed them, after removal of their disabilities, for objection to such probate to pass without instituting a contest thereof.⁷⁷

§ 1394. Ancillary probate

Where a will executed, proved, and admitted to probate in another state is presented for record to a court in this state, in which land belonging to the estate is situate, and such court, upon the evidence submitted, finds and adjudges that the authentication of the copy presented for record is sufficient, its adjudication thereon cannot be collaterally attacked.⁷⁸

A decree granting ancillary probate of a foreign will is only conclusive in so far as it affects the property of the testator within the state, and is not binding as to the will itself in other jurisdictions, where testator may have left property, or on the courts of his domicile.⁷⁹

⁷⁵ Bell v. Davis, 142 P. 1011, 43 Okl. 221, Ann. Cas. 1917C, 1075.

The probate of a will is a proceeding in rem, binding on all persons interested, who, being constructively notified to appear at the probate, might have come in, and who, had they come in, would have been heard for or against the will. In re Allen's Estate, 176 Cal. 632, 169 P. 364.

A party interested in a will who had legal notice of contest on the ground of unsoundness of mind is bound by a decree admitting the will to probate, and cannot later contest the will on that ground. In re Allen's Estate, 176 Cal. 632, 169 P. 364.

⁷⁶ Goldtree v. Allison, 51 P. 561, 119 Cal. 344.

⁷⁷ Samson v. Samson, 30 P. 979, 64 Cal. 327.

⁷⁸ Calloway v. Cooley, 32 P. 372, 50 Kan. 743; Goldtree v. McAllister, 23 P. 207, 86 Cal. 93; Id., 24 P. 801, 86 Cal. 93.

⁷⁹ In re Clark's Estate, 82 P. 760, 148 Cal. 108, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306.

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DIVISION I.—IN GENERAL

§ 1395. Nature of former recovery

A judgment by a court having jurisdiction is a bar to any future suit between the same parties or their privies, on the same cause, so long as it remains unreversed.⁸⁰

To constitute *res judicata*, there must be the same parties, the

⁸⁰ Long v. Early, 55 Okl. 647, 155 P. 538; Wiley v. Edmondson, 43 Okl. 1, 133 P. 38.

A dissolution of an Indian marriage contract according to tribal laws and customs will be upheld, in the absence of a federal law invalidating such laws and customs. James v. Adams, 56 Okl. 450, 155 P. 1121.

Court having jurisdiction of parties and subject-matter and judgment being within petition, judgment though perhaps erroneous, is not void on its

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same subject-matter, the same issues relating to the same subject-matter, and the capacities of the parties must be the same as to the subject-matter and the issues.⁸¹

Where it affirmatively appears on the face of the record, in an action against several parties in which different matters of relief are sought, that the court refuses to grant one such matter on the ground that, affecting only some of the parties, it is not determinable in that action, the plaintiff is not thereby barred of a subsequent action for such relief.⁸²

face, and, not having been appealed from, or any motion made to vacate it, it is conclusive as to rights of parties. *Gray v. Gray*, 57 Okl. 667, 157 P. 730.

Where an action to reform an insurance policy and to recover dividends thereon has been decided in a judgment on the pleadings, the matter is res judicata, and a subsequent action to recover the dividends will not lie between the same parties and their privies in interest, and the fact that the subsequent action is brought upon the original policy does not relieve the second suit from the bar. *Hayes v. Mutual Ben. Life Ins. Co.*, 104 Kan. 230, 178 P. 432.

⁸¹ *Alfrey v. Colbert*, 44 Okl. 246, 144 P. 179; *State v. Kaemmerlin*, 111 P. 443, 83 Kan. 383.

A mare and colt, belonging to the same person, entered on a railroad track at the same time and place, and, both running before a train, the colt was first struck and killed, and then the mare was struck and injured, at a point 30 rods from where the colt was struck. Held, that judgment for the value of the colt and its satisfaction were not a bar to an action for the value of the mare, which died subsequently from her injuries, as the causes of action were independent. *Missouri Pac. Ry. Co. v. Scammon*, 21 P. 590, 41 Kan. 521.

When the board of county commissioners are compelled by mandamus to canvass the votes and declare the result of an election held to fill a supposed vacancy in the office of a member of the board, the question as to whether there was a vacancy in the office by reason of a change in the boundaries of the commissioner districts is not res judicata in a subsequent action by the holder of such an election certificate against the sitting member. *Brungardt v. Leiker*, 21 P. 1065, 42 Kan. 206.

In an action to foreclose mortgages of real estate and chattels, an heir of the deceased mortgagor was joined as defendant because of his interest in the land as heir, but no other relief was asked against him, and no issue was presented as to what property was included in the chattel mortgage, and the judgment directed sale of the mortgaged property generally. Held, that the heir was not estopped by the judgment from showing that he owned part of the personal property. *Scott v. Wagner*, 42 P. 741, 2 Kan. App. 386.

Laws 1881, c. 161, provides a summary proceeding for ascertaining whether cattle are diseased, and for their detention by the sheriff. Held, that an adjudication in such a proceeding that certain cattle are diseased does not conclude the owner from showing the contrary in an action against the sheriff for their conversion. *Wilcox v. Johnson*, 9 P. 610, 34 Kan. 655.

⁸² *Smith v. Auld*, 1 P. 626, 31 Kan. 262.

The county court can determine the amount due an attorney for services in a guardianship proceeding, and an order on the attorney's petition for allowance of fees is *res judicata* in a subsequent suit for a fee for the same services.⁸³

§ 1396. Nature of action—Warrant indebtedness

Where the district court has determined the validity of warrant indebtedness under refunding proceedings, and has decreed that funding bonds sought to be issued are valid and duly issued, and no objection or exception or appeal has been taken, the decree is conclusive.⁸⁴

§ 1397. Equitable actions

A perpetual injunction granted after a full hearing between the original parties to a nonnegotiable note before a court having jurisdiction, restraining the collection of such note, is a complete defense to a suit on the same when brought by one claiming to be a bona fide purchaser before maturity and without notice.⁸⁵

§ 1398. Interplea

A judgment on an interplea filed in an attachment proceeding is binding on the interpleader and the parties to the action and is a bar to another action by the interpleader to recover possession of the property in controversy.⁸⁶

§ 1399. Real property

In an action to quiet title, a general finding of title in the plaintiff is conclusive against the defendants on the question of title, from whatever source it may be derived, and estops them from asserting

⁸³ *Evans v. Harris*, 60 Okl. 27, 158 P. 898.

⁸⁴ *Hume v. Wyand* (Okl.) 173 P. 813.

Where the district court has determined the validity of the warrant of indebtedness of a school board under refunding proceedings provided for by Sess. Laws 1905, c. 7, art. 3 (Comp. Laws 1909, §§ 408-421), and has decreed that the refunding bonds sought to be issued are valid and issued in strict conformity with the funding law, and no objections or exceptions are made to such determination and decree, and no appeal taken therefrom the decree is final and conclusive, notwithstanding Sess. Laws 1910, c. 94, making the Attorney General *ex officio* bond commissioner, and making it his duty to examine into and pass on any security of any county or other subdivision of the state. *State v. West*, 118 P. 146, 29 Okl. 503.

⁸⁵ *Randolph v. Hudson*, 74 P. 946, 12 Okl. 516.

⁸⁶ *Dunning v. Posten*, 163 P. 640, 100 Kan. 116.

a claim which existed at the time of the finding and judgment,⁸⁷ and is a bar to an action to prevent him from taking possession.⁸⁸

A general finding and judgment in ejectment prevents a party from thereafter asserting a claim of title, from whatever source it comes, which he had pending the action and prior to the judgment.⁸⁹

A judgment in an action of forcible entry and detainer is not a bar to a subsequent action by either party.⁹⁰

§ 1400. Criminal prosecutions

An acquittal on a criminal charge is not a bar to a civil action against the defendant, though to recover the plaintiff must prove him guilty of the criminal offense.⁹¹

§ 1401. Scope of adjudication

If a suit is disposed of upon any ground which does not go to the merits of the action, the judgment rendered will prove no bar to another suit; hence a finding of the court that "there was no joint liability on the part of the codefendants," and that defendants should therefore recover their costs, is not a judgment on the merits, for the defendants might have been liable, if sued separately.⁹²

A judgment for costs rendered upon a decision in favor of a party to an action is, as a general rule, to be interpreted as a judgment for such party upon the merits.⁹³

⁸⁷ *Commissioners of Marion County v. Welch*, 20 P. 483, 40 Kan. 767.

⁸⁸ *Missouri, K. & T. Ry. Co. v. Allen*, 73 P. 98, 67 Kan. 838.

⁸⁹ *Peterson v. Albach*, 32 P. 917, 51 Kan. 150.

⁹⁰ *Rev. Laws 1910, § 5506; Soden v. Roth*, 61 P. 500, 9 Kan. App. 826; *Deisher v. Gehre*, 26 P. 3, 45 Kan. 583; *Redden v. Tefft*, 29 P. 157, 48 Kan. 302.

⁹¹ In an action by the state to enjoin the maintenance of a liquor nuisance, it is error to render judgment for defendant on the ground that under the same evidence he had been acquitted at law of a criminal charge of maintaining such a place. *State v. Roach*, 112 P. 150, 83 Kan. 606, 31 L. R. A. (N. S.) 670, 21 Ann. Cas. 1182, rehearing denied 113 P. 401, 84 Kan. 177.

⁹² *Brakefield v. Lucas*, 64 P. 10, 10 Okl. 584.

⁹³ Where, in an action for the custody of a child, a decision is made that the defendant is entitled to retain the custody, a judgment rendered upon such decision for the defendant for costs is to be interpreted as a final judgment in favor of the defendant upon the merits. *State v. Tillotson*, 117 P. 1030, 85 Kan. 577, Ann. Cas. 1913A, 464.

Where the original petition and an amendment made thereto, construed together, set out a claim of indebtedness upon an itemized account, and also upon promissory notes given for such account, and the court trying the case without a jury specially finds in defendant's favor as to liability upon the

Where, in partition, a decree has been entered determining the interests of the parties, and under proper proceedings the court orders a sale of the property, such decree and proceedings are binding on the parties, and neither can thereafter abandon the same and maintain another action in partition.⁹⁴

A judgment that plaintiff had misconceived his remedy is no bar to a subsequent action brought in proper form within one year.⁹⁵

A judgment against plaintiff for the reason that he had brought his action prematurely is not a bar to a subsequent action.⁹⁶

§ 1402. Judgments without prejudice

A judgment of dismissal of an action without prejudice is not a bar to another action between the same parties on the same cause of action.⁹⁷

§ 1403. Reserving rights

A judgment against the defendant which recognizes that a claim of his in another court has not been determined does not bar him from litigating the claim in such other court.⁹⁸

notes, but makes no special finding as to liability on the account, but renders a general judgment for costs in defendant's favor, such judgment will be held to be inclusive of the issues as to the indebtedness upon the account, and to bar an action subsequently begun to recover thereon. *John V. Farwell Co. v. Lykins*, 52 P. 99, 59 Kan. 96.

⁹⁴ *Gerdorn v. Durein*, 87 P. 1137, 74 Kan. 704.

⁹⁵ *Town of Cross v. De Roberts*, 51 Okl. 765, 155 P. 496.

⁹⁶ *Krapp v. Eldridge*, 5 P. 372, 33 Kan. 106; *Seaton v. Hixon*, 12 P. 22, 35 Kan. 663.

⁹⁷ *Moore v. Russell*, 65 P. 624, 133 Cal. 297, 85 Am. St. Rep. 166; *Missouri, K & T. Ry. Co. v. McWherter*, 53 P. 135, 59 Kan. 345; *Bates v. Drake*, 68 P. 961, 28 Wash. 447.

After a first trial in ejectment the judgment was vacated, on demand of defendant, by notice on the journal, and the cause continued until the next term of court. The plaintiff dismissed the suit without prejudice. Within a year she commenced a new action against the same defendant for recovery of the same land. Held, that the last action could not be maintained. *Deming v. Douglass*, 57 P. 954, 60 Kan. 738; *Dickson v. Same*, 57 P. 954, 60 Kan. 738.

The dismissal without prejudice of a motion for the allowance of a claim of a creditor of a firm seeking to intervene in a suit for an accounting between the partners does not bar an independent action on the claim. *Graves v. Neosho Falls Bank*, 131 P. 146, 89 Kan. 179.

⁹⁸ *Faier v. Culver*, 146 P. 333, 94 Kan. 123.

§ 1404. Default

In an action on a foreign judgment rendered on a note, a default judgment for the defendant on the plea of the statute of limitations is not *res judicata* as to the validity of the judgment or whether the note was merged therein.⁹⁹

§ 1405. Motion or summary proceedings

Where the decision on a motion affects a substantial right, and the question is distinctly presented, litigated, and decided, it binds the parties in subsequent proceedings.¹

Where the question of jurisdiction over the defendant was directly put in issue by defendant's motion to vacate a former judgment, the judgment overruling the motion was conclusive on the question of jurisdiction in a subsequent trial between the same parties.²

An adjudication on the merits of an application for a new trial on the ground of fraud is a bar to another petition and application for the vacation of the same judgment on the same grounds.³

The purchaser of land is not concluded by the overruling of his motion to set aside the sale of the land, on execution against his vendor.⁴

A decision on a motion to discharge an attachment is not a final adjudication of the rights in the premises, and therefore is not a bar to subsequent proceedings.⁵

⁹⁹ *Merten v. San Angelo Nat. Bank*, 49 P. 913, 5 Okl. 585.

¹ *Com'rs of Wilson County v. McIntosh*, 1 P. 572, 30 Kan. 234.

² *McDuffie v. Geiser Mfg. Co.*, 138 P. 1029, 41 Okl. 488.

³ *Sanford v. Weeks*, 31 P. 1088, 60 Kan. 339.

⁴ *Mills v. Pettigrew*, 26 P. 33, 45 Kan. 573.

⁵ A judgment overruling a motion by a mortgagee to discharge attached property is not *res judicata*, and an action may thereafter be maintained by the mortgagee against the sheriff and his bondsmen for the conversion of the property covered by the mortgage. *Bishop v. Smith*, 72 P. 220, 66 Kan. 621.

Plaintiff, claiming to be the owner of land which had been levied on under an order of attachment in an action to which he was not a party, filed a motion to discharge the order of attachment, and after his motion had been overruled, and judgment rendered in the original action sustaining the attachment, and ordering the land to be sold to satisfy such judgment, instituted a suit to quiet his title to said land. Held, that the decision on the plaintiff's motion to discharge the attachment was not a final adjudication of his rights in the premises, and not a bar to the action to quiet title. *First Nat. Bank v. Linvill* (Kan. App.) 62 P. 165.

An order overruling a motion by an assignee for creditors to discharge an attachment levied on the assigned property does not bar replevin by the as-

§ 1406. Void in part

That part of a judgment which is void because it is in excess of the court's jurisdiction does not constitute a bar to the relief sought.⁶

§ 1407. Dismissal

An order on motion of plaintiff dismissing a case "with prejudice" is a final disposition of the controversy, and unless reversed, is a bar to a future action.⁷

Where the plaintiff is allowed to dismiss without prejudice before the expiration of the time for election to plead, after order sustaining demurrer, such order will not defeat another action in another court on the same facts as set forth in the petition demurred to,⁸ or where he is allowed to dismiss without prejudice, pending a ruling on a demurrer to the evidence, or pending a decision on a motion for an instructed verdict, such order does not bar another suit on the same cause of action.⁹

The dismissal of a suit, on an agreement between the parties by which settlement is made, is a dismissal on the merits, and a bar to further litigation between the parties.¹⁰

signee to recover the property, though the question involved on the motion was the validity of the assignment and the alleged fraud of the parties to it. *Blair v. Anderson*, 48 P. 562, 58 Kan. 97, 62 Am. St. Rep. 606.

An order vacating an attachment obtained by creditors on the ground that a mortgage of the attached property was fraudulent as to them is not a bar to a subsequent action involving the same question. *Miami County Nat. Bank of Paola v. Barkalow*, 35 P. 796, 53 Kan. 68.

⁶ In an action under Rev. Laws 1910, § 4881, to enjoin the levying of a tax warrant issued pursuant to a judgment of the county court, held that that part of the judgment which was void as in excess of the court's jurisdiction constituted no bar to the injunctive relief sought. *Rogers v. Duncan*, 57 Okl. 20, 156 P. 678.

⁷ *Hargis v. Robinson*, 79 P. 119, 70 Kan. 589.

⁸ *Lisle v. Anderson*, 61 Okl. 68, 159 P. 278, L. R. A. 1917A, 128.

In action by mine foreman employed pursuant to Rev. Laws 1910, §§ 3983, 3991, for personal injury held, on the record, and in view of Rev. Laws 1910, § 5128, that trial court did not err in denying master's plea of *res adjudicata*; plaintiff having filed a dismissal of former cause, without prejudice, while amended petition was pending. *Oklahoma Coal Co. v. Corrigan* (Okl.) 163 P. 1024.

⁹ *Shufeldt v. Jefcoat*, 50 Okl. 790, 151 P. 595.

¹⁰ *Turner v. Fleming*, 130 P. 551, 37 Okl. 75, 45 L. R. A. (N. S.) 265, Ann. Cas. 1915B, 831; *Robinson v. Chicago, R. I. & P. Ry. Co.*, 150 P. 636, 96 Kan. 137.

The purchaser of land is not concluded by the dismissal, for want of prosecution, of a suit brought by him to enjoin a sale of the land on execution against his vendor.¹¹

Where a suit to enforce a tax lien on certain land was dismissed without prejudice, such suit did not preclude relief to the lienor in a subsequent proceeding by the owner to quiet title.¹²

In an action to recover real estate for partition thereof, where the title set up is denied, and the making and delivery of a deed alleged in the petition is denied under oath, a judgment of dismissal, generally is a bar to a subsequent action having the same object in view.¹³

Where an undertaking in replevin had been given to an officer in his individual name, a dismissal by him of the action on the undertaking is not a bar to a subsequent action on the undertaking prosecuted by the real parties in interest.¹⁴

§ 1408. Demurrer

A judgment, sustaining a demurrer to a petition, going to the merits of case, is a final judgment, and constitutes a complete defense as a plea of *res adjudicata*.¹⁵

Where a demurrer to a petition contains several grounds, one of which reaches the merits of the case as pleaded, and the others do not, a judgment for costs upon the sustaining of the demurrer is a

¹¹ *Mills v. Pettigrew*, 26 P. 33, 45 Kan. 573.

¹² *Davidson v. Timmons*, 129 P. 133, 88 Kan. 553.

¹³ *Goodman v. Malcom*, 48 P. 439, 5 Kan. App. 285.

¹⁴ *Norton v. Lawrence*, 18 P. 526, 39 Kan. 458.

¹⁵ *Davis v. Bolon* (Okl.) 177 P. 903; *Pettis v. McLain*, 98 P. 927, 21 Okl. 521; *Duncan v. Deming Inv. Co.*, 54 Okl. 680, 154 P. 651; *City of El Reno v. Cleveland-Trinidad Paving Co.*, 107 P. 163, 25 Okl. 648, 27 L. R. A. (N. S.) 650; *Corrugated Culvert Co. v. Simpson Tp.*, McIntosh County, 51 Okl. 178, 151 P. 854, 4 A. L. R. 1170; *McLaughlin v. Doane*, 19 P. 853, 40 Kan. 392, 10 Am. St. Rep. 210.

A decision rendered upon a demurrer to a pleading setting forth the facts is as conclusive between the parties as if the facts had been proven upon trial and a judgment based thereon had been rendered. *Hyatt v. Challiss*, 53 P. 467, 59 Kan. 422.

Where, on appeal, rulings on demurrer are sustained, but the judgment on the pleading is reversed, and the cause remanded for trial on an issue of fact, the first judgment is not a bar to a trial of the issues made as the cause stands for a second trial, or as subsequently amended. *King v. Mollohan*, 60 P. 731, 61 Kan. 683, judgment affirmed 198 P. 969, 61 Kan. 692.

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bar to a subsequent action between the parties upon the same facts.¹⁶

A judgment dismissing a case because the petition does not state facts sufficient to constitute a cause of action against the defendants either on demurrer or motion thereto is not a bar to a subsequent suit on the same cause of action wherein the omitted allegations are supplied.¹⁷

A party to a suit, who obtains the dismissal thereof upon demurrer or motion on the ground that material allegations are not in the petition, will not be heard to say in a subsequent suit on the same cause of action that the petition did contain them, for the purpose of claiming a bar by the judgment of dismissal.¹⁸

Where a demurrer to a petition is sustained on the ground of insufficient facts pleaded, and the pleader elects to stand thereon, and judgment is rendered against him, such judgment is final on the facts pleaded, and the same cannot be relitigated between the same parties in any court.¹⁹ However, where a new action is brought on a note, the subject of the judgment demurred to, such former judgment cannot be interposed as a defense to such note.²⁰

The judgment sustaining a demurrer for misjoinder of causes of action is not available to establish the plea of *res judicata*.²¹

§ 1409. Verdict without judgment

A verdict on which a judgment has not been rendered will not support a plea of *res judicata*.²²

A mere memorandum opinion not entered as a judgment is not a judgment pleadable in *res judicata*.²³

§ 1410. Pendency of appeal

The filing of a petition in error in the supreme court, and the filing of a stay bond, do not destroy nor suspend the effect of the judgment of the lower court as evidence, nor as a determination of the rights of the parties.²⁴

¹⁶ *Merrill v. Board of Com'rs of Ness County*, 52 P. 109, 7 Kan. App. 717.

¹⁷ *McClung v. Hohl*, 61 P. 507, 10 Kan. App. 93.

¹⁸ *McClung v. Hohl*, 61 P. 507, 10 Kan. App. 93.

¹⁹ *Holderman v. Hood*, 96 P. 71, 78 Kan. 46.

²⁰ *McLaughlin v. Doane*, 19 P. 853, 40 Kan. 392, 10 Am. St. Rep. 210.

²¹ *Goldsborough v. Hewitt*, 99 P. 907, 23 Okl. 66, 138 Am. St. Rep. 795.

²² *Attica State Bank v. Benson*, 54 P. 1037, 8 Kan. App. 566.

²³ *De Watteville v. Sims*, 44 Okl. 708, 146 P. 224.

²⁴ *Willard v. Ostrander*, 32 P. 1092, 51 Kan. 481, 37 Am. St. Rep. 294.

A judgment pleaded as an estoppel is admissible in evidence, though an appeal is pending and execution is stayed.²⁵

§ 1411. Judgment vacated or reversed

Where a judgment is entered denying the plaintiff relief because of a prior judgment against him involving the same matter, he is not precluded from maintaining a new action for the same purpose, if the judgment interposed as a bar has been vacated;²⁶ but the subsequent reversal of a judgment is not ground for reversing a judgment rendered in the action in which the first judgment was admitted in evidence, where another trial of the action resulted in the same judgment.²⁷

DIVISION II.—CAUSES OF ACTION OR DEFENSES MERGED, BARRED, OR CONCLUDED

§ 1412. Nature of merger

All causes of action on which suit is brought and judgments obtained are merged in the final judgment, and are thereby extinguished, and cannot be made the foundation of a subsequent action or judgment.²⁸

§ 1413. Elements of judgment

To render a judgment *res judicata*, the parties or their privies and the subject-matter of the action must be the same, the issues must be the same, and must relate to the same subject-matter, and

²⁵ *Munn v. Gordon*, 125 P. 7, 87 Kan. 519.

²⁶ *Messing v. Faulkner*, 109 P. 1001, 83 Kan. 115.

²⁷ *Munn v. Gordon*, 125 P. 7, 87 Kan. 519.

²⁸ *Price v. First Nat. Bank*, 64 P. 637, 62 Kan. 735, 84 Am. St. Rep. 419.

A mortgage lien is merged into a decree foreclosing it, and after that an action cannot be maintained on the debt secured. *Dumont v. Taylor*, 74 P. 234, 67 Kan. 727.

A note which has passed into judgment is merged into judgment and has no life or vitality thereafter, and an assignment of it indorsed "Assigned with recourse" does not make the assignor a guarantor of payment of the note. *Reiden v. First Nat. Bank*, 71 P. 578, 66 Kan. 747.

A note reduced to judgment is merged and cannot be made the basis of a subsequent action. A mortgage note having been merged in a judgment is no longer evidence of the debt; and a proceeding to foreclose the mortgage should be founded on the judgment. *Rossiter v. Merriman*, 104 P. 858, 80 Kan. 739, 24 L. R. A. (N. S.) 1095.

the capacities of the persons must be the same as to the issues between them.²⁹

The estoppel of a judgment extends only to the facts determined when it was rendered, and to legal rights and relations of parties

²⁹ *Ellison v. Hodges* (Okla.) 174 P. 1089; *Ratcliff-Sanders Grocer Co. v. Blue-jacket Mercantile Co.*, 63 Okla. 298, 164 P. 1142; *Brush v. Rich*, 112 P. 158, 83 Kan. 531.

An adjudication against the vendor in an action to cancel the contract because induced by fraud held *res judicata* in the vendee's subsequent action to compel specific performance. *Greenwood v. Greenwood*, 152 P. 657, 96 Kan. 591, judgment affirmed on rehearing 155 P. 807, 97 Kan. 380.

A judgment by a property owner against the city for an amount which the city had agreed to pay him for his property held not *res judicata*, in view of Gen. St. 1909, §§ 1638, 1641, 1642, in an action by another property owner to recover an amount which the city had agreed to pay him, and not to estop the city from pleading the defenses set up in the first action. *Martin v. City of Chanute*, 152 P. 20, 96 Kan. 433.

A party is bound by, and may plead the conclusiveness of a former judgment only in the same capacity in which he was a party to it. A judgment in favor of a minor in an action brought by his father as guardian and next friend to recover for injuries resulting from negligence of his employer is not conclusive against employer in an action by father to recover in his own right. *Henry v. Missouri, K. & T. Ry. Co.*, 158 P. 857, 98 Kan. 567, Ann. Cas. 1918E, 1094.

Where a contractor furnished material and labor for the improvement of a lot under a contract with the equitable owner thereof, and obtained a judgment foreclosing his lien therefor, wherein the legal title was extinguished, and collected a part of the judgment from the proceeds of sale, he cannot afterwards recover the balance of the judgment from the former legal owner on his original promise to be responsible for the material and labor to the equitable owner in the improvement. *Kirk v. Goodwin*, 36 P. 1057, 53 Kan. 610.

An action of forcible entry and detainer by a landlord against a tenant for the restitution of the whole or part of a farm does not necessarily involve the ownership of the corn grown by the tenant on the farm during his occupancy; and a judgment in such action is no bar to an action by the tenant against the landlord for the conversion of such corn, or to any subsequent action brought by either party. *Waite v. Teeters*, 14 P. 146, 36 Kan. 604.

Plaintiff, who had furnished materials for a house, sued the owner (defendant) for the price thereof, alleging that he had furnished them to defendant's agent, C., who was building the house. After he had recovered judgment, C. assigned to him his claim against defendant on the building contract, and he brought an action thereon against defendant. Held, that the first action was not a bar to the second; the issues not having been the same. *Tracy v. Kerr*, 28 P. 707, 47 Kan. 656.

A married woman deposited notes secured by a mortgage on her land as collateral security for her husband's debt to a bank. Interest was afterwards paid on the notes. The mortgage was foreclosed and the land bid in by the mortgagee, who took possession and received the rents and profits. The husband afterwards paid the debt in full. The wife sued the bank to obtain

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as fixed by facts so determined and when new facts intervene before a second suit, furnishing a new basis for other issues of fact, the former judgment cannot be pleaded in bar.³⁰

an accounting, a reconveyance of her land, and a cancellation of the personal judgment rendered against her in the foreclosure suit. Held, that the judgment rendered in the foreclosure suit, and the proceedings based thereon, are not a bar to the action, where no part of the wife's property or the proceeds thereof was appropriated to the payment of the husband's debt. *Washington Nat. Bank v. Woodrum*, 55 P. 330, 60 Kan. 34.

In an action to foreclose a mortgage, in which the petition alleges that one B. has or claims to have some interest in or lien upon said premises, which lien or interest, if any such exists, has accrued subsequently and is subject to the plaintiff's lien under his mortgage, and in which the defendant B. is served by publication only, and makes default, and a judgment is therein entered barring such claim, the judgment does not bar a claim of B. amounting to an adverse and paramount title to such land, acquired long before the making of the mortgage. *Provident Loan Trust Co. v. Marks*, 49 P. 625, 6 Kan. App. 34.

One owning certain real estate at the time of his death provided in his will that for 20 years it should be used by the executors with other property in continuing his banking business, and at the end of that period the other property should be divided and this piece of real estate should go to his son. After his death all debts of the estate and special legacies were paid. The executors continued the banking business, but it shortly became insolvent. Creditors began an action to subject its assets to the payment of their demands. The son was made a party. The petition alleged that all property in the executors' hands belonged to the business, and that any interest the son had in the trust estate was inferior to the equitable lien of the creditors. Judgment was rendered for the sale of the property belonging to the trust estate by a receiver, all parties to be barred of their interest after such sale. The receiver reported that he had sold the real estate for an amount which was about equal to its actual value. The sale was confirmed and a deed ordered and made, under which possession was taken. At the expiration of the 20-year period the son brought ejectment. Held, that his claim was barred by the proceedings in the prior action. *Woodman v. Davison*, 118 P. 1066, 85 Kan. 713.

A judgment, in an action against the guardian of an insane person, quieting the title of the grantee in a guardian's deed to land described, while in full force, is a bar to an action by the guardian to set aside the deed as procured by fraud. *Weedman v. Fowler*, 113 P. 390, 84 Kan. 75.

³⁰ *Marks v. Stevens* (Okla.) 179 P. 7; *Penrose v. Cooper*, 121 P. 103, 86 Kan. 597, judgment reversed on rehearing 128 P. 362, 88 Kan. 210.

Decision of Supreme Court, holding tax deed valid because five years old, is not binding, where, on retrial, it is shown that the deed was of record less than five years when attacked. *Penrose v. Cooper*, 121 P. 1103, 86 Kan. 597, judgment reversed on rehearing 128 P. 362, 88 Kan. 210.

The dismissal of an action on a note and mortgage setting up an indorsement of note and assignment of mortgage, and raising issue as to whether payee's signature by mark was defective, because not witnessed and attested,

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§ 1414. Identity of actions

Where a party, without good excuse, fails to plead all material facts constituting his defense, such facts cannot be made the basis of another action.³¹

The rule that a judgment settles matters litigated and those which might have been litigated applies only where the same cause of action is sued on,³² and does not apply to a different and distinct cause of action which arose out of the same state of facts.³³

A judgment on a matter in issue is conclusive thereon in a different cause of action.³⁴

A judgment, dismissing suit because brought in the wrong venue, was not *res adjudicata* in another suit, while the cause of action survived, brought in the same county after the statute was amended to make that county the proper venue.³⁵

§ 1415. Identity of subject-matter

Where, on a trial in the district court, a writ of mandamus has been denied, such judgment will not bar a proceeding in the Supreme Court for a like writ, founded on a different transaction though between the same parties.³⁶

Where, in a foreclosure action in one county, a party is found to be the owner and in the possession of certain land, such special finding of fact is *res adjudicata* in an action of ejectment in another county.³⁷

was no bar to a new action based on a duly executed indorsement and assignment; there being a distinction between a "cause of action" and the "subject-matter" of the suit. *Marks v. Stevens* (Okl.) 179 P. 7.

³¹ *Duncan v. Deming Inv. Co.*, 54 Okl. 680, 154 P. 651.

³² *Lynn v. McCue*, 147 P. 808, 94 Kan. 761, rehearing denied 150 P. 523, 96 Kan. 114; *Cressler v. Brown*, 79 Okl. 170, 192 P. 417.

³³ Where plaintiff brought ejectment and obtained judgment, but made no demand therein for rents and profits, the judgment was not a bar to a subsequent action for rents and profits, in view of Rev. Laws 1910, § 4738, relating to joinder of action. *Loughridge v. Morris* (Okl.) 171 P. 451.

Where the petition in a purchaser's action for specific performance refers to an existing mortgage, rendition of a judgment for a conveyance, without abatement in price, does not preclude a subsequent action against the vendor for breach of warranty on account of existence of such lien. *Paris v. Golden*, 153 P. 528, 96 Kan. 668, rehearing denied 154 P. 1123, 97 Kan. 174.

³⁴ *Cressler v. Brown*, 79 Okl. 170, 192 P. 417.

³⁵ *Shelby-Downard Asphalt Co. v. Enyart* (Okl.) 170 P. 708.

³⁶ *Bushey v. Hardin*, 86 P. 146, 74 Kan. 285.

³⁷ *Redden v. Metzger*, 26 P. 689, 46 Kan. 285, 26 Am. St. Rep. 97.

Where separate actions in replevin are brought by the same person against the attaching officer to recover different portions of stock, and the officer defends in his official right, without joinder of the attaching creditors, a final judgment against the plaintiff on the merits, in the action first tried, is a bar to his prosecution of the others.³⁸

§ 1416. Theory of action

Where a judgment creditor sues a stockholder to establish his liability, he cannot thereafter amend his petition by alleging the dissolution of the corporation, and base his right to recover on the notes which had been merged in the original judgment.³⁹

Where a school district took land and erected a school building, after which the condemnation proceedings were held invalid and the owner recovered the land in ejectment, the judgment therein was not *res judicata* in a subsequent condemnation proceeding.⁴⁰

Where an appeal had been taken from the decision of the board of county commissioners allowing a claim for which a warrant had been issued, and the assignee of the warrant, with knowledge of the appeal, failed to assert his rights in the district court, and judgment was rendered declaring the original claim void, the assignee could not later recover on a quantum meruit.⁴¹

§ 1417. Form of remedy

If the same evidence will sustain both the present and the former action pleaded in bar, it is immaterial that the form of the two actions is not the same.⁴²

Where a sheriff wrongfully attaches the goods of a stranger to the writ, who replevies them from the sheriff, claiming damages for their detention, and recovers the goods and costs, but no damages, and the sheriff satisfies the judgment, it is a bar to an action against the sheriff and his sureties for damages caused by the seizure and detention of the goods.⁴³

³⁸ McDowell v. Gibson, 50 P. 870, 58 Kan. 607.

³⁹ Remington Paper Co. v. Hudson, 67 P. 636, 64 Kan. 43.

⁴⁰ Aldridge v. Board of Education of City of Stillwater, 82 P. 827, 15 Okl. 354.

⁴¹ Crawford v. Board of Com'rs of Noble County, 58 P. 616, 8 Okl. 450.

⁴² Pratt v. Ratliff, 61 P. 523, 10 Okl. 168.

⁴³ Ellis v. Crowl, 26 P. 454, 46 Kan. 100.

§ 1418. Grounds of action

A person who is defeated in an action by reason of his failing to produce evidence which it is within his power to produce is estopped by the judgment from maintaining a second suit upon the same cause of action.⁴⁴

An employé's action on a contract entitling him to half wages during disability is not barred by a judgment in his favor for damages for the same injury.⁴⁵

A judgment denying relief, where nothing was involved except the right to an injunction, will not bar a subsequent action by plaintiff for damages.⁴⁶

§ 1419. Relief

A final judgment determines the facts only as they appear in the pleadings.⁴⁷

An action is barred by the judgment in a prior action, where the relief sought was possible and inherent in the cause of action set up in the prior action, though not sought therein.⁴⁸

A judgment is not an estoppel as to facts which did not occur

⁴⁴ A person holding title under a sheriff's deed made to him upon a transfer of the interest of the purchaser at the sheriff's sale, who fails to produce evidence of such transfer, though within his power to do so, and who because of such failure is defeated in an action of ejectment brought against a person in possession of the land, is estopped by the judgment from suing the same person upon a new deed based upon the same sheriff's sale and order of confirmation. *Austin v. Ballard*, 114 P. 1084, 84 Kan. 619.

⁴⁵ *McAdow v. Kansas City Western Ry. Co.*, 151 P. 1113, 96 Kan. 423, 646, L. R. A. 1917B, 1158.

⁴⁶ *Meyn v. Kansas City*, 136 P. 898, 91 Kan. 29.

⁴⁷ *Marks v. Stevens* (Okl.) 179 P. 7.

Where plaintiff in ejectment relied on deeds as absolute conveyances, and defendant alleged that deeds were in fact mortgages securing an indebtedness, a judgment sustaining the defense without adjudication as to indebtedness or right of foreclosure did not bar another action between same parties for recovery of mortgage debt and for foreclosure. *Traylor v. Rogers*, 104 Kan. 250, 178 P. 416.

⁴⁸ An action for damages for breach of contract to sell land held barred by judgment for defendants in a prior action for specific performance of such contract, though the question of damages was not litigated in the prior suit. *Naugle v. Naugle*, 132 P. 164, 89 Kan. 622.

Where certain facts are pleaded in an action, and a final judgment rendered therein, necessarily deciding the merits thereof, the same facts cannot again be the basis of an action between the same parties arising out of the same transaction, though in the former action the facts were pleaded as a defense

until after judgment was rendered, though reference was made in the pleadings in that action to matters not involved therein.⁴⁹

Where the only issue litigated in a former action was whether plaintiff was entitled to equitable relief, and the question of damages was not involved and the evidence in the first action did not tend to sustain the issues in the second action, the former judgment could not be pleaded as a defense to the second action.⁵⁰

In an action upon an account and notes given for such account, a only, and no claim made thereon for affirmative relief. *Bierer v. Fretz*, 14 P. 558, 37 Kan. 27.

A. commenced an action against B. and C., in which he claimed to be the owner and entitled to the possession of an undivided half of certain real estate; that B. was the owner of the other half; that C. held a tax deed, and was in possession; that he had held possession for years, and had collected rent in excess of the taxes paid by him; that the tax deed was void; and prayed, first, for possession of the undivided half; second, partition between himself and B.; and, third, for recovery of rents and profits. The case was tried by the court without a jury. Special findings of fact were made. A. was found to be the owner of the half, and possession and partition were awarded. In respect to the rents the court found the amount received by C. and the taxes paid by him, and the excess of the former over the latter; but further stated in the findings that A.'s claim for rents, being a matter of accounting between A. and C., and not affecting all the parties to the action, could not be determined therein, and was refused. In the entry of the judgment or decree was a formal order dismissing plaintiff's claim for an accounting with C. and judgment against him for the excess of rents over taxes, but such order of dismissal was not in terms stated to be without prejudice. Held that, notwithstanding this omission, A. was not estopped from prosecuting a subsequent action against C. to recover the excess of rents over taxes. *Smith v. Auld*, 1 P. 626, 31 Kan. 262.

In an equitable suit in the nature of a creditors' bill, two of the parties defendant filed answers and cross-petitions, one setting up a judgment against the owner of the land in controversy, and the other a mortgage. A decree was entered adjudging the mortgage lien to have priority over the judgment, but no decree of foreclosure of the mortgage was rendered. The cross-petition of the mortgagee had attached thereto a copy of the note secured by the mortgage, which showed its maturity, but there was no allegation or proof that it was due. The special prayer for a foreclosure was based on a contingency which did not happen.⁵¹ Held that, in a subsequent suit to foreclose the mortgage, a plea of former adjudication by the holder of the judgment cannot be sustained. *First Nat. Bank v. Kingman & Co.*, 64 P. 65, 62 Kan. 571.

⁴⁹ Where, in a former action of false arrest and imprisonment, plaintiff alleged wrongful attachment of his property to show malice, but when the action was tried the attachment had not been vacated and damages for wrongful attachment could not have been awarded, a judgment for plaintiff was not res judicata of his damages for wrongful attachment of his property. *Murphree v. Anderson*, 140 P. 880, 92 Kan. 370.

⁵⁰ *Chanute Brick & Tile Co. v. Gas Belt Fuel Co.*, 130 P. 649, 89 Kan. 177.

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finding by the court in defendant's favor as to liability upon the notes without a finding as to liability upon the account, with a general judgment for costs in defendant's favor, such judgment will be considered conclusive of the issues as to indebtedness upon the account, and to bar an action subsequently begun to recover thereon.⁵¹

§ 1420. Splitting actions—Single and entire

Where separate actions are brought for different parts of a cause of action, a judgment upon the merits in one will be available as a bar to the other;⁵² but, where separate actions are prosecuted for distinct causes of action which might have been united in one petition, a judgment in one action is not a bar to the others.⁵³

Each contract affords one, and only one, cause of action. The case of a contract containing several stipulations, to be performed at different times, is no exception, although an action may be maintained on each stipulation as it is broken, before the time for the performance of the others.⁵⁴

§ 1421. Accounts

Where a creditor splits up a cause of action on a running account, and recovers on a part of the account, the adjudication is a bar to a recovery on the remaining portion.⁵⁵

⁵¹ John V. Farwell Co. v. Lykins, 52 P. 99, 59 Kan. 96.

⁵² Akin v. Bonfils (Okl.) 169 P. 899.

The suit and recovery on a portion of a note is a bar to a recovery on the remainder. Wells v. Hickox, 40 P. 821, 1 Kan. App. 485.

The reason which precludes splitting a cause of action forbids its repeated use in different kinds of relief which could have been had in the first action. Naugle v. Naugle, 132 P. 164, 89 Kan. 622.

⁵³ Akin v. Bonfils (Okl.) 169 Pac. 899.

The right of a creditor having various claims against a corporation to exact payment from a stockholder is not such a single demand that by placing one such claim in judgment against the stockholder he is precluded from proceeding against him upon the others. Manley v. Park, 75 P. 557, 68 Kan. 400, 66 L. R. A. 967, 1 Ann. Cas. 832, Id., 76 P. 1130.

⁵⁴ Whitaker v. Hawley, 1 P. 508, 30 Kan. 317.

⁵⁵ Bolen Coal Co. v. Whittaker Brick Co., 35 P. 810, 52 Kan. 747.

Defendant, in a sworn statement which contained the debits and credits of an account between the parties, and which extended over a long period, confessed judgment for the amount asked by plaintiff. Held, that the judgment operated as a bar to an action by defendant for an item which, if correct, constituted a part of the unsettled account upon which he had already confessed judgment. Manley v. Tufts, 54 P. 683, 59 Kan. 660.

§ 1422. Installments

A judgment for the plaintiff for installments due and for the defendant for installments not yet due, is not a bar to the plaintiff's subsequent action for such unpaid installments after the cause of action therefor accrued.⁵⁶

§ 1423. Torts

A recovery against the sheriff for part of goods wrongfully taken on attachment is a bar to a later action between the same parties to recover for the remainder of the same stock of goods, though taken and sold under another attachment, levied before the first action was brought.⁵⁷

A judgment in an action against an officer for the wrongful seizure of goods, for the recovery of a part of the goods demanded, is a bar to a subsequent action for the balance of the goods, where all were seized at the same time and under the same writ.⁵⁸

Where negligent injuries to realty are permanent, the owner thereof can recover his entire damages in one action,⁵⁹ and such recovery is a bar to a subsequent action on the same facts.⁶⁰

⁵⁶ Barnett v. Worrell, 46 Okl. 60, 148 P. 133.

⁵⁷ Burdge v. Kelchner, 72 P. 232, 66 Kan. 642.

⁵⁸ Thisler v. Miller, 36 P. 1060, 53 Kan. 515, 42 Am. St. Rep. 302.

⁵⁹ St. Louis & S. F. R. Co. v. Ramsey, 132 P. 478, 37 Okl. 448.

⁶⁰ Where an overflow is of a permanent nature, springing from the manner in which a ditch was completed, the land of the abutting owner necessarily being injured thereby, a recovery by such owner of his damages for depreciation of the value of his property results in the consent by such owner to the maintenance of the ditch, concluding him and any subsequent owner. Chicago, R. I. & P. Ry. Co. v. Davis, 109 P. 214, 26 Okl. 434.

Where the owner of lands adjacent to a permanent dam sued to recover damages because they were made subject to overflow, and the answer set up the record in a former action wherein the plaintiff recovered damages from the erection of the dam, the facts pleaded constituted res judicata. Hubbard v. Spring River Power Co., 131 P. 1182, 89 Kan. 446.

The judgment in an adjacent property owner's action for damages from the construction of a railroad held res judicata, so as to preclude the same damages being made the basis of another suit against a lessee of the railroad. Marshall v. Wichita & M. V. R. Co., 152 P. 634, 96 Kan. 470.

A judgment for plaintiff in an action for wrongfully causing his land to be overflowed is a bar to another action for damages resulting from the same overflow to land which forms a part of the tract involved in the former action, though that action was for damages to growing crops, while the latter action is for preventing plaintiff from planting and cultivating the ground. Wichita & W. R. Co. v. Beebe, 18 P. 502, 39 Kan. 465.

§ 1424. Successive causes of action

A recovery for death for the benefit of the widow and next of kin will not bar a recovery for the benefit of decedent's estate on account of the suffering and loss sustained by decedent through the injuries, where death was not instantaneous.⁶¹

A judgment for the plaintiff in forcible entry and detainer is not a bar to a suit for damages which defendant may have sustained.⁶²

A decree awarding alimony is not a bar to a subsequent action for divorce and permanent alimony or division of property.⁶³

§ 1425. Defenses concluded

The doctrine of *res adjudicata* applies, not only to the questions brought forward by the defendant, but to every question open to consideration as part of the subject of litigation, and which could have been then presented.⁶⁴

⁶¹ *St. Louis & S. F. R. Co. v. Goode*, 142 P. 1185, 42 Okl. 784, L. R. A. 1915E, 1141; *Rev. Laws 1910*, §§ 5279, 5281, 5282.

⁶² *Sanders v. Cline*, 101 P. 267, 22 Okl. 154.

⁶³ A decree awarding the wife the right to occupy and cultivate a certain half of the husband's homestead, in a suit under *Rev. Laws 1910*, § 4975, for alimony alone, held not a bar to her subsequent action for divorce and permanent alimony or division of the property. *Lewis v. Lewis*, 39 Okl. 407, 135 P. 397.

⁶⁴ *Engle v. Legg*, 39 Okl. 475, 135 P. 1058; *Furneaux v. First Nat. Bank*, 17 P. 854, 39 Kan. 144, 7 Am. St. Rep. 541.

Judgment that plaintiff, under contract with deceased ancestor, owned an undivided one-third of all realty owned by ancestor at his death, and quieting her title on prayer for general relief, etc., and defendant's allegation of ownership by virtue of will precluded reopening of questions of title, and ownership as between them, and defense of title under transactions between defendant and ancestor prior to first action. *Steele v. Stevenson*, 104 Kan. 469, 179 P. 304.

In an action to recover rent under a written lease, a defense that other property was substituted for that described in the written instrument, which avoided the lease, was adjudged invalid. Thereafter an action was brought for installments of rent after the rendition of the former judgment. Defendant claimed that the substitution of property previously litigated changed the contract to one in parol, not enforceable under the statute of frauds. Held, the defense was *res judicata*. *Dixon v. Caster*, 70 P. 871, 65 Kan. 739.

A final judgment in an action against the city to recover on coupons attached to city bonds, where the defenses were that the bonds were illegal, is a bar to the reconsideration of the same defenses in a subsequent action between the same parties on other coupons attached to the same bonds. *Garden City v. Merchants' & Farmers' Nat. Bank*, 69 P. 325, 65 Kan. 345, 93 Am. St. Rep. 284.

Two notes were given at the same time for part payment of a header.

DIVISION III.—PERSONS TO WHOM BAR AVAILABLE

§ 1426. Mutuality of estoppel

Estoppel by judgment must be mutual.⁶⁵ A person who is not bound by a judgment cannot ordinarily avail himself thereof as *res judicata*.⁶⁶

§ 1427. Parties or privies

Only parties and their privies are bound by a judgment.⁶⁷ A privy must have acquired his interest after suit or after judgment.⁶⁸

A judgment of restitution obtained against a tenant in an action for forcible entry and detainer, without notice to the landlord, is not a bar to a subsequent action in the nature of ejectment by the landlord against the party obtaining such restitution.⁶⁹

A judgment in favor of an agent binds the adverse party in a subsequent suit against the principal.⁷⁰ Where one who has obtained a decree quieting his title as to another person conveys all of his interest in the property involved, such decree is a bar in an action by the defendant to quiet his title as to the grantee.⁷¹

Where a purchaser of property agrees to pay the purchase price to a third person, in payment of his vendor's debt, and the third person sues both the purchaser and the vendor in the same suit, and

Both were executed by the same maker to the same payee. In an action brought on one of the notes, judgment was rendered for defendant for costs. Held, in a subsequent action between the same parties on the other note, that the judgment in the former act was not a defense when defendant's answer failed to show that all the defenses that might have been tried in the former action were decided in defendant's favor. *Knickerbocker v. Ream*, 21 P. 795, 42 Kan. 17.

A judgment for defendant in bank's suit on bill of exchange, alleging a balance due, after credits, in which defendant counterclaimed, was *res judicata* as to his subsequent suit to recover on item admitted as a credit in the former suit. *Farmers' State Bank of Temple v. Andruss*, 63 Okl. 310, 165 P. 172.

⁶⁵ *Cressler v. Brown*, 79 Okl. 170, 192 P. 417.

⁶⁶ *De Watteville v. Sims*, 44 Okl. 708, 146 P. 224.

⁶⁷ *Cressler v. Brown*, 79 Okl. 170, 192 P. 417.

⁶⁸ *Cressler v. Brown*, 79 Okl. 170, 192 P. 417.

⁶⁹ *Redden v. Tefft*, 29 P. 157, 48 Kan. 302.

⁷⁰ *Cressler v. Brown*, 79 Okl. 170, 192 P. 417.

⁷¹ Where P. sued to cancel deeds on the ground of fraud, and obtained a decree quieting his title as to W., and after the judgment P. conveyed the land, the judgment against W. was a bar to an action by him to quiet his title against such grantee. *Weer v. Bell* (Okl.) 174 P. 500.

obtains judgment against both, and the purchaser appeals, the third person may still maintain the action against the purchaser, though the judgment against the vendor is still standing, unreversed and unsatisfied.⁷²

A judgment against the defendant in a suit in the nature of a creditors' bill will not inure to the benefit of another creditor of the defendant, who is neither a party nor privy to the judgment.⁷³

Where a creditor in attachment against the debtor obtains a judgment and a sale of the property attached, the judgment is not binding on another creditor who has a prior and valid chattel mortgage, and who was not a party to the attachment suit.⁷⁴

§ 1428. Joint and several contractors

The common-law rule making a judgment against one joint maker of a note a bar to further proceedings against the other joint makers has been so far modified by statute that an obligation appearing to be joint will be presumed joint and several until such presumption is overcome, so that any one of the joint makers of a note may be proceeded against severally without prejudice to the rights of the holder against other makers.⁷⁵

§ 1429. Joint tort-feasors

One joint tort-feasor is not benefited by a judgment against the other.⁷⁶ But a judgment against one tort-feasor, followed by satisfaction, may be pleaded in bar by the other joint tort-feasors.⁷⁷

In an action against a master and servant for damages caused by the negligent act of the servant, a judgment for the servant is not a bar to a recovery against the master.⁷⁸

⁷² *Plano Mfg. Co. v. Burrows*, 19 P. 809, 40 Kan. 361.

⁷³ *Kinkel v. Chase*, 102 Kan. 275, 169 P. 1134.

⁷⁴ *Gleason v. Wilson*, 29 P. 698, 48 Kan. 500.

⁷⁵ *McMaster v. City Nat. Bank of Lawton*, 101 P. 1103, 23 Okl. 550, 138 Am. St. Rep. 831.

⁷⁶ *City of Tulsa v. Wells*, 79 Okl. 39, 191 P. 186.

⁷⁷ *Westbrook v. Mize*, 10 P. 881, 35 Kan. 299.

⁷⁸ In action against carrier and two of its trainmen for negligent killing of plaintiff's husband, a judgment for the trainmen was not a bar to a recovery against carrier as to alleged negligence of trainmen. *Chicago, R. I. & P. Ry. Co. v. Brooks* (Okl.) 179 P. 924.

DIVISION IV.—JUDGMENTS CONCLUSIVE IN GENERAL

§ 1430. Nature—In general

A question in issue in a former suit and there determined cannot be litigated in any future action by the same parties or their privies upon the same or a different cause of action.⁷⁹

A finding of fact of the trial court cannot be considered an adjudication, or used as evidence, unless some other ground can be found for its use than merely that it is a finding of the court.⁸⁰

The reasons given by the appellate court for affirming a judgment are not an estoppel binding on the parties, as the conclusiveness of a judgment resides in the judgment itself, and not in the reasons of the court in pronouncing it.⁸¹

§ 1431. Failure to appeal

When a court, having jurisdiction of the subject-matter and the parties to an action, renders judgment therein, and the party aggrieved thereby fails to effect an appeal from such judgment within the time and in the manner provided by law, such judgment is res adjudicata as to all matters necessarily involved in such action, and therefore presumably considered by the court, save alone such propositions appearing in the record as relate to the jurisdiction of the court over the subject-matter and parties to such action.⁸²

⁷⁹ *McDuffie v. Geisler Mfg. Co.*, 138 P. 1029, 41 Okl. 488; *Rennolds v. Guthrie*, 103 Kan. 829, 177 P. 359; *Comanche Ice & Fuel Co. v. Binder & Hillery* (Okl.) 172 P. 629.

⁸⁰ *Mitchell v. Insley*, 7 P. 201, 33 Kan. 654.

⁸¹ *Citizens' Bank v. Brigham*, 60 P. 754, 61 Kan. 727, reversing judgment *Brigham v. Jansen*, 58 P. 1117, 9 Kan. App. 889.

The Supreme Court in a prior case decided that a legislative committee appointed under a statute to select a site for an insane asylum had no authority to purchase the site selected, but that such authority rested in the board of trustees of certain charitable institutions, and hence enjoined the committee from making the purchase. Thereafter the state brought mandamus to compel the board of trustees to make the purchase. Held, that the expression in the prior decision as to the board's authority to make the purchase was not conclusive in the second case; the expression not constituting the judgment of the court, but merely one of the reasons for the judgment. *State v. Hornaday*, 62 P. 998, 62 Kan. 334.

⁸² *Manley v. Park*, 64 P. 28, 62 Kan. 553, judgment affirmed 23 S. Ct. 208, 187 U. S. 547, 47 L. Ed. 296; *Board of Com'rs of Atoka County v. Cypert* (Okl.) 166 P. 195.

§ 1432. Judgments of federal courts

The judgments of federal courts having jurisdiction of parties and subject-matter, unless corrected therein or by appeal, are final and conclusive on the state courts.⁸³

§ 1433. Probate jurisdiction

Proceedings in the county court, when exercising jurisdiction concurrent with the district court, are considered in the same manner and with like intendment as the proceedings of courts of general jurisdiction, and its records, orders, judgments, and decrees are accorded like force, effect, and legal presumption as the records, orders, judgments, and decrees of the district court.⁸⁴

§ 1434. Finality of determination

Where a court having jurisdiction of the subject-matter and of the parties to an action, renders judgment therein, and the party aggrieved fails to effect an appeal, the fact that a proceeding in error from the judgment was taken, and was dismissed by the supreme court for noncompliance with the statute, will not change the rule as to the conclusiveness of the judgment of the court below.⁸⁵

In a proceeding to foreclose a mechanic's lien on certain property, a personal judgment against the former owner is final, and cannot be overcome by proof of payment prior to judgment.⁸⁶

⁸³ *Rennolds v. Guthrie*, 103 Kan. 829, 177 P. 359.

Plaintiff brought an action in the state court, and a judgment was rendered against him. At his request the judgment was vacated, and the cause was set down for another trial. Before the second trial he dismissed the action, and subsequently brought a like action against the same parties in the federal court, which court held that the former proceedings barred plaintiff from maintaining the action in that tribunal. Afterwards plaintiff brought a similar action against the same parties in the state court. Held, that the decision of the federal court, holding the plaintiff to be barred from maintaining another action, was conclusive between the parties and those in privity with them. *Hyatt v. Challiss*, 53 P. 467, 59 Kan. 422.

⁸⁴ *Carmichael v. Pierce*, 61 P. 583, 10 Okl. 176.

A decree of a county court touching matters within its jurisdiction, when not appealed from, is conclusive on all persons. *Greer v. McNeal*, 69 P. 891, 11 Okl. 519, judgment affirmed 69 P. 893, 11 Okl. 526.

⁸⁵ *Manley v. Park*, 64 P. 28, 62 Kan. 553, judgment affirmed 23 S. Ct. 206, 187 U. S. 547, 47 L. Ed. 296.

⁸⁶ On opening judgment by default on cross-petition to foreclose mechanic's lien on application of purchaser of property, personal judgment against

§ 1435. Special proceedings

Where the plaintiff in ejectment relied on a deed absolute on its face, which the defendant showed was only a mortgage, a finding that no part of the mortgage had been paid was not conclusive in a subsequent action to foreclose it.⁸⁷

A judgment in ejectment, finding that the widow, claiming under the laws of descent, and the devisees, are tenants in common, does not estop the devisees from claiming the full title to the same land under the will, in a subsequent action by the widow for partition as tenants in common.⁸⁸

Where the plaintiff in ejectment has voluntarily dismissed his action after judgment had been set aside, and has thus lost a right to maintain such an action, he cannot by taking possession of the land while temporarily unoccupied assert his claim of title by way of defense.⁸⁹

A judgment in attachment, reversing orders sustaining defendant's motion to dissolve the attachment because the affidavit was untrue, and sustaining a motion of an interpleader claiming ownership of the land attached, is final against the attachment defendant that the attachment was rightfully issued, but is not conclusive upon the issue between plaintiff and the interpleader as to the ownership of the property.⁹⁰

§ 1436. Form of judgment

A judgment will not ordinarily support a plea of res judicata until it has been entered.⁹¹

Unnecessary recitals in the journal entry of an order dismissing former owner held final, not subject to be overcome by proof of payment prior to judgment. *Moline Elevator Co. v. Loewen Real Estate & Investment Co.*, 57 Okl. 478, 157 P. 99.

⁸⁷ *Mitchell v. Insley*, 7 P. 201, 33 Kan. 654.

⁸⁸ In ejectment by a widow against the devisees, she claimed the land in controversy under the laws of descent, while defendants claimed it under the will. The court found them to be tenants in common, and rendered judgment for defendants. Held, that the judgment does not estop defendants from claiming the full title to said land under the provisions of the will, in a subsequent action by the widow for partition as tenants in common. *Neuber v. Shoel*, 55 P. 350, 8 Kan. App. 345.

⁸⁹ *Bank of Topeka v. Sadler*, 131 P. 585, 89 Kan. 321.

⁹⁰ *Western Grocer Co. v. Alleman*, 106 P. 460, 81 Kan. 543, 27 L. R. A. (N. S.) 620, 135 Am. St. Rep. 398, rehearing denied 106 P. 997, 81 Kan. 900.

⁹¹ *De Watteville v. Sims*, 44 Okl. 708, 146 P. 224.

ing an action to enjoin, will not be res judicata in a subsequent action at law for damages.⁹²

An order allowing a dismissal without prejudice, after sustaining a demurrer to the evidence, was in effect setting aside the order sustaining the demurrer, so that it was not res adjudicata in a subsequent suit between the same parties as to the same subject-matter.⁹³

§ 1437. Confession or consent

The rule that a judgment is conclusive as to every matter that might have been pleaded or given in evidence obtains as to a judgment by confession.⁹⁴

Where the pleadings include the subject-matter on which the court made the finding that the parties agreed in open court that certain matters had been settled between them, such finding will be held, in a subsequent action between the same parties concerning the same subject-matter, to have been an adjudication, though no evidence was introduced in the former action.⁹⁵

§ 1438. Default

A judgment by default is as conclusive on the parties to the action as any other judgment.⁹⁶

⁹² *Miller v. Phillips*, 141 P. 297, 92 Kan. 662.

⁹³ *Hutchison v. Brown* (Okla.) 167 P. 624.

⁹⁴ *Farmers' State Bank of Arkansas City, Kan., v. Stephenson*, 102 P. 992, 23 Okla. 695.

⁹⁵ *Townsdin v. Shrader*, 18 P. 186, 39 Kan. 296.

⁹⁶ *Johnson v. Jones*, 51 P. 224, 58 Kan. 745; *Seattle Nat. Bank v. School Dist. No. 40*, 55 P. 317, 20 Wash. 368.

A plaintiff in possession of land obtained a judgment against a nonresident defendant, on service by publication only, and without his appearance in court. Afterwards defendant in such action brought an action against the former plaintiff. Held that, in the trial of such subsequent action, the judgment in the first action is conclusive of the rights of the parties to the land in dispute. *Venable v. Dutch*, 15 P. 520, 37 Kan. 515, 1 Am. St. Rep. 260.

Judgment by default, on actual notice to defendant, is as conclusive against him on every matter admitted by the default as if he had personally appeared and contested plaintiff's rights. *Garrett Biblical Institute v. Minard*, 108 P. 80, 82 Kan. 338.

Where, on an appeal from an allowance by the county commissioners of a claim for which a county warrant was issued, the claim was adjudged void, such adjudication is res adjudicata and conclusive against the holder of the warrant, where the original payee, as well as the present holder, knew of the

In a foreclosure suit against an alleged mortgagor and his grantee, who contends that the mortgage is a forgery, a decree by default against the mortgagor is not *res judicata* as to the grantee.⁹⁷

§ 1439. Judgment on motion

Where, after judgment, a motion is made in regard thereto, due notice is given, the parties appear, the question is distinctly presented and decided, and time given to make a case for review, the movant cannot treat such decision as a nullity, and, without leave to renew it, or showing of additional facts, relitigate the exact question then decided.⁹⁸

A judgment discharging an attachment, on the ground that the property seized was exempt, is not *res judicata* in a subsequent direct proceeding to subject the property to the judgment rendered in the action in which the attachment issued.⁹⁹

The decision on a motion to discharge from an attachment certain property, claimed by the maker of the motion under a chattel mortgage executed in his favor by defendant in the action, on the ground that his lien is prior to that of the attachment, is not conclusive, and the same subject-matter may be investigated in a subsequent action brought by the mortgagee to recover possession of the same property.¹

§ 1440. Erroneous judgment

A judgment is no less conclusive because it is based upon a mistake of law.²

Whether there is estoppel by a judgment depends on whether there has been a judicial determination of a fact and not on what evidence or by what means the determination was reached.³

appeal, and had an opportunity to assert their rights, but did not appear. *Crawford v. Board of Com'rs of Noble County*, 58 P. 616, 8 Okl. 450.

⁹⁷ *Montgomery v. Road*, 8 P. 253, 34 Kan. 122.

⁹⁸ *Board of Com'rs of Wilson County v. McIntosh*, 1 P. 572, 30 Kan. 234.

⁹⁹ *Shelby v. Ziegler*, 98 P. 989, 22 Okl. 799.

¹ *Frazer v. Barry*, 45 P. 724, 4 Kan. App. 33.

² *National Surety Co. v. S. H. Hanson Builders' Supply Co.*, 64 Okl. 59, 165 P. 1136.

³ *McDuffie v. Gelser Mfg. Co.*, 138 P. 1029, 41 Okl. 488.

DIVISION V.—PERSONS CONCLUDED

§ 1441. Identity of persons—In general

The conclusiveness of a judgment, as between the plaintiff and a defendant in the action, is not affected by the fact that there were other parties defendant who were bound by the judgment.⁴

The holders of the legal title to land are bound by judgments rendered in actions of ejectment brought against their tenants of which they are notified and which they defend, and writs of ouster may be awarded against them and against all persons in possession of the land claiming under them.⁵

§ 1442. — Unknown parties

A decree will not ordinarily affect the rights of a person without notice or knowledge of the pendency of an action, though he is in like situation as plaintiff.⁶

§ 1443. — Additional parties

A plea of *res judicata* is not barred because in a subsequent action others are joined as defendants.⁷

The fact that an original defendant's motion to dissolve an attachment was overruled does not preclude such motion by one who subsequently interpleads as defendant.⁸

⁴ Peterson v. Warner, 50 P. 1091, 6 Kan. App. 298.

Failure, in an action on purchase-price notes by a person other than the payee, to interpose the defense of breach of warranty, though the notes are nonnegotiable, will not prevent the maker from maintaining an action against the payee for damages for breach of the warranty. Delaney v. Great Bend Implement Co., 98 P. 781, 79 Kan. 126.

⁵ Crane v. Cameron, 81 P. 480, 71 Kan. 880; Same v. Peninger, Id.; Cameron v. Crane, Id.; Peninger v. Same, Id.; motion to retax costs granted 87 P. 466.

⁶ In a suit by a beneficiary of an express trust against the trustee to enjoin a sale of lands held by the latter for conversion into money to pay debts, the bill alleged that it was filed on behalf of the complainant and other creditors, likewise situated, who desired to avail themselves thereof. Held, that a final decree did not affect the rights of a beneficiary in the trust, though in a like situation as complainant, who was without notice or knowledge of its pendency. Holderman v. Hood, 78 P. 838, 70 Kan. 267.

⁷ Davis v. Bolon (Okla.) 177 P. 903.

⁸ Merchants' Nat. Bank of Kansas City v. Kopplin, 42 P. 263, 1 Kan. App. 599.

§ 1444. — Official capacity

Proceedings against an executrix, who is also the sole devisee of the land belonging to testator, are binding on the executrix as devisee.⁹

Where one with whom decedent had contracted to leave property brings his action against the executor and beneficiary under decedent's will to determine ownership of the residue after payment of the debts, a judgment against the beneficiary is final and binding on him in the final distribution of the estate.¹⁰

§ 1445. — Participating in action

A final judgment canceling a contract is *res judicata* in a later suit on the same contract as to a person who, though not a party to the former suit, caused it to be brought, verified the petition, and accepted the benefits of a temporary injunction issued therein.¹¹

An injured person cannot maintain an action against an insurance company on his judgment against the employer, to whom a policy of indemnity had been issued, though the insurance company defended for the employer against his claim.¹²

The owner of several judgments against a board of education is not concluded by a judgment against their validity in a suit by the board against its treasurer to mandamus him to pay the judgments in which their dormancy was directly involved, though the owner assumed the defense of the suit.¹³

⁹ Where the nonresident executrix of a nonresident decedent is also the sole devisee of the land belonging to testator, and situated in the state, and where the land is levied on in attachment against the executrix in that capacity, such proceedings bind defendant as devisee. *Heyl v. Donifelser*, 54 P. 1050, 59 Kan. 779, affirming judgment *Donifelser v. Heyl*, 52 P. 468, 7 Kan. App. 606.

¹⁰ *Harris v. Morrison*, 163 P. 1062, 100 Kan. 157.

¹¹ *Rivers v. School Dist. No. 51 of Noble County (Okla.)* 156 P. 236.

¹² An indemnity policy provided that, if an action was brought against the insured by an injured employé, the insurance company might defend, and in an action by an employé in which judgment was rendered against the insured the insurance company made a defense. Held, that the employé could not maintain an action on the judgment against the insurance company, and the fact that the insurance company defended against the employé's claim did not estop it from denying the liability to the employé. *Carter v. Aetna Life Ins. Co.*, 91 P. 178, 76 Kan. 275, 11 L. R. A. (N. S.) 1155.

¹³ *In re Board of Education of City of Perry*, 130 P. 951, 35 Okl. 733.

§ 1446. — Representatives

Where a beneficiary has assigned a claim to another for the purpose of bringing suit thereon, the beneficiary is as fully estopped by the judgment as if he had been a party to the action.¹⁴

§ 1447. Privity in general

The determination of any issue or fact by a court of competent jurisdiction is conclusive upon both the parties and their privies.¹⁵ Thus one assigning for the purpose of litigation is concluded by a judgment for or against his assignee.¹⁶

A "privity in estate," so as to be bound by a judgment affecting realty in an action to which he was not a party, is one whose title is derived from a party bound by the judgment.¹⁷

A judgment against the owner of a homestead is not binding, as

¹⁴ Where a minor on coming of age assigned an interest in a certain claim to her mother, who had been her guardian, for the purpose of bringing an action, with the expectation that if her mother won the suit, she would get the money though there was no formal assignment, plaintiff was vested with a right to bring the action and the beneficiary was as fully estopped by the judgment as if she had been a party to the action. *Rullman v. Rullman*, 106 P. 52, 81 Kan. 521.

¹⁵ *Ellis v. Crowl*, 26 P. 454, 46 Kan. 100; *Bishop v. Smith*, 58 P. 493, 9 Kan. App. 602; *Bruner v. Bearden*, 80 Okl. 154, 195 P. 117.

A judgment on the merits is conclusive between the parties and those in privity with them. *Corrugated Culvert Co. v. Simpson Tp., McIntosh County*, 51 Okl. 178, 151 P. 854, 4 A. L. R. 1170.

A suit against a consolidated school district by one of the several districts comprising the consolidated district, in which the validity of bonds issued by defendant was upheld, is *res judicata* in an action by the other constituent districts against the same defendant, involving the same question. *Ellison v. Hodges* (Okl.) 174 P. 1089.

Where a taxpayer of a consolidated school district sued the officers thereof and obtained a judgment directing them to maintain schools in the separate districts until further order of the court, such judgment was a bar to another taxpayer's suit to enjoin the maintenance of schools in the separate school-houses. *Worrell v. Landis*, 141 P. 962, 42 Okl. 464.

¹⁶ *Cressler v. Brown*, 79 Okl. 170, 192 P. 417.

¹⁷ *Hungate v. Hetzer*, 111 P. 183, 83 Kan. 265.

Where land has been fraudulently conveyed by an insolvent debtor to his minor children, and a creditor, after having prosecuted a claim against the debtor by attachment on the land to final judgment, and after confirmation of a sale thereunder to him, obtains a judgment against the fraudulent grantees setting aside their deeds and directing a conveyance to him of their apparent title to the land, one who was a simple contract creditor at the time of the conclusion of these proceedings cannot attack any of them for mere irregularities, nor for a defective levy of the attachment, the judgment debtor

to the homestead exemption, on the owner's husband or wife, when not a party.¹⁸

§ 1448. Vendor and purchaser

Purchasers from parties to an action involving title to property are the same in legal contemplation as such parties, where they acquired their title after the institution of the original suit, and are bound by the judgment rendered.¹⁹

and the fraudulent grantees having been personally served and appeared and litigated the actions. *Harrison v. Shaffer*, 55 P. 881, 60 Kan. 176.

In ejectment involving only the right of possession, a judgment against the occupant, a party defendant, usually binds those under whom he occupies. *Mullen v. Carter* (Okla.) 173 P. 512.

¹⁸ *King v. Wilson*, 148 P. 752, 95 Kan. 390.

¹⁹ *Provident Loan Trust Co. v. Marks*, 49 P. 625, 6 Kan. App. 34.

Where the buyer of real estate causes the deed to be made to a person having no beneficial interest who conveys to him after a decree quieting title, he is bound by an order vacating the decree, though made without notice to him, and can claim no rights as an intervening innocent purchaser. *McMahan v. Noble*, 112 P. 600, 83 Kan. 749.

A decree against a grantor, affecting his title to realty, binds his grantee, and affects his title to the same extent; the grantee acquiring no greater rights. *Hungate v. Hetzer*, 111 P. 183, 83 Kan. 265.

Where one files suit to quiet title and conveys his title to another, but cause proceeds as filed and judgment is rendered for defendant, it bars subsequent action by purchaser on same facts seeking same relief. *Scott v. Wise-Autry Stock Co.*, 56 Okl. 504, 156 P. 340.

A judgment canceling a conveyance held effectual to divest the interest of a person, who, though not a party to the action, claimed under the grantee, of which plaintiff had no notice. *Bowen v. Carter*, 144 P. 170, 42 Okl. 565.

In an action to foreclose a mechanic's lien in which B., the owner of the real estate, was made a party defendant, a lien was denied against the real estate of B. Afterwards an application by plaintiff to set aside such judgment was denied as to B., and no further action was taken by plaintiff so far as B. was concerned. Held, that plaintiff was concluded by the judgment in B.'s favor from maintaining proceedings to establish a lien against the property in the hands of B.'s grantees. *Irish v. Foulks*, 22 P. 315, 42 Kan. 370.

A deed of assignment for the benefit of creditors was made and filed in the office of the register of deeds, and two days later a schedule of liabilities was filed, and the same day an attaching creditor caused the assignee to be summoned as garnishee. The assignor filed a motion to discharge the attachment, and the justice of the peace, after final judgment in favor of the creditor and against the assignor was rendered, overruled such motion, and sustained the attachment. No appeal was taken from such rulings. The assignee was present and testified as a witness in the hearing upon the motion, but was not required to answer, and did not answer, as garnishee. Held,

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A grantee is not bound by the judgment in an action to which he is not a party where the action was commenced against his grantor after the grant.²⁰

Purchasers of property at a judicial sale, and all claiming under them, are privies to the judgment and concluded thereby.²¹

There is no such privity of estate between the grantee in a champertous deed and his grantor as to render judgment in ejectment by the grantee conclusive in a subsequent action by grantors for possession.²²

§ 1449. Other special relations

When a recovery is had against the tenant in an action for ejectment, the landlord is bound by it.²³

The holder of a mortgage on real property, having neither title nor right of possession, and who is not a party to an action against the mortgagor to recover possession, is not, as a general rule, bound by a judgment rendered therein against the mortgagor.²⁴

Where one who has mortgaged his property is adjudged bankrupt upon the ground that the mortgage was given with intent to defraud creditors, the adjudication of bankruptcy is conclusive against the mortgagee as to the intent of the mortgagor, though the mortgagee was not a party to the bankruptcy proceeding.²⁵

that said proceedings and rulings did not become *res adjudicata* as to the assignee. *Goodin v. Newcomb*, 49 P. 821, 6 Kan. App. 431.

²⁰ *Blackwell v. McCall*, 54 Okl. 96, 153 P. 815.

A purchaser cannot ordinarily plead *res judicata* because of a judgment in his grantor's favor in a suit brought after his purchase and to which he was not a party. The defense of *res judicata* as to the validity of an usurious mortgage debt is not personal to the mortgagor and his privies under the judgment, but is available to his privies in the estate by purchase prior to the judgment. *De Watteville v. Sims*, 44 Okl. 708, 146 P. 224.

²¹ *Arnold v. Joines*, 50 Okl. 4, 150 P. 130.

Judgment in ejectment by grantee in champertous deed is not conclusive in subsequent action by grantors in a champertous deed for the use and benefit of the grantee for the same land. *Butler v. Fryer*, 59 Okl. 274, 159 P. 367.

²² *Mullen v. Carter* (Okl.) 173 P. 512.

²³ *Chapek v. Jurgensen*, 162 P. 1165, 99 Kan. 658.

One S. was adjudged a bankrupt on the ground that he had within four months mortgaged his entire property with intent to defraud his creditors, and a trustee appointed for such bankrupt sued to set aside the mortgage and recover the property or its value. Held, that in such action the adjudication of bankruptcy was conclusive against the mortgagee as to the intent of the mortgagor, and evidence of their own good faith was immaterial, though they

The consignor of goods replevined while in transit is not bound by a judgment against the carrier though he has notice of the facts, where he is not a party.²⁶

A dismissal by an administrator of an action for the death of intestate is a bar to an action by the widow.²⁷

The decision in mandamus, at the suit of a private relator to compel a county officer to keep his office at a certain place as county seat, is no bar to an original action by the state to compel the county officers to keep their offices at the county seat, and to determine its location.²⁸

A taxpayer in a city is in privity with the municipal officers of such city in a proceeding brought against them in their representative capacity for the purpose of obtaining a writ of mandamus to compel the levy of a tax to pay a valid judgment against the city, and is concluded by the final decision and the issuance of a peremptory writ of mandamus on all questions necessarily involved in the final decision and the granting of such peremptory writ as effectively as are the parties to the record.²⁹

were not parties to the bankruptcy proceedings. *Dedrick v. Farmers' Bank of Stafford*, 88 P. 888, 75 Kan. 187, 121 Am. St. Rep. 414.

²⁶ *Peck v. Merchants' Transfer & Storage Co. of Topeka*, 116 P. 365, 85 Kan. 126.

²⁷ A dismissal by an administrator of an action in another state for the death in Kansas of intestate, who resided in a third state, on settlement or a payment actually made to the widow, is a bar to an action by the widow. *Robinson v. Chicago, K. I. & P. Ry. Co.*, 150 P. 636, 96 Kan. 137.

²⁸ *State v. Stock*, 16 P. 106, 38 Kan. 154, rehearing denied 16 P. 799, 38 Kan. 184.

In mandamus on the relation of a county attorney to compel the county officers to hold their offices at a certain place as the permanent county seat, a judgment in a suit by electors and taxpayers against the clerk that said place was not the permanent county seat is not conclusive. *State v. Burton*, 27 P. 141, 47 Kan. 44.

²⁹ *McEntire v. Williamson*, 65 P. 244, 63 Kan. 275.

A valid judgment against a city on coupons clipped from municipal bonds of such city, regularly issued, and the issuance of a peremptory writ of mandamus in a proceeding regularly brought for such purpose against the officers of such city and their successors in office, commanding such officers to levy a tax to pay such judgment, is conclusive on the question whether the levy ordered is in excess of the statutory power of the city to levy taxes, and cannot be again raised or retried in a subsequent action for injunction brought by a taxpayer in such city. *McEntire v. Williamson*, 65 Pac. 244, 63 Kan. 275.

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§ 1450. Coplaintiffs and codefendants

A judgment ordinarily settles nothing between coplaintiffs or codefendants unless their hostile claims are put in issue and litigated.⁸⁰

Where two persons are sued as codefendants and answer separately, the judgment of the court adjudicating the rights of the plaintiff as against them will not be res judicata as to the relative rights of the defendants themselves.⁸¹

Where one of two codefendants files separate answer to petition not in nature of cross-petition against his codefendant, and codefendant defaults, judgment on issues joined by petition and separate answer does not necessarily include relative rights of defendants between themselves.⁸²

§ 1451. Persons not parties or privies

One who is not a party to an action is not, as a general rule, bound by the judgment rendered therein, nor can he claim any advantage growing out of such judgment.⁸³

⁸⁰ *De Watteville v. Sims*, 44 Okl. 708, 146 P. 224. A judgment foreclosing a materialman's lien against several defendants, including the holder of a mortgage who does not set up the mortgage, held not to preclude the latter from foreclosing his mortgage against his codefendants. *Id.*

The fact that parties in the instant case were not placed in adversary positions as parties in the former case will not deprive the final judgment therein of its effect as res judicata, where they were all proper parties to the first case, and the questions raised in the instant case could have been determined in the former action. Where a resident taxpayer of an improvement district in a city of the first class sues to enjoin the carrying into effect of an invalid contract for paving and final judgment is rendered for defendant and is unappealed from, there is sufficient identity between the parties filing such suit and the suit brought by one of the defendants in the former suit against his codefendants, wherein the validity of the contract is involved to justify the pleading of the decree in the first suit as res judicata as to the validity of the contract. *City of El Reno v. Cleveland-Trinidad Paving Co.*, 107 P. 163, 25 Okl. 648, 27 L. R. A. (N. S.) 650.

⁸¹ *Keagy v. Wellington Nat. Bank*, 69 P. 811, 12 Okl. 33.

⁸² *Henthorn v. Tidd*, 63 Okl. 280, 164 P. 783.

⁸³ *Manley v. Debentures "B" Liquidation Co.*, 68 P. 31, 64 Kan. 573.

Where merchant exchanged stock for land, and after buyer had bought goods on credit, obtained judgment rescinding the exchange, but binding him, the merchant, to pay sums due for goods purchased by the buyer, and creditor sued, the merchant was not estopped by the judgment to deny liability to the creditor, as the creditor was not a party to the judgment. *Simmons v. Chestnut-Gibbons Grocery Co.* (Okl.) 173 P. 217.

Notices being limited to debtor, attached property being proceeded against

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A property right cannot be affected by a judgment to which the holder of the right is neither a party nor privy.³⁴

§ 1452. — Evidence

Where a husband and wife bring separate actions against the same defendant for damages for personal injuries sustained by the wife, the judgment in one action is not evidence in the other.³⁵

§ 1453. — Evidence of property rights

Scheduling of property as exempt by a bankrupt and approval by the referee is not *res judicata* as to ownership of property as against third parties who are not parties to bankruptcy proceeding.³⁶

A judgment quieting title constitutes no estoppel, and is not evidence against a person whose claim of title antedates the commencement of the action, and who was then a minor, had no notice of the pendency of the action, was not a party thereto, and was not represented by guardian or otherwise.³⁷

That part of the judgment in a suit to quiet title, which recited that any of plaintiff's children thereafter born should have no interest in the property, is ineffective, where no party to the proceedings had rights in common with the unborn heirs.³⁸

DIVISION VI.—MATTERS CONCLUDED

§ 1454. Scope of estoppel

A matter directly in issue, and determined by a court of competent jurisdiction, is conclusive as to the parties and their privies,

as his, and the judgment being against it only as his property, the debtor and his privies are concluded, but no other persons. *Davies v. Thompson*, 61 Okl. 21, 160 P. 75, L. R. A. 1917B, 395.

³⁴ *Chittenden v. Crosby*, 48 P. 209, 5 Kan. App. 534.

In an action on an open account against a company and its principal stockholder, finding of bankruptcy court wherein plaintiff was not a party that goods had been purchased by purchaser from defendants as a sole trader doing business under defendant company's name held not *res judicata*. *Ratcliff-Sanders Grocer Co. v. Bluejacket Mercantile Co.*, 63 Okl. 298, 164 P. 1142.

Where testator's grandchildren who were the ultimate beneficiaries of a trust were not parties to proceeding in which the trust lands were partitioned between two of testator's sons who were trustees, facts as to title may be shown in proceeding by creditors of one of sons to subject to their claims lands received by him. *Niblack v. Knox*, 101 Kan. 440, 167 P. 741.

³⁵ *Mundell v. City of Greeley*, 92 P. 1117, 76 Kan. 797.

³⁶ *Swaydan v. Ellis*, 59 Okl. 175, 158 P. 434.

³⁷ *Peck v. Ayres*, 100 P. 283, 79 Kan. 457.

³⁸ *Bell v. Watkins*, 135 P. 596, 90 Kan. 558.

and cannot be relitigated by them in an action in the same court or in a court of concurrent jurisdiction on the same or a different cause of action.³⁹

³⁹ *Comanche Ice & Fuel Co. v. Binder & Hillery* (Okla.) 172 P. 629.

When a fact has once been determined in a judicial proceeding, and a final judgment has been rendered in accordance therewith, it cannot be again litigated between same parties, as public policy does not permit correctness of former decision to be impeached. *Uncle Sam Oil Co. v. Richards* (Okla.) 175 P. 749.

The adjudication, in mandamus brought by the holder of a certificate of purchase of school land to compel the county treasurer to accept money to redeem the land from taxes and to pay interest, held conclusive on the rights of the parties in a subsequent action by such holder to enforce his rights against the grantee of the person to whom a patent for the land was issued. *Plummer v. Scott*, 151 P. 1115, 98 Kan. 390.

Where, in an action on a note, the court has determined whether any of the parties jointly and severally bound are sureties, and no appeal has been taken, a party claiming to be surety is not entitled to have the question redetermined in another action. *Emery v. Farmers' State Bank of Washington*, 155 P. 34, 97 Kan. 231.

Where a judgment was obtained against a railroad company for personal injuries, and receivers were appointed in a foreclosure suit, and, under a decree of the United States court, all the property was sold, and judgment was allowed except as to interest, and paid by the purchaser at the foreclosure, the order of allowance was conclusive on the plaintiff in the judgment to the extent that it cannot be relitigated in another action to recover the amount of the claim for interest disallowed by the federal court. *Atchison, T. & S. F. Ry. Co. v. Cross*, 66 P. 620, 63 Kan. 564.

Where an issue is presented by the pleadings and tried in foreclosure, it cannot be again tried at the instance of the losing party on a motion to set aside the sheriff's sale in the same action. *Greenwell v. Moffett*, 93 P. 609, 77 Kan. 41.

A party brought ejectment to recover land from the grantee of a purchaser at sheriff's sale, and a mortgagee of the claimant was made a party, and pleaded that he purchased the judgment at sheriff's sale to protect his mortgage, and attacked the sheriff's sale and deed as void, and prayed that he be given a lien on the land as the property of the claimant. The sheriff's sale and deed were sustained, and the judgment was affirmed on appeal. The mortgagee and the owner of the judgment sued the successful defendant in the first action for the land, asking that the title conveyed by the sheriff's deed be decreed to be held in trust for him. Held, that the matter was *res judicata*. *Ullrich v. Bigger*, 106 P. 1073, 81 Kan. 756.

Where, in a prior action, a stock of goods had been attached as the property of a partnership, and in the litigation following the fact that attachment defendants were a partnership was fully litigated, the judgment not having been appealed from, the question of the existence of a partnership was concluded by the judgment, and could not be raised in a subsequent action. *Bishop v. Smith*, 58 P. 493, 9 Kan. App. 602.

In an action for rent of premises, including a quantity of personal property,

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An estoppel by judgment is not confined to the judgment, but extends to all facts involved in it as necessary steps or as groundwork upon which it must have been founded,⁴⁰ including pleadings, verdict, and findings.⁴¹

A final judgment is conclusive between the parties in a subsequent action involving the same subject-matter, not only as to matters determined, but as to all germane matters which might have been litigated and determined.⁴² But a judgment of a court of

brought after the destruction of buildings and property by fire on a lease, by the terms of which defendants were not to be liable for the rent in case of such destruction, a judgment for defendants is conclusive as to plaintiff's right to maintain another action for the value of the personal property destroyed by the fire, but alleged to be wrongfully converted by defendants. *Whitaker v. Hawley*, 1 P. 508, 30 Kan. 317.

⁴⁰ *Uncle Sam Oil Co. v. Richards* (Okl.) 175 P. 749.

A fact or question in issue in a former suit and judicially determined is conclusive as to the parties and their privies. *Deming Inv. Co. v. Shannon*, 62 Okl. 277, 162 P. 471.

⁴¹ *Cressler v. Brown*, 79 Okl. 170, 192 P. 417; *Hawkins v. Ferguson*, 79 Okl. 273, 198 P. 35; *McDuffie v. Geiser Mfg. Co.*, 138 P. 1029, 41 Okl. 488.

⁴² *Dill v. Flesher* (Okl.) 175 P. 359; *Baker v. Leavitt*, 54 Okl. 70, 153 P. 1099; *Cook v. Elmore* (Wyo.) 192 P. 824; *Corrugated Culvert Co. v. Simpson Tp., McIntosh County*, 51 Okl. 178, 151 P. 854, 4 A. L. R. 1170; *Kingfisher Improvement Co. v. Talley*, 51 Okl. 226, 151 P. 873; *Parks v. Haynes*, 52 Okl. 63, 152 P. 400; *Norton v. Kelley*, 57 Okl. 222, 156 P. 1164; *Ely Walker Dry Goods Co. v. Smith* (Okl.) 160 P. 898; *Pioneer Telephone & Telegraph Co. v. State*, 138 P. 1033, 40 Okl. 417; *Alfrey v. Colbert*, 44 Okl. 246, 144 P. 179; *Prince v. Gosnell*, 47 Okl. 570, 149 P. 1162; *Earl v. Earl*, 48 Okl. 442, 149 P. 1179; *State v. City of Leavenworth*, 90 P. 237, 75 Kan. 787; *Stroup v. Pepper*, 73 P. 896, judgment reversed 76 P. 825, 69 Kan. 241; *Sanford v. Oberlin College*, 31 P. 1069, 50 Kan. 342.

Party claiming a life estate and also a fee and suing to quiet title as to the fee after an adverse judgment is affirmed by Supreme Court cannot maintain another suit based upon life estate, which might have been pleaded and proven in first action. *Sweeney v. Coleman* (Okl.) 169 P. 495.

Final judgment in mandamus requiring school district treasurer to register warrants of district, not being appealed from, is *res judicata* as to validity of warrants. *Bank of Chelsea v. School Dist. No. 1, Rogers County*, 62 Okl. 185, 162 P. 809.

A fact or question directly in issue in a former suit, and passed upon by a court of competent jurisdiction, is conclusively settled by the judgment as to parties in that action and persons in privity with them. *Woodworth v. Town of Hennessey*, 122 P. 224, 32 Okl. 267.

Notes for the price of machinery were secured by a chattel and a real estate mortgage. Before they became due plaintiff declared himself unsafe, and brought replevin to recover possession of the chattel security, and obtained the same, and never returned it to defendant. Pending the trial of the action

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competent jurisdiction between same parties is conclusive in a pending suit only upon questions and rights litigated and determined or which might properly have been adjudicated in such former action.⁴³

the debt became due, and the court instructed the jury if they found for defendant, and return could not be had, a verdict should be returned for the value of the property, less the amount of the debt. Verdict was given for defendant for possession, and, if a return could not be had, fixing the value of the property at \$906. Plaintiff paid the judgment and brought action to foreclose the real estate mortgage. Held, that the verdict in replevin was res judicata as to any further attempt to enforce the notes. *Nichols & Shepard Co. v. Trower*, 78 P. 575, 14 Okl. 461.

When fact has been determined in a judicial proceeding and final judgment rendered, it cannot be again litigated between same parties. Estoppel of a judgment is not confined to the judgment, but extends to all facts involved in it as necessary steps, or as the basis upon which it must have been founded. Upon a plea of former adjudication, a matter will be held res adjudicata, although not in issue under pleadings in former action, if from the record it appears that it formed one of the premises upon which judgment necessarily rested. *Johnson v. Gillett* (Okl.) 168 P. 1031.

Judgment in action by one who has distrained animals for their trespass is conclusive as to right to damages for trespass in subsequent action by owner of animals for their possession. *Brown v. Calvert*, 57 Okl. 364, 157 P. 284.

Under a plea of former adjudication a matter will be held res judicata, though not raised by an issue of the pleadings in the former case, where from the record it appears that it formed one of the premises on which the judgment necessarily rested. *Bleakley v. Barclay*, 89 P. 906, 75 Kan. 462, 10 L. R. A. (N. S.) 230.

Where a person acting under a void appointment, as receiver for a corporation, appeared and defended a claim against the corporation, a judgment against him and the corporation was not an adjudication that he was duly appointed. *Lynn v. McCue*, 147 P. 808, 94 Kan. 761, rehearing denied 150 P. 523, 96 Kan. 114.

A former decision, that a school district had no right to tax territory which had been detached therefrom and attached to another district, would be res judicata of another action by the same plaintiff involving the same question. *School Dist. No. 116 of Sedgwick County v. School Dist. 141 of Sedgwick County*, 99 P. 620, 79 Kan. 407.

In mandamus proceedings by a railroad company against county officers to compel them to issue bonds in aid of the company, it appeared that the parties were the same parties to a prior injunction suit, wherein were litigated, or might have been litigated, all the questions which could arise in the mandamus proceeding, except a question as to the tender of the company's stock for such bonds. Held, that all such questions, except the question of the tender of stock, were res judicata. *Chicago, K. & W. R. Co. v. Commissioners of Anderson County*, 47 Kan. 766, 29 P. 96.

In suit for fraud in procuring deed from plaintiff, where former judgment

⁴³ *Scrivner v. McClelland*, 75 Okl. 239, 182 P. 503,

§ 1455. Identity of subject-matter

To constitute a good plea of *res judicata*, the subject-matter of the actions must be the same.⁴⁴

against defendant in another county, setting aside plaintiff's deed and quieting her title, was pleaded as *res judicata*, it was error to sustain demurrer to plaintiff's evidence on ground that damages should have been pleaded in former suit. *Campbell v. Cubbon*, 158 P. 1121, 98 Kan. 642.

⁴⁴ *Harris v. Milligan* (Okl.) 171 P. 850.

Matters involved in prior decision by the Supreme Court in a suit for a partnership accounting are *res adjudicata* as to the account as between plaintiff and defendants and their creditors in a subsequent suit. *Alexander v. Clarkson*, 164 P. 294, 100 Kan. 294, L. R. A. 1917F, 1008.

A final judgment in action for replevin of cotton is not *res judicata* of action for damages sustained by defendant as a result of malicious and unwarranted institution and prosecution of replevin suit, subject-matter not being the same. *Harris v. Milligan* (Okl.) 171 P. 850.

Where one who has received money contends that it was given him under an express contract for services performed but is defeated as to that contention in an action against him to recover the money he is not thereby precluded from maintaining an action for the reasonable value of the services. *Clifton v. Meuser*, 129 P. 159, 88 Kan. 408, 43 L. R. A. (N. S.) 124.

Where the board of railroad assessors assessed real estate of a railroad corporation, and the county clerk refused to recognize such assessments on the return made by the auditor of state, and the land was subsequently assessed by local assessors, in an action by the railroad corporation to enjoin the sale of the premises by the county treasurer for nonpayment of taxes so assessed, the question to be determined was whether the premises were assessable by the board of railroad assessors, or by the local assessors, and it appearing that the same question had been determined in a former adjudication between the parties, and the facts not having been changed, such former adjudication was *res adjudicata*. *Union Pac. R. Co. v. Board of Com'rs of Wyandotte County*, 77 P. 274, 69 Kan. 572.

A judgment perpetually enjoining the city from the collection of an assessment under a former ordinance is not *res adjudicata* of the validity of an assessment under a subsequent ordinance. *Shepherd v. Kansas City*, 105 P. 531, 81 Kan. 369.

A judgment affirming the validity of a sale and transfer of property is conclusive upon the parties thereto, with respect to all the property covered by that entire transaction, although but part thereof was in fact the subject-matter of the issues. *Peterson v. Warner*, 50 P. 1091, 6 Kan. App. 298.

In an action upon one of three notes given at the same time to secure one entire debt, payable in one, two, and three years, it was determined that defendant was surety thereon, and was released by a material change in the contract. Held, that the judgment is conclusive in an action between the same parties upon the other notes. *Peru Plow & Wheel Co. v. Ward*, 51 P. 805, 6 Kan. App. 289.

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§ 1456. Identity of issues

A judgment is conclusive only so far as it determines matters put in issue or admitted in the pleadings.⁴⁵

Extrinsic evidence is admissible to identify points decided on a former trial.⁴⁶

⁴⁵ *New v. Smith*, 119 P. 380, 86 Kan. 1.

Doctrine of res adjudicata cannot be applied to judgments or decrees merely interpreting general statutes and obligations of citizens under them, except in so far as such judgments involve findings of fact to which such interpretation has been applied. *Oklahoma Ry. Co. v. Severns Paving Co.* (Okl.) 170 P. 216, 10 A. L. R. 157; *Id.*, 170 P. 220.

Judgment in suit to remove cloud of fraudulent deed is not res judicata as to damages on account of attorney's fees and expenses incurred in clearing title. *Campbell v. Cubbon*, 158 P. 1121, 98 Kan. 642.

The decision of a former action, refusing an injunction against the paving of a strip of a railroad's right of way adjoining a street by a city of the second class, because no injury was shown, is not an adjudication of the validity of an assessment on the property of the railroad for the paving of such strip. *Atchison, T. & S. F. Ry. Co. v. City of Cherryvale*, 123 P. 874, 87 Kan. 57.

A judgment in replevin is conclusive as against a right to maintain a subsequent action for malicious prosecution. *Oklahoma Moline Plow Co. v. Smith* (Okl.) 196 P. 962.

An action was brought to restrain the collection of interest which accumulated during the pendency of an injunction action prosecuted to restrain the collection of a personal property tax, on the ground that the statutes under which such interest was made collectible were unconstitutional and void. It appeared in the record of such action brought to the supreme court that the original injunction proceeding to restrain the collection of the tax, during the pendency of which this interest accrued, was based on the ground that the levy of such tax was unauthorized and invalid, and the tax not collectible, and that the defendants in such action joined issue on the validity of such tax, and final judgment was rendered therein sustaining the validity thereof. Held, that the question of the constitutionality of the laws under which the tax was levied and interest authorized was res judicata. *Missouri, K. & T. Ry. Co. v. Board of Com'rs of Labette County*, 64 P. 56, 62 Kan. 550.

Where an action is brought to recover damages by a mortgagor against the mortgagee of chattels for having converted the property wrongfully, and for failure to account to the mortgagor for the proceeds thereof in excess of the amount required to satisfy the debt, and where it appears that the mortgagee obtained possession of the property by an order of replevin, and had the possession at the time of the trial and judgment in the replevin action, a finding of the value of the property is not res judicata upon the issue of value in the subsequent action for damages. *Hawkins v. Overstreet*, 54 P. 472, 7 Okl. 277.

The decision of the probate judge that one who has petitioned as a settler is entitled to purchase school land is conclusive on those matters as to which the court is required to find, namely, the facts stated in the petition, and since the petition is not required to show a subdivision of the land by the

⁴⁶ *Bruner v. Bearden*, 80 Okl. 154, 195 P. 117.

§ 1457. Matters not in issue

A judgment is not conclusive between the parties as to facts which did not occur until after the judgment was rendered and which were not involved in the suit in which it was rendered.⁴⁷

A judgment for the full amount of principal and interest contracted for in a usurious transaction is not *res adjudicata* as to an action brought afterwards to recover twice the usurious interest paid in satisfaction of such judgment.⁴⁸

A judgment for the defendant on the question of the execution of a note is not *res judicata* as to the existence of the indebtedness.⁴⁹

§ 1458. Issues undecided

An adjudication upon the merits of a petition, which declines to pass upon a question raised, is a bar to another petition based upon the same ground raising the same question.⁵⁰

A judgment against plaintiff in an action for rent where the issues were whether plaintiff owned the property and whether defendant occupied it as tenant does not estop plaintiff to assert the

statutory tribunal having jurisdiction thereof, such decision of the court, when made in respect to tracts of less than 40 acres, does not determine that such subdivision has been duly authorized. *Hooper v. Nation*, 78 Kan. 198, 96 P. 77.

⁴⁷ *State v. City of Leavenworth*, 90 P. 237, 75 Kan. 787.

A judgment against a trust company and its directors for loss of a trust fund through negligence held not conclusive of the directors' negligence in a subsequent action against them by stockholders for appropriation of the company's assets in payment of such judgment, where it was rendered on a compromise without determination of the charge of negligence, and the directors were held liable because they held the assets of the trust company after it had ceased to do business. *Chambers v. Land Credit Trust Co.*, 139 P. 1178, 92 Kan. 30, rehearing denied 142 P. 248, 92 Kan. 1032.

That a party may have obtained a judgment against another does not estop him to subsequently ask for the same kind of relief against the same party if conditions have changed and new elements are brought in. A judgment in *quo warranto* in favor of the state ousting a city from the unauthorized exercise of corporate powers by its officers does not bar a subsequent action against the same city, brought many years afterwards, based on later abuses of power of the same character by the officers then in control of the city government. *State v. City of Leavenworth*, 90 P. 237, 75 Kan. 787.

⁴⁸ *Bean v. Rumrill* (Okl.) 172 P. 452.

⁴⁹ *Bruner v. Bearden*, 80 Okl. 154, 195 P. 117.

⁵⁰ *Bellamy v. Washita Valley Telephone Co.*, 108 P. 389, 25 Okl. 792.

An order confirming a sheriff's sale is not conclusive on the question of homestead rights in the realty, where that question, although raised, was ignored. *Brury v. Smith*, 53 P. 74, 8 Kan. App. 52.

same title in ejectment against the same defendant, where it is not shown that the question of title was determined in the first action.⁵¹

A judgment which may have resulted from determination of either one of two or more separate issues does not constitute an adjudication as to either where it is not shown upon which it was based.⁵²

Where a cause of action, because of improper joinder, is stricken from the pleadings, the party pleading same is not concluded as to the issues which might have been determined under such cause of action.⁵³

Where the entry of a judgment in an action involving several issues of fact recites a finding on one of such issues, compelling judgment for defendant, and is silent as to the rest, there is no presumption that they have been passed upon, and, in the absence of some further showing, they will be held open to inquiry in future litigation between the same parties based on a different cause of action.⁵⁴

§ 1459. Title or right to property

Where a new or distinct title or interest in the land in controversy is acquired by one of the parties, pending an action of ejectment, and such title or interest is not asserted in the action, the judgment is conclusive against such title or interest.⁵⁵

⁵¹ Routh v. Board of Com'rs of Finney County, 113 P. 397, 84 Kan. 25.

⁵² Routh v. Board of Com'rs of Finney County, 113 P. 397, 84 Kan. 25.

⁵³ In ejectment, defendant claimed the rights of a mortgagee in possession and plaintiff showed that in a prior suit between the same parties defendant in the ejectment suit sought to foreclose the mortgage relied on to justify possession, but it appeared that, after setting it up as a cause of action, all reference thereto was stricken out of the pleadings by the court because of improper joinder of causes of action. Held, that the rights of the mortgagee were not actually determined, though the mortgage might have been foreclosed in the equity suit, and that the decree did not affect the rights of defendant, as a mortgagee in possession, in the subsequent ejectment suit. Stroup v. Pepper, 76 P. 825, 69 Kan. 241, reversing judgment 73 P. 896, on rehearing.

⁵⁴ Hudson v. Remington Paper Co., 80 P. 568, 71 Kan. 300, 6 Ann. Cas. 103.

⁵⁵ If, pending an action of ejectment, a new or distinct title or interest in the land is acquired by the defendant, either in equity or in law, if such title or interest is not asserted in the action before judgment, the judgment for plaintiff is conclusive against such title or interest, under the provisions of the Civil Code by which such an action settles the title between the parties in favor of the one recovering the judgment. Hentig v. Redden, 26 P. 701, 46 Kan. 281, 26 Am. St. Rep. 91.

In an action against a mortgagor in possession and the mortgagee for the possession of real property, a judgment for the plaintiff is not an adjudication as to the right of the mortgagee to a lien on the land under his mortgage.⁵⁶

A judgment rendered on personal service, affecting real estate or some interest therein, is binding and conclusive between the parties and their privies.⁵⁷

The judgment in an action of partition, where the title and right to divide in severalty were in issue, is binding on all the parties to the proceeding, as to such issues.⁵⁸

A party to an action, resulting in a judgment for the sale of land, cannot in subsequent litigation impeach the validity of a sheriff's deed founded thereon, by showing that plaintiff had no authority to maintain such action.⁵⁹

In replevin, the right of possession of the property is not *res judicata* unless that question is tried and passed upon with such certainty that the issue is removed from the domain of doubt and uncertainty, and has become distinct and certain.⁶⁰

Where, in two actions of replevin, the parties, evidence, defense, and issues are the same, except that the title to different animals is involved, a judgment in the first case is conclusive as to the second.⁶¹

A decree of distribution made in winding up an estate is conclusive as to matters properly before the county court at the hearing but not as to the right to the possession of realty belonging to the estate, or the right of the surviving spouse to occupy the homestead.⁶²

A Supreme Court decision in an action upon an administrator's bond to recover insurance money received by the administrator and

⁵⁶ An action for the possession of real property was brought against a mortgagor in possession and a mortgagee. Judgment was rendered against the mortgagee by default, and against the mortgagor after a trial. Held, that said judgment was not an adjudication as to the right of the mortgagee to a lien on the land under his mortgage. *Provident Loan Trust Co. v. Marks*, 52 P. 449, 59 Kan. 230, 68 Am. St. Rep. 349.

⁵⁷ *Challiss v. City of Atchison*, 25 P. 228, 45 Kan. 22.

⁵⁸ *Pennell v. Felch*, 39 P. 1023, 55 Kan. 78.

⁵⁹ *Power v. Snow*, 88 P. 1083, 75 Kan. 182.

⁶⁰ *Geiser Mfg. Co. v. Berry*, 70 P. 202, 12 Okl. 183.

⁶¹ *Holsington v. Brakey*, 3 P. 353, 31 Kan. 560.

⁶² *Pennington v. Woodner-McGaugh*, 64 Okl. 110, 158 P. 875.

used as part of the estate, that the estate and not decedent's children were entitled to the insurance and that the administrator was liable for it to the children, is *res judicata*, in subsequent administration proceedings, that the insurance money belonged to the estate.⁶³

§ 1460. Rights under contracts

Where the existence of a contract between cotenants of an oil and gas lease involved in instant action and its legality had been determined in a former action between same parties, such issues could not be relitigated.⁶⁴

Where, in a suit to quiet title, certain contracts were adjudged void, it was error, in ejectment brought by defendant in the former suit against the plaintiff therein, to admit evidence of the making of the contracts.⁶⁵

§ 1461. Real property

In an action to quiet title, all matters affecting the title may be litigated, and the judgment is conclusive against the parties thereto.⁶⁶

⁶³ *Hunt v. Remsberg*, 133 P. 706, 90 Kan. 350.

⁶⁴ *Uncle Sam Oil Co. v. Richards* (Okla.) 175 P. 749.

⁶⁵ *Gosnell v. Prince*, 129 P. 27, 36 Okl. 445.

⁶⁶ *Baker v. Leavitt*, 54 Okl. 70, 153 P. 1099.

A judgment regularly rendered in an action against a mortgagee and others to quiet title, that the defendants therein have no estate or interest in and to the premises, and that they be perpetually barred and enjoined from asserting any claim to them, or any part thereof, adverse to that of plaintiff, bars the lien of the mortgage. *Hillyard v. Banchor*, 118 P. 67, 85 Kan. 516.

A person in the actual possession of land obtained a judgment quieting her title thereto, against nonresident defendants who had taken tax deeds, on a service by publication only, and without the appearance of defendants in court. Afterwards defendants sued the board of county commissioners to recover the amount of taxes paid, with interest, and on the trial introduced in evidence the record of the action against them quieting title. Held, that the court had jurisdiction to render the judgment quieting title; that it was admissible against the county to show that the tax deeds had been adjudged invalid; and that it could not be attacked collaterally, on the ground that the petition did not state a cause of action. *Com'rs of Marion County v. Welch*, 20 P. 483, 40 Kan. 767.

Where land of a nonresident has been sold for taxes, and the title quieted in the purchaser on service by publication, the decree quieting the title divests the nonresident owner of all interest in the land, and he cannot sue to set aside a quitclaim deed which he is afterwards, by false representations, in-

A judgment in a suit to quiet title does not affect the rights of the owner who was not a party either in person or through his privies.⁶⁷

Where a tax title was held valid on foreclosure as against the mortgagee, but the holder of the tax title claimed nothing under it against other parties to the action, and they sought no affirmative relief as against him, the judgment of foreclosure did not estop the holder under the patent title from asserting a defense in an action by the tax title holder to recover the land.⁶⁸

A decree quieting title in favor of the holder of a tax title is good as against persons holding title under the original owner by previously executed but unrecorded deeds, who were not in possession.⁶⁹

A judgment previously recovered by defendant against plaintiff in ejectment for the same land, having become final was a bar to a subsequent action by plaintiff to recover the land on the same issues.⁷⁰

ARTICLE XI

AMOUNT OF RECOVERY

Sections

- 1462. Damages—Assessment—Measure.
- 1463. Breach of warranty.
- 1464. Unlawful detention—Conversion.
- 1465. Use and occupation.
- 1466. Exemplary damages.
- 1467. Interest and attorney's fees.

§ 1462. Damages—Assessment—Measure

"When, by the verdict, either party is entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of recovery."⁷¹

"Whenever damages are recoverable, the plaintiff may claim and

duced to make to another than the holder of the tax title. *Oldham v. Stephens*, 25 P. 863, 45 Kan. 369.

⁶⁷ *Buck v. Simpson* (Okl.) 166 P. 146, L. R. A. 1918F, 604.

⁶⁸ *Taylor v. Danley*, 132 P. 583, 90 Kan. 1.

⁶⁹ *Utley v. Fee*, 7 P. 555, 33 Kan. 683.

⁷⁰ *Markham v. Dugger*, 126 P. 190, 34 Okl. 492.

⁷¹ Rev. Laws 1910, § 5015.

recover any rate of damages to which he may be entitled for the cause of action established."⁷²

Defendant is liable for all natural consequences of his wrongful act, whether they were foreseen or injuries are more serious than intended.⁷³

The statute relative to the measure of damages⁷⁴ is merely declaratory of the common law.⁷⁵

⁷² Rev. Laws 1910, § 5088.

⁷³ Walbridge v. Walbridge, 103 P. 89, 80 Kan. 567.

⁷⁴ Rev. Laws 1910, §§ 2852-2891.

⁷⁵ *Breach of contract*.—Where a seller refuses to deliver as contracted, he is liable for an amount sufficient to cover the loss resulting therefrom. W. H. Coyle Consol. Cqs. v. Swift & Co., 141 P. 1114, 42 Okl. 613.

In action against tenant for breach of lease, the damages cannot exceed amount party could have gained by full performance on both sides, except as exemplary and penal damages. Rucker v. Mason, 61 Okl. 270, 161 P. 195; Rev. Laws 1910, §§ 2871, 2878.

In suit on written contract and note and mortgage given to secure its performance, wherein plaintiff claimed title to realty covered by mortgage after breach of contract, measure of damages was not governed by Rev. Laws 1910, § 2858, relating to damages for breach of contract as to real estate. Garnett v. Storm, 64 Okl. 137, 166 P. 401.

Damages for breach of oil and gas drilling contract would include necessary expenses in moving plaintiff's rig and oil-drilling machinery to location and in drilling until interruption, and a reasonable compensation for loss of time in remaining on premises at defendant's request. Letcher v. Maloney (Okl.) 172 P. 972.

Injury to property.—Where a railroad company appropriates an alley in a city for its tracks, and makes a deep excavation near to the lot lines, the damage recoverable is restricted to the special injury sustained by a lot owner, and he does not suffer damages recoverable at law for injury to lateral support of his property until the earth is so much disturbed that it slides or falls. Kansas City Northwestern R. Co. v. Schwake, 78 P. 431, 70 Kan. 141, 68 L. R. A. 673, 3 Ann. Cas. 118.

In an action against a railroad company to recover damages for failure to maintain proper cattle guards, whereby plaintiff was compelled to guard his cattle during parts of two years, and lost the use of certain pasturage, and the rental value of his farm was reduced thereby, evidence held to sustain the award of damages. Atchison, T. & S. F. Ry. Co. v. Billings, 93 P. 590, 77 Kan. 119.

Trespass.—In actions for trespass, the rental value of the premises during the time the party is forcibly and unlawfully kept out of possession is the proper measure of damages, and it is not necessary to such recovery that the party entitled thereto should have regained his possession. City of Oklahoma City v. Hill, 50 P. 242, 6 Okl. 114.

The cost of restoring land to its former condition is the measure of damages for trespass thereof, when such cost is less than the diminution in the market value of the whole property by reason of the injury; but if the

§ 1463. Breach of warranty

"Where any grantor applies in any action to defend his warranty or fails to appear after due notice, the court shall determine all

cost is more than the diminution in market value, the latter is the true measure of damages. *Enid & A. Ry. Co. v. Wiley*, 78 P. 96, 14 Okl. 310.

Where one willfully and without authority enters upon another's land and cuts and removes timber, the measure of damages is three times what would compensate owner for actual injury. *Kilgore v. Rowland*, 172 P. 43; *Rev. Laws 1910*, § 2883.

Where a railway company builds its road through a fenced pasture, and fails to erect and maintain cattle guards at the entrance and exit of its road to and from the pasture, as required by statute, the owner may recover damages for the loss of the pasture, or, if he put his animals therein, to reasonable compensation for his efforts in preventing them from straying from the pasture, and injuring the crops on his own premises, or from trespassing on the lands of other persons. *Nelson v. St. Louis & S. F. Ry. Co.*, 30 P. 178, 49 Kan. 165.

The good faith of one permitting his cattle to trespass on the land of another may be shown in order to relieve him from punitive damages. Where one, without authority, turns his cattle into another's field, where they do damage, nominal damages, if no more, may be recovered. The cost of restoring realty to its former condition and compensation for loss of use is the measure of damages for injury thereto but if such cost is more than diminution in the market value, the latter is generally the true measure of damages. *Harris v. Gray* (Okl.) 165 P. 1148.

Water, damages from.—In action for injury to growing crops from damming up a water course, causing it to overflow land and ruin crops, the measure of damages would be difference between reasonable value of crops, which would have been raised but for injury, and market value of any crops actually raised thereon. In action for injury to growing crops from damming up of water course and causing an overflow, the measure of recovery, if no crops were planted, or if crops planted failed to come up by reason of injury, was the reasonable rental value of land for such year or years. *Castle v. Reeburgh*, 75 Okl. 22, 181 P. 297.

In an action for damages for destruction of crops by maintenance of a dam causing the lands of another to be flooded, proper measure of damages was the value of the property at the time of the injury with interest from said date. *Oklahoma City v. Hoke*, 75 Okl. 211, 182 P. 692.

In an action to recover for an injury to property, arising from the carelessness and negligence of corporate authorities in permitting a water standpipe to continuously overflow upon the premises of an adjacent property owner, the measure of damages is the loss actually sustained, and, in case of a permanent injury to the property, the true measure of damages is the difference between the value of the property immediately prior to the location and construction of such standpipe and its diminished value immediately thereafter. *Town of Norman v. Ince*, 58 P. 632, 8 Okl. 412.

Wrongful attachment.—At common law both actual and punitive damages may be recovered for the wrongful and malicious suing out of an attachment without probable cause, while under the statute only actual dam-

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the rights of all parties, and in case the recovery is adverse to the warrantor the warrantee shall recover of the warrantor the price of the land paid for the conveyance at the time of the warranty, the

ages including a reasonable attorney's fee, may be recovered on the bond for wrongful attachment. *Overton v. Sigmon Furniture Mfg. Co.*, 50 Okl. 531, 151 P. 215.

Fraudulent representations.—The measure of damages for the seller's fraudulent representations as to value is the difference between the actual value and the value as represented. *Silverwood v. Carpenter*, 51 Okl. 745, 152 P. 381; *Werline v. Aldred*, 57 Okl. 391, 157 P. 305.

The measure of damages for deceit in an exchange of lands is the difference in the value of the land had it been as represented and its actual value. *Howe v. Martin*, 102 P. 128, 23 Okl. 561, 138 Am. St. Rep. 840.

In a purchaser's action against a real estate broker for damages from fraudulent representations as to the price asked by the owner, held, that plaintiff was entitled to recover the excess pocketed by defendant, less the usual commission for making the sale. *Stevens v. Reilly*, 56 Okl. 455, 156 P. 157.

Bailment.—In action against bailee for hire for loss of goods having no market value, measure of damages is such reasonable value as they had to the owner from the nature and condition of the goods and purpose to which they were adapted and used. In action against bailee for hire for loss of household goods, measure of damages, where they have market value, is the cash market value thereof. *Stack v. Gudgel*, 60 Okl. 32, 158 P. 1144, L. R. A. 1917D, 493.

In an action against a carrier for loss of household goods and wearing apparel having no fixed market value, the measure of damages is their value to the owner. *St. Louis & S. F. R. Co. v. Dunham*, 129 P. 862, 36 Okl. 724.

A carrier of a passenger's baggage is ordinarily liable only to the owner in case of loss or damage, unless when receiving the property as baggage it is informed that it is owned by another. Where passenger procures another's property to be carried as baggage, the carrier, without knowledge of true ownership, is a gratuitous bailee, and liable to owner only for loss or damage from its gross negligence or willful misconduct. *Lusk v. Bloch* (Okl.) 168 P. 430.

Medicine expenses.—In action for an assault and battery, the amount of physician's bill to plaintiff was a proper item to be considered by jury in estimating damages. *Kenworthy v. Pendergrass* (Okl.) 175 P. 939.

In an action to recover for injuries inflicted by a vicious dog, evidence held to show that certain expenses incurred in taking the Pasteur treatment for hydrophobia were necessary and a proper item of damages. *Ayers v. Macoughtry*, 117 P. 1088, 29 Okl. 399, 37 L. R. A. (N. S.) 865.

Parent and child.—In determining the damages to be awarded a parent for loss of the services of a minor child, the jury may consider that with age, growth, and experience the value of the child's services would increase, though they cannot consider that the child might, if not injured, engage in any particular calling. In an action by a parent for the loss of the services of a minor child, the damage to the parent is limited to such as will com-

value of all improvements lost, if any, and all sums necessarily expended, including a reasonable attorney fee, and interest at the

pensate him for the loss of the child's services to the time of his majority, the reasonable amount expended in the treatment and care of the child, and the value of the parent's services for nursing. *Shawnee Gas & Electric Co. v. Motesenbocker*, 138 P. 790, 41 Okl. 454.

Where father informs minor son that he must do for himself, permits him to remain away from home for more than a year, and son suffers injuries and notifies father, but receives no offer of assistance, son may recover loss due to impairment of earning capacity prior to majority. *Harriss Irby Cotton Co. v. Duncan*, 57 Okl. 761, 157 P. 746.

Master and servant.—The measure of damages for breach of a contract for the use of plaintiff's well-drilling outfit and his personal services for two months was the difference between the contract price and what plaintiff was reasonably able to earn by other similar employment, after deducting the expenses of such other employment. *Robertson v. Vandeventer*, 51 Okl. 561, 152 P. 107.

Measure of damages for breach of contract of employment by employer is prima facie sum stipulated to be paid. In action for damages for breach of contract of employment by employer, the employer has burden of showing what amount servant earned or might have earned had he used due diligence in securing other employment of same character. *Sharpless Separator Co. v. Gray*, 63 Okl. 73, 161 P. 1074; *Ditzler Dry Goods Co. v. Sanders*, 44 Okl. 678, 146 P. 17.

Libel and slander.—The statute does not authorize recovery of exemplary damages in the absence of express malice actuating the libelous publication. *Zimmerman v. Newsom*, 46 Okl. 230, 148 P. 733; Rev. Laws 1910, § 4961.

The statute declaring that when verdict in action for libel is for plaintiff it shall in no case be less than \$100, authorizes a minimum verdict in each action, and not for each act of libel. *Kelly v. Roetzel*, 64 Okl. 86, 185 P. 1150.

Conspiracy—Malicious prosecution—Insult—Assault.—A verdict for \$20,000 for a conspiracy to defraud plaintiff of his stock in a bank and oust him from his possession as president held excessive, and would be reduced to \$15,400. *Felt v. Westlake* (Okl.) 174 P. 1041.

A verdict of \$2,500 for malicious prosecution on a complaint charging a school teacher with beating a board bill, an offense under Rev. Laws 1910, § 2704, held not excessive. *Spencer v. Lambert* (Okl.) 173 P. 1035.

As plaintiff went into defendant's store with a package containing a purchase made of another merchant, a member of defendant firm in a rude and insolent manner, under the pretense that plaintiff had stolen the package from defendant's stock, jerked it from her in the presence of others, examined it, and, after discovering that it had not been purchased there, returned it to plaintiff, without apology, and ordered her from the store. Held, that a verdict allowing plaintiff \$2,500 was excessive and should be reduced to \$1,000. *Loneragan v. Wm. Small & Co.*, 81 Kan. 48, 105 P. 27, 25 L. R. A. (N. S.) 976.

In an action for an assault, the testimony showed that defendant struck plaintiff in the face, causing severe injury to the nose. The defendant admitted the assault. The court instructed that if plaintiff had been unlawfully assaulted they should allow reasonable compensation. The jury found

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rate of ten per centum per annum on all sums so paid from the time of payment." ⁷⁶

The measure of damages for a breach of warranty of personal for plaintiff, and assessed his damages at \$1; 50 cents for physical pain, and 50 cents for insult. Held, that the verdict was inadequate. *Sundgren v. Stevens*, 119 P. 322, 86 Kan. 154, 39 L. R. A. (N. S.) 487.

In a tenant's action for an attempted eviction and assault by a landlord, evidence held to sustain a verdict of \$1,000 against the landlord. *Weatherly v. Manatt* (Okl.) 179 P. 470.

Mental suffering.—Damages for mental suffering may be recovered, where such suffering is the proximate and natural result of the assault, though no battery or bodily injury was inflicted. *Lonergan v. Wm. Small & Co.*, 81 Kan. 48, 105 P. 27, 25 L. R. A. (N. S.) 976.

In an action by a passenger against a carrier for false arrest, plaintiff may recover for bodily and mental suffering. *Chicago, R. I. & P. Ry. Co. v. Radford*, 129 P. 834, 36 Okl. 657.

In an action for damages for expulsion from a train, where recovery is warranted by the evidence, plaintiff may recover for insult, injured feelings, and humiliation, together with the actual expense, though the conductor used no violence, and was without fault. *St. Louis & S. F. R. Co. v. Yount*, 30 Okl. 371, 120 P. 627.

— *Telegrams*.—In the absence of statute, damages are not recoverable for mental distress alone, caused by negligent delay in delivering a telegram. *Western Union Telegraph Co. v. Choteau*, 115 P. 879, 28 Okl. 664, 49 L. R. A. (N. S.) 206, Ann. Cas. 1912D, 824; *Western Union Telegraph Co. v. Foy*, 124 P. 305, 32 Okl. 801, 49 L. R. A. (N. S.) 343; *Thomas v. Western Union Telegraph Co.*, 30 Okl. 63, 118 P. 370.

Damages for mental pain and suffering alone, occasioned by the negligence of a telegraph company in failing to deliver a message announcing the death of a relative, cannot be recovered. *Butner v. Western Union Telegraph Co.*, 2 Okl. 234, 37 Pac. 1087.

Telegrams.—The measure of damages for the incorrect transmission of a telegram is the actual damage which the sendee suffers up to the time of notice of the mistake. *Levy Bros. v. Western Union Telegraph Co.*, 39 Okl. 416, 135 P. 423.

Compensatory damages may be recovered from a telegraph company for failure to deliver a message containing an offer to enter into a contract, where there is competent evidence establishing the proper measure of damages. *Western Union Telegraph Co. v. Sights*, 126 P. 234, 34 Okl. 461, 42 L. R. A. (N. S.) 419, Ann. Cas. 1914C, 204.

Where a telegraph company omitted from a message to real estate brokers the word "net," resulting in the brokers negotiating a sale at a price which would leave them no commission, and the omission was discovered before consummation of the sale, but when the brokers could not refuse to complete the deal, the company was liable to the brokers for the actual value of their services up to the discovery of the omission. In order to render a telegraph company liable in an action in tort for the omission of a word from a telegram, it is sufficient if the damages claimed are such as might

⁷⁶ Rev. Laws 1910, § 1167.

property is the difference between the actual value of the property at the time of sale and what its value would have been if it had complied with the warranty.¹⁷

reasonably be expected to result from error in transmission. *Levy Bros. v. Western Union Telegraph Co.*, 39 Okl. 416, 135 P. 423.

A verdict for \$2,000 for personal injuries resulting from failure to deliver a telegram, whereby plaintiff was in great pain and suffering for many days resulting in a miscarriage and in permanent injury, was not excessive. *Western Union Telegraph Co. v. Crawford*, 116 P. 925, 29 Okl. 143, 35 L. R. A. (N. S.) 980.

A telegraph message from an agent to his principal as follows: "High-water, expense heavy, send ten dollars, funds low"—where no explanation at the time is made, will not support evidence showing the loss of a cherry crop in Arkansas, which is said to have been lost or damaged because of a failure to correctly transmit such message, as such item of damages could not have been in the reasonable contemplation of the parties when the contract for the transmission of the message was entered into. Where one seeks to recover damages from a telegraph company for a failure to correctly transmit a message delivered to it, only such damages may be recovered as may fairly and reasonably be considered as arising naturally in the usual course of things from the breach itself, or such as may reasonably be supposed to have been in contemplation of the parties at the time they

¹⁷ *Burgess v. Felix*, 140 P. 1180, 42 Okl. 193; *Jackson v. Bates* (Okl.) 170 P. 897; *Kansas City Hay Press Co. v. Williams*, 51 Okl. 6, 151 P. 570.

Under Rev. Laws 1910, §§ 2865, 2866, the detriment caused by breach of warranty of fitness of an animal for a particular purpose is the excess of its value if the warranty had been complied with over its actual value, together with fair compensation for the loss from an effort in good faith to use it for such purpose. *Parsons v. Smith*, 51 Okl. 495, 151 P. 862.

The measure of damages for breach of warranty of fitness of machinery to do certain work is the difference in the value of the machinery as warranted to be, and its actual value. *Murray Co. v. Palmer*, 55 Okl. 480, 154 P. 1137.

Under Rev. Laws 1910, §§ 2865, 2866, damages for breach of warranty of fitness of article for particular purpose is the excess of the value which it would have had at time of warranty if it had been complied with, over actual value then, and fair compensation for loss incurred in bona fide effort to use it for such purpose. On breach of warranty of fitness for particular purpose, buyer may recover anticipated profits, where business of which he was deprived was contemplated by parties, and where such profit is reasonably certain, even though speculative and uncertain. *Bishop-Babcock-Becker Co. v. Estes Drug Co.*, 63 Okl. 117, 163 P. 276.

Where traction engine was sold under warranty that it would do certain work, in reliance on which buyer executed his notes in payment, and where warranty was breached and buyer sought a rescission, he might recover actual damages sustained by reason of breach. *Hart-Parr Co. v. Duncan*, 75 Okl. 59, 181 P. 288, 4 A. L. R. 1434.

§ 1464. Unlawful detention—Conversion

Where it appears, in an action brought by the plaintiff, as the owner of a stock of merchandise, to recover damages against a sheriff who has levied on and taken possession of the stock in good

made the contract. *Western Union Telegraph Co. v. Pratt*, 89 P. 237, 18 Okl. 274.

Carriers—Shipments.—Where shipper specially brings to carrier's attention at time of delivery for shipment his intent to use goods for a particular purpose, or circumstances are known to carrier from which intent ought reasonably to be inferred, damages for delay may be recovered for natural consequences of failure of such object. Where shipper of cotton seed cake, known by carrier's agent to have been purchased to feed shipper's cattle, at time of contract for shipment informed agent that he needed it and was told that it would promptly arrive, the conversation and circumstances gave carrier notice of intended use, so as to authorize recovery for depreciation in stock resulting from negligent failure to deliver as agreed. *Lusk v. Kennedy* (Okl.) 176 P. 502.

Carrier contracting to deliver certain machinery at a certain time for a certain purpose, and failing so to do, held liable for such amount as would reasonably compensate the shipper. *Ft. Smith & W. R. Co. v. Williams*, 121 P. 275, 30 Okl. 726, 40 L. R. A. (N. S.) 494.

In an action for injury by delay to shipment of cattle, where the evidence showed damages slightly in excess of \$90, a verdict for \$175 is excessive. *Midland Valley R. Co. v. George*, 127 P. 871, 36 Okl. 12.

In an action against a carrier for delay in delivery of machinery, the proper measure of damages in the absence of special notice is the rentable value of the machinery during the delay, with reasonable expenses of plaintiff in endeavoring to secure delivery. *Chicago, R. I. & P. Ry. Co. v. Reid*, 38 Okl. 214, 132 P. 812.

In an action against a carrier for unreasonable delay in transporting machinery, elements of damages recoverable by the shipper stated. *St. Louis & S. F. R. Co. v. Farmers' Union Gin Co.*, 125 P. 894, 34 Okl. 270.

In an action for negligent delay in delivery of machinery, the measure of damages, in the absence of special notice, is its rental value pending delivery, with the reasonable expenses incurred in endeavoring to secure delivery. In an action for damages from delay in the delivery of certain machinery, plaintiff, without notice that employes' wages would be lost in event of delay, cannot recover for the same. *Missouri, O. & G. Ry. Co. v. Hazlett & Price*, 128 P. 105, 35 Okl. 12.

To recover special damages for delay in shipment of freight, it must be shown that such damages were within contemplation of both parties to contract. *Wichita Falls & N. W. Ry. Co. v. D. Cawley Co.* (Okl.) 172 P. 70.

In the statement of the rule that, where a common carrier fails to deliver merchandise within a reasonable time, the measure of damages in the depreciation in the market value between the date on which the delivery should have been made and the date on which it was made, the term "market value" means the value at which the article would be sold in the open market in the quantities as carried, and where the articles shipped are merchandise in large quantities, it is improper to measure the damages by

faith, as the property of a third party, that the plaintiff has purchased back the goods from a stranger, who bid them off at the sheriff's sale, the measure of his damages is the sum thus paid, not greater than the market value, and, in addition, such special damages as

the market value of such merchandise when sold at retail. *Chicago, R. I. & P. Ry. Co. v. Broe*, 86 P. 441, 16 Okl. 25.

Where a railroad company fails and neglects to deliver a car load of freight within a reasonable time (taking into consideration all of the conditions surrounding the shipment), and such delay is due to the negligence of the company, in the absence of any evidence to the effect that the consignee has suffered actual damages, he can recover nominal damages only. *Chicago, R. I. & P. Ry. Co. v. Broe*, 86 P. 441, 16 Okl. 25. The measure of damages in an action against a negligent collecting bank is the actual loss which plaintiff has suffered, which prima facie is the amount of the claim given the bank for collection, where there is a reasonable probability that it could have been collected except for the bank's negligence. *St. Louis Carbonating & Mfg. Co. v. Lookeba State Bank*, 130 P. 280, 35 Okl. 434.

In an action against a carrier for damage to household goods or wearing apparel, the measure of damages is the difference in their actual value prior and subsequent to the injury, and not the difference in the market value of similar goods at such time, at the nearest place where such market obtains. *St. Louis & S. F. R. Co. v. Dickerson*, 118 P. 140, 29 Okl. 386.

Under Rev. Laws 1910, § 2852, the measure of damages for a carrier's delay in forwarding sample trunks of a salesman, is the value of their use during the delay, together with the loss of time occasioned. Loss of time and inability to make sales, consequent on delay in transportation, held within the carrier's contemplation when it received and checked a salesman's sample trunks as baggage, so as to entitle him to recover damages therefor. Such damages as proximately flow from the breach of contract of carriage of baggage are recoverable. *Kansas City, M. & O. Ry. Co. v. Fugatt*, 47 Okl. 727, 150 P. 669, L. R. A. 1916A, 545.

In an action against a railroad company for damages for delay in delivering freight, plaintiff may recover such as naturally arise in the usual course from the breach, or such as may be reasonably contemplated at the time of the contract, and such as result from special circumstances communicated to a railroad company when the contract was made. *Choctaw, O. & G. R. Co. v. Jacobs*, 82 P. 502, 15 Okl. 493.

Under Rev. Laws 1910, § 2869, the detriment from a carrier's delay is deemed the depreciation during the delay in the intrinsic value of the shipment, and also in the market value, otherwise than by reason of the depreciation in intrinsic value, at place where the shipment should have been delivered. In a shipper's action for damages from unnecessary and unreasonable delay, only such damages as were contemplated or could reasonably be presumed to have been contemplated were recoverable. Peculiar circumstances held not contemplated by the carrier, if not communicated to it by the shipper. *Missouri, K. & T. Ry. Co. v. Foote*, 46 Okl. 578, 149 P. 223, Ann. Cas. 1917D, 173.

In action against carrier for negligent delay in delivery of machinery, the measure of damages in absence of special notice is its usual value during time

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he has suffered from the unlawful taking, in the way of injury, depreciation, or otherwise, as may be proved.⁷⁸

The measure of damages for the detention of cattle of which plaintiff is entitled to possession under a chattel mortgage is interest on the value of the cattle during their detention, where such value does not exceed the debt.⁷⁹

The measure of damages for conversion is ordinarily the fair market value at the time and place of conversion, with lawful interest thereon, and fair compensation for expenses in pursuit of the property; but the owner can elect to take the highest fair market

of delay, and reasonable expense of effort to obtain delivery. *Atchison, T. & S. F. Ry. Co. v. Sun Drilling Co.* (Okla.) 165 P. 1133.

Under Rev. Laws 1910, § 2869, measure of damages for delay in transit without shipper's communication of unusual circumstances of shipment is depreciation of merchandise at market value at place of delivery between delivery and when it should have been delivered. In action for delayed carriage of merchandise, damages occurring after its receipt by consignee, because of fact that merchandise had to be carried over to another season, are not recoverable. *Wichita Falls & N. W. Ry. Co. v. D. Cawley Co.* (Okla.) 172 P. 70.

Passengers.—A recovery of \$300 for physical pain and distress suffered by a female passenger caused to alight from a train at a flag switch not her destination, and left alone in the dark half mile from any house, held not excessive. *St. Louis & S. F. Ry. Co. v. Henry*, 46 Okl. 526, 149 P. 132.

Verdict of \$750 awarded a passenger voluntarily ejected, while suffering with rheumatism and other infirmities, and who was compelled to wait a day for the next train, in view of the humiliation, etc., was not excessive. *Dickinson v. Bryant* (Okla.) 172 P. 432.

A railroad company is liable for the proximate damages from negligently carrying a passenger beyond her destination. Where illness and impaired health contracted from exposure in walking back to the station are the proximate consequence of a passenger's being wrongfully carried beyond her destination, they are proper elements of damage. A verdict for \$500 for impairment of plaintiff's health from exposure due to being carried beyond her destination held not excessive, though the evidence as to the state of her health was not altogether satisfactory. *St. Louis & S. F. R. Co. v. Davis*, 132 P. 337, 37 Okl. 340.

Where a carrier's train auditor wrongfully procured plaintiff's arrest for refusing to pay fare, except with a nontransferable ticket issued to another, and the officer handcuffed plaintiff and took him to the station house under a false charge of disorderly conduct, until released on bail, a verdict allowing him \$625 was not excessive. *Chicago, R. I. & P. Ry. Co. v. Radford*, 129 P. 834, 36 Okl. 657.

⁷⁸ *Dodson v. Cooper*, 15 P. 200, 37 Kan. 346.

⁷⁹ *Chattanooga State Bank of Chattanooga v. Citizens' State Bank of Lawton*, 39 Okl. 225, 134 P. 954.

value of the property at any time between the conversion and verdict, without interest, together with cost of pursuit.⁸⁰

Where the conversion has become complete, defendant cannot escape liability, nor reduce the actual damages recoverable, by a tender back of the property.⁸¹

§ 1465. Use and occupation

In an action for the use and occupation of land, recovery can be had only for the value of the use and occupation of the land during the time plaintiff was entitled to the possession thereof.⁸²

The fact that the case is one of occupation of land without color of title will not prevent plaintiff from recovering damages, simply because it is averred that the measure of damages is the value of the use and occupation of the premises during the period sued for, since the rental value while the owner is unlawfully kept out of possession is the proper measure of damages.⁸³

⁸⁰ First Nat. Bank v. Thompson, 137 P. 668, 41 Okl. 88; Funk v. Hendricks, 105 P. 352, 24 Okl. 837.

The measure of damages for conversion of personal property is the value of the property at time of conversion, with interest at 6 per cent. Dunn v. Modern Foundry & Machine Co., 51 Okl. 465, 151 P. 893; Comp. Laws 1909, § 2910 (Rev. Laws 1910, § 2875).

Where property is wrongfully converted, and is, on the order of the court, placed in a receiver's hands, the measure of damages for loss or depreciation is the difference between the market value at the time of the taking and at the time the receiver comes into possession. Aylesbury Mercantile Co. v. Fitch, 99 P. 1089, 22 Okl. 475, 23 L. R. A. (N. S.) 573.

Conversion by mortgagee.—A mortgagor's measure of damages for conversion by the mortgagee is the market value at the time of the conversion, and the debts then existing. Continental Gin Co. v. De Bord, 123 P. 159, 34 Okl. 66.

Conversion of note.—The measure of damages for conversion of a note is its reasonable value, less partial payments or any set off for failure of consideration. Capps v. Vasey Bros., 101 P. 1043, 23 Okl. 554.

⁸¹ West Tulsa Belt Ry. Co. v. Bell, 54 Okl. 175, 153 P. 622.

⁸² Cook v. Melton (Okl.) 176 P. 205; Bigham v. Alexander, 54 Okl. 51, 153 P. 644.

Under Rev. Laws 1910, § 2873, the detriment caused by wrongful occupation of realty in cases not within sections 2874, 2880-2882, is the value of the use of the property, not exceeding six years next preceding commencement of proceeding to enforce right of damages, and the cost of recovering possession. Drennan v. Harris (Okl.) 161 P. 781.

⁸³ Long-Bell Lumber Co. v. Martin, 66 P. 328, 11 Okl. 192.

§ 1466. Exemplary damages

"In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant."⁸⁴

To sustain a claim for exemplary damages, there must be not only gross negligence, but a willful, reckless disregard of the rights of a party injured.⁸⁵

Where a carrier carries a passenger beyond his destination through reckless, careless, wanton, and willful neglect, but not otherwise, the passenger may recover exemplary damages in addition to actual damages.⁸⁶

Where carrier's employés willfully refused to give passenger information requested as to change of cars, the passenger may recover exemplary damages.⁸⁷

A railroad corporation, without participating in such wanton acts, cannot be charged with exemplary damages for the illegal, wanton, and oppressive conduct of a conductor or brakeman of one of its trains toward a passenger.⁸⁸

⁸⁴ Rev. Laws 1910, § 2851.

Under Rev. Laws 1910, § 2851, exemplary damages may be recovered in addition to actual damages, where the competent evidence reasonably shows that the tort complained of was perpetrated by actual, willful fraud practiced to obtain ownership of personal property. *Blasdel v. Gower* (Okl.) 173 P. 644.

In an action for the alleged fraudulent representations of defendant, inducing plaintiffs to buy certain hogs which at the time were known by defendant to be infected with cholera, it was not error to charge that if defendant, knowing the hogs to be diseased with cholera, falsely and willfully represented to plaintiffs that they were sound in health and good stock hogs, and plaintiffs had not examined them prior to the purchase, but relied upon such representations, which were false, and the hogs were infected with cholera, defendant was liable, in addition to the amount of actual damages, for a reasonable sum as exemplary damages, in view of Comp. Laws 1909, § 2887, pro-

⁸⁵ *Atchison, T. & S. F. R. Co. v. Chamberlain*, 46 P. 499, 4 Okl. 542.

⁸⁶ *St. Louis & S. F. R. Co. v. Lilly*, 52 Okl. 727, 153 P. 810.

⁸⁷ *Lilly v. St. Louis & S. F. Ry. Co.*, 122 P. 502, 31 Okl. 521, 39 L. R. A. (N. S.) 663.

⁸⁸ *Moore v. Atchison, T. & S. F. Ry. Co.*, 110 P. 1059, 26 Okl. 682.

Exemplary damages may not be recovered against a telegraph company for breach of a contract to promptly deliver messages. *Western Union Telegraph Co. v. Reeves*, 126 P. 216, 34 Okl. 468.

If a sheriff or other officer makes a wrongful seizure of goods under an order of attachment, but acts without fraud, malice, oppression, or other improper motive, he is not liable therefor in vindictive or exemplary damages on account of the malicious motives of the plaintiff in the writ.⁸⁰

§ 1467. Interest and attorney's fees

"Any person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt."⁸⁰

"In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud or malice, interest may be given in the discretion of the jury."⁸¹

"Accepting payment of the whole principal, as such, waives all claim to interest."⁸²

Where plaintiff in his petition waives all interest in excess of the legal rate, and there is no plea of usury, interest will be allowed in accordance with such prayer.⁸³

A decree for the payment of alimony to a wife raised an indebted-

viding that in an action for breach of an obligation, not arising from contract, where defendant had been guilty of fraud, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing defendant. *Hobbs v. Smith*, 115 P. 347, 27 Okl. 830, 34 L. R. A. (N. S.) 697.

⁸⁰ *Dow v. Julien*, 4 P. 1000, 32 Kan. 576.

Where an officer broke into plaintiff's house in her absence, and under attachment against her husband removed everything, including all furniture and household supplies, personal wearing apparel of plaintiff and family, all of plaintiff's separate property, and all the chickens on the place, an award of exemplary damages was proper. *Sale v. Shipp*, 58 Okl. 598, 160 P. 502.

Findings following plaintiff's evidence held to convict defendant constable of such malicious conduct in making a levy as to justify the imposition of smart money. *Townsend v. Seefeld*, 102 Kan. 302, 169 P. 1157.

⁸⁰ Rev. Laws 1910, § 2848.

⁸¹ Rev. Laws 1910, § 2849.

Interest is a part of the detriment caused by the conversion of personal property. *Drumm-Flato Commission Co. v. Edmisson*, 208 U. S. 534, 28 Sup. Ct. 367, 52 L. Ed. 606, affirming, 17 Okl. 344, 87 P. 311.

⁸² Rev. Laws 1910, § 2850.

⁸³ *Ætna Building & Loan Ass'n v. Randall*, 99 P. 655, 23 Okl. 45.

ness in her favor, as every installment fell due and was unpaid, upon which she was entitled to interest at 6 per cent. per annum.⁹⁴

Where a guardian on final accounting is found liable to his ward, he is liable for interest at 6 per cent. per annum, and a judgment fixing interest at 10 per cent. per annum is unauthorized.⁹⁵

In foreclosure proceeding, judgment for amount, with interest from default to date of judgment at 6 per cent., is erroneous, as such interest should have been allowed from beginning of interest period, with allowance to mortgagors of interest on amount paid as interest in advance, etc., with judgment for principal loan, less overpayment of interest.⁹⁶

When attorney's fee is provided in a note, it is better practice to include such fee in judgment proper than to tax it as part of the costs.⁹⁷

Where, by the terms of a chattel mortgage, it is impossible to determine with certainty whether the percentage named therein as a reasonable attorney's fee in case of foreclosure is to be computed on the proceeds of the sale of the mortgaged property or on the amount secured by the mortgage, the fee should be computed in the way most favorable to the debtor.⁹⁸

⁹⁴ Stanfield v. Stanfield (Okl.) 168 P. 912; Rev. Laws 1910, § 1008.

⁹⁵ Abraham v. Harry (Okl.) 165 P. 1154.

⁹⁶ Garland v. Union Trust Co., 63 Okl. 248, 165 P. 197.

⁹⁷ Kerr v. McKinney (Okl.) 170 P. 685.

⁹⁸ Keokuk Falls Imp. Co. v. Kingsland & Douglas Mfg. Co., 47 P. 484, 5 Okl. 32.

Plaintiff, in action to foreclose a realty mortgage, held entitled to recover amount due on note, with amount of past-due interest coupon, with interest thereon, and also \$200 attorney's fee as provided in mortgage, with interest thereon. Passumpsic Savings Bank v. Johnson, 64 Okl. 4, 165 P. 181.

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ARTICLE XII

ACTIONS ON JUDGMENTS

Sections

1468. Cause of action.

1469. Who may sue.

1470. Review.

1471. Foreign judgments.

§ 1468. Cause of action

An action can be brought on a domestic judgment to recover a second judgment thereon, if the action is begun before the first judgment becomes dormant.⁹⁹

It is no objection to a suit on a judgment that the time within which an execution could be issued on the judgment has not expired.¹

Unpaid installments of alimony not made a lien on defendant's property may be collected by suit, judgment, and execution against the property.²

Where a judgment for specific performance provides that on the vendor's failure to execute a warranty deed the decree shall operate as a conveyance, and no deed is executed, the vendee may sue for breach of warranty if the title proves defective.³

§ 1469. Who may sue

Personal representatives of the owner of a judgment which has become dormant by death of creditor may sue on the dormant judgment without having it revived;⁴ but such action must be commenced within time for revivor.⁵

⁹⁹ Treat v. Wilson, 70 P. 893, 65 Kan. 729.

¹ Hummer v. Lamphear, 4 P. 865, 32 Kan. 439, 49 Am. Rep. 491.

Action may be maintained on judgment, though the judgment creditor has right to issue execution thereon. Davis v. Foley, 60 Okl. 87, 159 P. 646, L. R. A. 1917A, 187.

² Cheever v. Kelly, 150 P. 529, 96 Kan. 269.

³ Paris v. Golden, 153 P. 528, 96 Kan. 668, rehearing denied 154 P. 1123, 97 Kan. 174.

⁴ Jones v. Nye, 56 Okl. 578, 156 P. 332, L. R. A. 1916E, 735; Rev. Laws 1910, § 5294.

⁵ Jones v. Nye, 56 Okl. 578, 156 P. 332, L. R. A. 1916E, 735.

Under Code Civ. Proc. § 18, a right of action on a domestic judgment
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§ 1470. Review

Where a former adjudication is relied on as a defense, it should be made to appear by the verdict and findings or judgment that the issues involved are *res judicata*.⁶

Whether there is such identity of the parties and subject-matter or cause of action as will support a plea of *res judicata* is a question of law, when determinable from an inspection of the record.⁷

§ 1471. Foreign judgments

Recovery cannot be had on the transcript of a judgment rendered in another state, where it appears therefrom that the proceedings were not had according to the laws of the state of Oklahoma relating to judgments by confession; there being no proof that the laws of the other state are different from those of the state of Oklahoma.⁸

An action may be maintained on a foreign decree adjudging the unconditional payment of money by defendant, notwithstanding, as a preliminary, the judgment plaintiff is required to deposit certain debts with the clerk to be delivered to the judgment debtor on the payment of the money.⁹

Where a judgment for alimony rendered in another state was allowed to become dormant, under the laws of that state, and after the husband's death no steps were taken to revive the same, it is not a legal or equitable lien on land left by the husband in this state, and cannot be enforced by action here.¹⁰

whereon no execution has issued is barred by the five-years statute, unless within an exception. *Schuyler County Bank of Lancaster, Mo., v. Bradbury*, 43 P. 254, 56 Kan. 355.

⁶ *James McCord Co. v. Johnson Grocery Co.* (Ok.) 172 P. 438.

⁷ *Alfrey v. Colbert*, 44 Okl. 246, 144 P. 179.

⁸ *Harn v. Cole*, 95 P. 415, 20 Okl. 553; *McNair v. Underwood*, 55 Okl. 585, 155 P. 553.

⁹ *McLain v. Parker*, 129 P. 1140, 88 Kan. 717, judgment affirmed on rehearing 131 P. 153, 88 Kan. 873.

¹⁰ *Chapman v. Chapman*, 29 P. 1071, 48 Kan. 636.

ARTICLE XIII

EQUITABLE RELIEF

Sections

- 1472. In general.
- 1473. Fraud.
- 1474. Injunction—Forms.
- 1475. Suit to vacate.
- 1476. Parties.
- 1477. Pleading.
- 1478. Evidence.

§ 1472. In general

Equity will not grant relief against a judgment at law, on grounds which were available at law, and which complainant, through negligence, failed to interpose.¹¹

Mistake warranting cancellation of a judgment and declaration of a resulting trust must have prevented a fair hearing.¹² A party without notice of default judgment in time to file a motion to vacate it may have its enforcement restrained.¹³

§ 1473. Fraud

A domestic judgment may be attacked by an equitable proceeding to set aside the judgment for fraud.¹⁴

In an equitable suit, fraud which will justify cancellation of an order or judgment must be extraneous to the issues and such as prevented complaining party from having a fair hearing.¹⁵ Ordi-

¹¹ Howard v. Eddy, 43 P. 1133, 56 Kan. 498; Crist v. Cosby, 69 P. 885, 11 Okl. 635.

¹² Hollingshead v. Hollingshead, 79 Okl. 163, 193 P. 412.

¹³ Pettis v. Johnston, 78 Okl. 277, 190 P. 681.

¹⁴ McIntosh v. Holtgrave, 79 Okl. 63, 191 P. 739.

¹⁵ Driskill v. Quinn (Okl.) 170 P. 495; Hollingshead v. Hollingshead, 79 Okl. 292, 193 P. 412; Brown v. Trent, 128 P. 895, 36 Okl. 239.

A judgment or decree may not be set aside for fraud unless the fraud is extrinsic or collateral to the questions determined in the action in which the judgment was rendered. *Estes v. Timmons*, 73 P. 803, 12 Okl. 537, judgment affirmed 26 S. Ct. 85, 199 U. S. 391, 50 L. Ed. 241; *O'Brien v. Van Arsdale-Osborne Brokerage Co.*, 80 Okl. 174, 194 P. 1083.

By "extrinsic or collateral fraud" for which a court of equity will set aside a judgment rendered by a court of competent jurisdiction is meant some act or conduct of the prevailing party which has prevented a fair submission of the controversy. *Garrett Biblical Institute v. Minard*, 108 P. 80, 82 Kan. 338.

District courts have power to vacate and annul orders of other courts for

narily it is fraud which prevents a party from fairly presenting his case, or fraud upon the court, or its process, and not fraud in the cause of action, which will authorize the setting aside of a final judgment.¹⁶

A fraud for which a judgment may be set aside must be actual fraud involving intentional wrong, as distinguished from legal or constructive fraud.¹⁷

A judgment of a court of record, entered by reason of the fraud of the party benefited thereby, is voidable at the suit of the judgment debtor when brought within two years from the discovery of the fraud, as provided by statute.¹⁸

fraud, where such fraud is extraneous to the issues in the proceeding attacked, especially where the court has been imposed upon by such fraud. *Elrod v. Adair*, 54 Okl. 207, 153 P. 660; *Id.*, 54 Okl. 218, 220, 156 P. 625, 634; *McIntosh v. Holtgrave*, 79 Okl. 63, 191 P. 739.

District courts may vacate orders of other courts for fraud inducing the order. *Wray v. Howard*, 79 Okl. 223, 192 P. 584.

¹⁶ *Ely Walker Dry Goods Co. v. Smith* (Okl.) 160 P. 898.

The nonresident payee of a note, to which the maker had a good defense, in order to confer apparent jurisdiction on a court located at a great distance from the residence of the maker, and to deprive him of an opportunity to defend, made a colorable indorsement, and procured a nonresident to make a colorable guaranty, and caused suit to be brought in the name of the indorsee against the maker and guarantor, and obtained a domestic summons for the guarantor, who accepted service in such manner that the court would presume, from an inspection, that the service was accepted in the county where suit was brought, and thereafter a summons was issued on the maker in the county of his residence, and a judgment by default taken; the maker being ignorant of the fraud. Held, that the judgment was fraudulent and void, and its enforcement in the hands of the payee would be enjoined. *McConnell v. Hicks*, 68 P. 651, 64 Kan. 828.

The fraud which would authorize a court to vacate a judgment in an action for that purpose under Code Civ. Proc. § 570 (Gen. St. 1901, § 5056), must be collateral to the matter involved in the former action, and justify the conclusion that but for such fraud the result would have been different. *Electric Plaster Co. v. Blue Rapids City Tp.*, 106 P. 1079, 81 Kan. 730, 25 L. R. A. (N. S.) 1237.

¹⁷ *Wagner v. Beadle*, 108 P. 859, 82 Kan. 468.

The word "fraud," in the fourth paragraph of section 601, c. 95, Gen. St. 1897, empowering the district court to vacate its own judgments for "fraud" practiced by the successful party in obtaining them, is used in its common, direct sense. It means fraud in fact, not fraud in law, and embraces only intentional wrong. *Ohio & W. Mortgage & Trust Co. v. Carter*, 58 P. 1040, 9 Kan. App. 621.

¹⁸ *City of Guthrie v. McKennon*, 91 P. 851, 19 Okl. 306.

The provisions of the statute which limit the time in which action may be
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In a proceeding to vacate a judgment against a defendant for fraud practiced by the plaintiff in obtaining it, the petition must fully state the facts constituting the defense. Unless the facts stated show an existing valid and meritorious defense, the petition is fatally defective.¹⁹

§ 1474. Injunction—Forms

An injunction against a judgment will not be granted in favor of a party who, through want of diligence, has lost his right of appeal.²⁰

The enforcement of an alleged void judgment will not be enjoined, where plaintiff had an adequate and complete remedy at law by proceeding to vacate the judgment, of which he had not availed himself or been deprived.²¹

Equity will enjoin execution of a judgment at law when the com-

brought to reverse or vacate a judgment to two years from its date, do not apply to an equitable action to cancel the judgment on the ground of fraud within two years from its discovery. *City of Guthrie v. McKennon*, 91 P. 851, 19 Okl. 306; *Harvey v. Dolan* (Kan.) 176 P. 134.

¹⁹ *Provins v. Lovi*, 50 P. 81, 6 Okl. 94.

²⁰ *Rumsey v. Howe*, 50 Okl. 327, 150 P. 1060; *Missouri, O. & G. Ry. Co. v. Riley*, 127 P. 391, 34 Okl. 760.

²¹ *Frost v. Akin*, 60 Okl. 174, 159 P. 752.

An injunction against the enforcement of a void judgment of a county court was properly denied, where it appears that plaintiff had an adequate remedy by motion to vacate or by appeal, and that he has not availed himself of such remedy or been unavoidably deprived thereof. *Bilby v. Stuart*, 39 Okl. 451, 135 P. 931.

On refusal of the clerk to approve an undertaking to stay execution until after review on appeal, the appropriate remedy is by application to the court to compel the clerk to perform that duty, and not by an action to enjoin the enforcement of the judgment. *Supreme Lodge of Order of Select Friends v. Carey*, 47 P. 621, 57 Kan. 655.

Where a judgment has been rendered against a party without service, actual or constructive, he has a complete adequate remedy at law against the same under the statute, which provides that the district court may vacate or modify its own judgment at or after the term at which such judgment was made, for "irregularity" in obtaining such judgment, since a judgment without service is irregularly obtained. *Hockaday v. Jones*, 56 P. 1054, 8 Okl. 156.

Under the statute, providing that a summons in an action for the recovery of money only must have indorsed thereon the amount for which the judgment will be rendered if defendant fails to appear, a summons without such indorsement is sufficient to give the court jurisdiction of the party and of the subject-matter, and the judgment rendered thereon is voidable only, so that injunction to restrain its enforcement will not be granted. *Lawton v. Nich-*

plainant has an equitable defense of which he could not avail himself at law because it did not amount to a legal defense.²²

In an action to enjoin collection of judgment and to have damages ascertained and set off against the judgment, where plaintiff had withdrawn his counterclaim in the action in which the judgment was rendered, he thereby waived it and could not make it the basis of equitable relief.²³

A party against whom a judgment has been rendered by default, which judgment is void for want of jurisdiction over the person of defendant, cannot enjoin an execution on said judgment, or annul such judgment, unless he shows that he has a meritorious defense, that he has no adequate remedy at law, and that the existence of such judgment is not attributable to his own neglect.²⁴

An action to enjoin a judgment may be maintained in any county in which it is sought to put it in force, even though the judgment was rendered in another county.²⁵

INJUNCTION AGAINST ENFORCEMENT OF VOID JUDGMENT

Petition

(Caption.)

Comes now the plaintiffs, A. B., and for cause of action against the defendant, C. D., alleges and states:

1. That plaintiff is the owner in fee simple and in possession of the following described real estate: (Describing same.)

olas, 73 P. 262, 12 Okl. 550; Tootle v. Ellis, 65 P. 675, 63 Kan. 422, 88 Am. St. Rep. 246.

A defendant in a foreclosure suit answered. After a decree against him, he commenced an action to enjoin the judgment, and to set aside a sheriff's sale under the decree, alleging fraud in the judgment. Such questions could have been litigated in the foreclosure suit. Held, that the injunction proceedings could not be maintained. *Myers v. Jones*, 61 Kan. 191, 59 P. 275.

Where defendant in ejectment was served personally by summons, and failed and neglected to plead or answer, and judgment was taken against him by default, a suit to restrain plaintiff in ejectment from executing the writ of restitution and enforcing the judgment of the court will lie, where there is no allegation that the failure of defendant in ejectment to answer or plead, or set up his defense, if he had any, in said action, was due to any wrong, misconduct, or fraud on the part of plaintiff in ejectment, and no reason or cause is shown for the failure to set up such defense. *Herbein v. Moore*, 61 P. 1060, 10 Okl. 317.

²² *Reynolds v. Hill* (Okl.) 169 P. 625.

²³ *Kibby v. Binion* (Okl.) 172 P. 1091.

²⁴ *Hockaday v. Jones*, 56 P. 1054, 8 Okl. 156.

²⁵ *Busenbark v. Busenbark*, 7 P. 245, 33 Kan. 572.

2. That the defendant, C. D., has, or claims to have, a judgment against one E. F., rendered in the justice court of ——— county on the ——— day of ———, 19—, for the sum of \$—— and cost of suit therein taxed. That afterwards, on or about the ——— day of ———, 19—, the said defendant, plaintiff in said action against said E. F. filed in said justice court an affidavit in garnishment against the plaintiff, and caused the summons in garnishment to issue against the plaintiff out of said justice court of ——— county, Oklahoma, in said action. That afterwards, and on or about the ——— day of ———, 19—, the justice before whom said cause was pending, unlawfully, and without any notice to this plaintiff, and without his knowledge or consent, and without any examination whatever of this plaintiff touching the matter of garnishment made, and in fraud of the rights of this plaintiff, found that this plaintiff was indebted to the said E. F. in the sum of \$——, and thereon made the following order:

"It is further ordered, considered, and adjudged by the court that said A. B., or his agent, pay to said plaintiff, out of the money now in or coming into his hands, allowing to the said E. F. \$—— debt and costs, forthwith, and plaintiff, C. D., have judgment against the said A. B. for \$—— and costs, and execution therefor.
G. H., Justice of the Peace."

3. Plaintiff further alleges that no summons, and no true garnishment, was ever served on him in any manner whatever, nor did he ever, in person or by counsel, appear in any proceeding in said case, or in the garnishment proceeding therein, or know anything about said order or judgment, or pretended judgment, until about the ——— day of ———, 19—. That he does not owe said E. F. or defendant any sum of money whatever, nor did he ever owe either of them any sum whatsoever, nor did he ever own or hold any contract that he would become indebted to said E. F., or liable to said E. F., in any sum whatever, nor did he have any property in his possession or under his control belonging to said E. F.

4. That afterwards, and on or about the ——— day of ———, 19—, the said defendant required a certified transcript of said proceeding and order or judgment to be filed and spread upon the records of the district court in and for the district court of ——— county, Oklahoma, and on the ——— day of ———, 19—, caused a

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further transcript thereof, certified by the court clerk of ——— county to be filed in the court clerk's office of ——— county, and spread upon the records thereof. That the said defendant threatened and is about to enforce the collection of said order or judgment against this plaintiff, and, unless prevented by a restraining order of this court, execution will be issued thereon against this plaintiff, and levied upon his property hereinbefore described and set out, for the satisfaction of said pretended judgment, and thereby cause great and irreparable injury to this plaintiff, and plaintiff alleges that he has no adequate remedy at law.

5. Plaintiff alleges that the transcript of said judgment, so as aforesaid filed in the district court of ——— county, Oklahoma, is a lien upon the said property, to wit: (Describing same,) and casts a cloud on the title thereof, impedes and hinders the transfer of sale of said real estate of this plaintiff, and deteriorates the value thereof.

6. That defendant neglects and refuses to relieve the said cloud upon the title of this plaintiff's said real estate, and refuses and neglects to cancel said alleged and pretended judgment, so as aforesaid filed in the district court of ——— county, Oklahoma, against the property of this plaintiff, and threatens and is about to levy an execution thereon to satisfy the said judgment so as aforesaid illegally and wrongfully obtained against this plaintiff in the said justice court of ——— county, Oklahoma.

7. That the action heretofore commenced by him in the court against C. D., defendant herein, in which plaintiff recovered judgment against said defendant on the ——— day of ———, 19—, has lately, to wit, on the ——— day of ———, 19—, been reversed by the Supreme Court of the state of Oklahoma, and the said action dismissed for the reason that the petition of this plaintiff in said action filed did not contain a description of the real estate of this plaintiff in the county of ——— and state of Oklahoma, and did not contain a complaint that the judgment in question was a lien upon any special real estate of this plaintiff, and therefore holding that this court in said action had no jurisdiction, and that the decree for the plaintiff was a nullity. And the plaintiff now comes, and shows to the court, as heretofore alleged, that he is the owner and in possession of the real estate hereinbefore described, and that

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the judgment in question, hereinbefore alleged as filed in this court by said defendant, C. D., as a transcript from the courts of _____ county, Oklahoma, is a cloud upon the title of plaintiff's said real estate, and is a lien in this county upon said real estate of this plaintiff, but illegally and wrongfully so, and in equity ought to be canceled of record.

Wherefore, plaintiff prays this honorable court for an order of injunction, whereby said defendant, C. D., his heirs and assigns, may be perpetually enjoined from enforcing or attempting to enforce said pretended judgment; that this court order and decree that said pretended judgment be set aside, vacated and held for naught, and the apparent liens thereof on plaintiff's said real estate be declared of no effect; and that the same be canceled of record.

X. Y., Attorney for Plaintiff.

(Verification.)

NOTE.—Form in *Cobbey v. Wright*, 34 Neb. 771, 52 N. W. 713.

§ 1475. Suit to vacate

Equity has jurisdiction to vacate judgments fraudulently procured in probate proceedings.²⁶

A bill in equity to set aside a decree cannot be sustained, where it is clear from the facts pleaded that plaintiff had an adequate remedy at law by an application to the court rendering the judgment to vacate or modify the same, of which he failed to avail himself without excuse shown.²⁷

While the allegations in the petition that plaintiffs relied on the stenographer's transcript of the testimony on the trial and the same could not be had owing to the failure of the stenographer to so furnish it, that his excuse was that the same was lost, and for that reason plaintiffs could not serve a case-made, might not be sufficient for equitable interference; but when coupled with the allegations that the term of office of the trial judge expired before the expiration of the time fixed by him for settling the same, and that he removed from the state, it was sufficient to show that plaintiffs were de-

²⁶ *Johnson v. Filtsch*, 138 P. 165, 37 Okl. 510, judgment modified on rehearing 138 P. 806, 42 Okl. 64.

For forms of petition, see ante, §§ 1474 and 1316.

²⁷ *Racey v. Racey*, 73 P. 305, 12 Okl. 650.

prived of their right to appeal, and to invoke a court of equity to grant a new trial.²⁸

Equity does not interfere with judgments at law unless complainant has equitable defense of which he could not avail himself at law, or was prevented from presenting a good defense at law by fraud or accident, unmixed with negligence of himself or agents.²⁹

One who executed mortgages in order to evidence an indebtedness that did not exist, and then waived service and made default so that judgments of foreclosure might be taken against her, stands in no position to obtain relief against the judgments or against the sheriff's deed which was executed in satisfaction of one of them.³⁰

Where a judgment obtained against several defendants is sought to be vacated on account of the fraud practiced by the successful party, and it is also alleged that it is void as to some of the defendants because no service of summons was made upon them, those not served are not confined to the remedy prescribed by statute of having the judgment vacated on motion, but may join with the other defendants in an action to have it set aside for the fraud.³¹

An objection to a judgment that the deed on which it was based was champertous, cannot be made basis of an action to vacate, where the court otherwise had jurisdiction.³²

In an action to set aside a judgment, no defense can be set up against such judgment which might, with proper diligence, have been interposed in the action in which the judgment was rendered.³³

§ 1476. Parties

In an action to vacate a judgment the plaintiff in whose name the judgment stands is a necessary party to the action.³⁴

²⁸ *Whitely v. St. Louis, E. R. & W. Ry. Co.*, 116 P. 165, 29 Okl. 63.

²⁹ *Ashton v. Board of Com'rs of Murray County*, 58 Okl. 259, 158 P. 901.

³⁰ *Cheney v. Hovey*, 44 P. 605, 56 Kan. 637.

³¹ *Steele v. Duncan*, 28 P. 206, 47 Kan. 511.

Assuming, but not deciding, that the rule forbidding a judgment to be set aside for fraud in a matter thereby adjudicated does not apply where defendant had no actual notice of the action, no ground for vacation is established by showing that it was based on a claim insufficient in law but admitting of assertion in good faith. *Wagner v. Beadle*, 108 P. 859, 82 Kan. 468.

³² *Stauffer v. Watts (Okl.)* 174 P. 1031.

³³ *Johnson v. Reed*, 57 P. 680, 125 Cal. 74; *Rucker v. Langford*, 71 P. 1123, 138 Cal. 611; *Ohio & W. Mortgage & Trust Co. v. Carter*, 58 P. 1040, 9 Kan. App. 621.

³⁴ *Weer v. Bell (Okl.)* 174 P. 500.

In a case where the petition alleged that a sum of money was held by an unincorporated association in trust for plaintiff; that the defendant officer of the association loaned the same on mortgage security, foreclosed the mortgage, and assigned the judgment to her codefendant; and that the codefendant was attempting to enforce the same,—and prayed an injunction restraining the enforcement thereof, the association and its members were necessary parties to the suit.³⁵

§ 1477. Pleading

In action to vacate a judgment for fraud practiced by plaintiff in obtaining it, the petition must set forth the judgment complained of,³⁶ state the grounds of defense, and be verified by affidavit.³⁷

³⁵ *Leroy Coal & Mining Co. v. Crowl*, 45 P. 132, 3 Kan. App. 288.

³⁶ *First State Bank of Indianahoma v. Carr* (Okl.) 180 P. 856.

³⁷ A petition under Rev. Laws 1910, §§ 5267, 5269, to vacate a judgment on ground of fraud which sets up only a general denial by way of defense and does not state facts constituting it, is fatally defective. *First State Bank of Indianahoma v. Carr* (Okl.) 180 P. 856.

In action to vacate a judgment for fraud practiced by plaintiff in obtaining it, the petition must be verified by affidavit. *First State Bank of Indianahoma v. Carr* (Okl.) 180 P. 856.

In a proceeding to vacate a judgment against a defendant for fraud practiced by the plaintiff in obtaining it, the petition must set forth the judgment complained of, and must also fully state the facts constituting the defense. Unless the facts stated show an existing valid and meritorious defense, the petition is fatally defective. *Mulvaney v. Lovejoy*, 15 P. 181, 37 Kan. 305.

In an action to vacate a judgment for fraud, a petition fails to state a cause of action where it relies solely on the ground that judgment was obtained by perjury, and shows that the issue to which the false testimony relates was raised by the pleading, and was tried on a conflict of evidence. *Electric Plaster Co. v. Blue Rapids City Tp.*, 106 P. 1079, 81 Kan. 730, 25 L. R. A. (N. S.) 1237.

In an action to set aside a judgment under Gen. St. 1897, c. 95, § 606, empowering the district court to vacate its own judgments for fraud practiced by the successful party in obtaining such a judgment, the facts showing such fraud must be stated or set forth in a plain and concise manner, as in other cases; mere knowledge of certain facts not being sufficient. The fraudulent acts and proceedings of such party, designed and practiced for the purpose of securing an unfair and unjust judgment, must be clearly shown. *Ohio & W. Mortgage & Trust Co. v. Carter*, 58 P. 1040, 9 Kan. App. 621.

Since the statutes provide an exclusive proceeding for vacating a judgment rendered in attachment against a defendant who has died pending the action, a petition for injunction against the enforcement of such a judgment is insufficient unless it sets forth the judgment, the grounds to vacate it, and the

§ 1478. Evidence

A plaintiff, suing in equity, to show invalidity of a judgment for want of jurisdiction, must show a meritorious defense.³⁸ Relief based on extrinsic evidence may be had against a judgment rendered without service of process.³⁹

Where parties by sufficient pleading assail a judgment for want of jurisdiction, because of fraud practiced by prevailing party, parol evidence is admissible to support such pleading, whether such an attack be denominated direct or collateral.⁴⁰

A party against whom a judgment has been rendered in his absence, seeking to be relieved therefrom upon the ground of "fraud practiced by the successful party in obtaining the judgment," must

defense to the action, as required by the section last named. *Mosely v. Southern Manufg Co.*, 46 P. 508, 4 Okl. 492.

An averment in a petition that a certain third party executed to defendants a note and mortgage; that they were without consideration; that the transaction was for the purpose of defrauding creditors; that afterwards the land described in the petition was sold to plaintiffs, and possession thereof given; that the sum of \$1,700 was taken from the plaintiffs for payment therefor; and that a judgment was afterwards rendered upon the said note, and the property and possession of plaintiffs taken under execution therefrom—alleges with sufficient definiteness facts which constitute fraud sufficient to authorize the issuance of an injunction restraining a sale under said execution. *Tibbits v. Miller*, 60 P. 95, 9 Okl. 677.

A petition to vacate a judgment for fraud must be verified and set forth the judgment, the facts constituting the fraud, and fully state the facts constituting the defense. A petition to vacate a judgment for fraud which sets up only a general denial by way of defense, and does not state the facts constituting the fraud is fatally defective. *Thompson v. Caddo County Bank*, 82 P. 927, 15 Okl. 615.

In an action to set aside a judgment for fraud, in procuring the same, where the petition alleges that it was obtained on a chose in action which the party obtaining it did not own at the time, and which had been reduced to judgment by a third party, and that the petition on which the alleged fraudulent judgment was entered set out that such third party claimed some interest therein, and prayed that he be impleaded, that the right of all parties might be adjudicated, which petition was verified, the petition did not state a cause of action; it appearing that plaintiff had notice of such facts as would put an ordinary person on inquiry, which would have disclosed the defense, if any, the defendant in such action had. *City of Guthrie v. McKennon*, 91 P. 851, 19 Okl. 306.

³⁸ *Pettis v. Johnston*, 78 Okl. 277, 190 P. 681.

³⁹ *Pettis v. Johnston*, 78 Okl. 277, 190 P. 681.

⁴⁰ *Griffin v. Culp* (Okl.) 174 P. 495.

not only make satisfactory proof of fraud in fact, but should also show that he was himself guilty of no laches in failing to appear at the trial.⁴¹

ARTICLE XIV

FOREIGN JUDGMENTS

Sections

- 1479. Recognition—In general.
- 1480. Jurisdiction.
- 1481. Judgment in rem.
- 1482. Fraud.
- 1483. Conclusiveness.
- 1484. Divorce and alimony.
- 1485. Enforcement in other states.

§ 1479. Recognition—In general

Giving to the proceedings of a sister state the same faith and credit that are given to like proceedings by the courts of such sister state is a compliance with the provisions of the federal constitution and the act of congress requiring each state to give full faith and credit to the judgments and judicial proceedings of the sister state.⁴²

§ 1480. Jurisdiction

Foreign courts of general jurisdiction will be presumed to have the authority they assume to exercise, though such authority differs from that under the state laws.⁴³

⁴¹ *Ohio & W. Mortgage & Trust Co. v. Carter* (Kan.) 58 P. 1040, 9 Kan. App. 621.

⁴² *Chicago, R. I. & P. Ry. Co. v. Campbell*, 49 P. 321, 5 Kan. App. 423.

⁴³ *Robinson v. Chicago, R. I. & P. Ry. Co.*, 150 P. 636, 96 Kan. 137.

It will be presumed, in favor of a foreign judgment, that a court of general jurisdiction had the authority it assumed to exercise. *Westervelt v. Jones*, 47 P. 822, 5 Kan. App. 35.

A judgment rendered and entered in another state in accordance with the laws of such state, may be valid and enforceable in Kansas, although a judgment rendered and entered in the same manner and form and under like circumstances in Kansas would be void. *Ritter v. Hoffman*, 10 P. 576, 35 Kan. 215.

An answer challenging the action of the probate court in appointing an administrator of the estate of a resident of that state on the ground that deceased did not have any property at time of her death was a collateral at-

A judgment by confession in another state, entered on a note made there, is valid, notwithstanding the maker's removal from the state.⁴⁴

A judgment rendered in a foreign country without jurisdiction of the person of the defendant may be attacked in either a direct or collateral proceeding in which the validity of the judgment is questioned.⁴⁵

A contention that a foreign judgment is void for want of jurisdiction on judgment of another court, to which demurrer was properly sustained. *Chicago, R. I. & P. Ry. Co. v. Forrester* (Okl.) 177 P. 593, 8 A. L. R. 163.

A judgment of a justice of the peace of another state may be brought within the protection of the full faith and credit clause of the federal Constitution, but there is no presumption in favor of the authority or jurisdiction of such justice, and such facts must be lawfully established before it can be known to what faith and credit his acts are entitled. *Hindman v. Missouri, K. & T. Ry. Co.*, 83 Kan. 35, 110 P. 102, 21 Ann. Cas. 1152.

Where judgment was confessed in a foreign state by appearance of duly authorized attorney for defendant, it will be enforced in the state, although defendant was not a resident of either state. Where plaintiff and defendant, parties to a foreign judgment, are both nonresidents of Oklahoma, and suit is brought there on that judgment, and property of defendant is attached, the judgment will be enforced. *Williams v. Hirschfield*, 122 P. 539, 32 Okl. 598.

⁴⁴ *Kitchen v. Bellefontaine Nat. Bank*, 36 P. 344, 53 Kan. 242, 42 Am. St. Rep. 282.

⁴⁵ *Thorn v. Salmonson*, 15 P. 588, 37 Kan. 441.

In determining the faith and credit to be given to proceedings of a sister state under the federal constitution and acts of congress, the question of jurisdiction of the court of the sister state is always open to inquiry. *Chicago, R. I. & P. Ry. Co. v. Campbell*, 49 P. 321, 5 Kan. App. 423.

Neither the full faith and credit clause of the federal Constitution nor the congressional enactment pursuant thereto preclude an inquiry by the courts of one state into the jurisdiction of a court of another state in which a judgment was rendered. The courts of one state have jurisdiction to declare a judgment of another state void for want of jurisdiction. *Earl v. Earl*, 48 Okl. 442, 149 P. 1179.

In an action to quiet title to land in Arkansas, where service was made by publication and defendant did not appear, she is not bound beyond the property which was the subject of the suit. *Gordon v. Munn*, 125 P. 1, 87 Kan. 624, rehearing denied 127 P. 764, 88 Kan. 72, Ann. Cas. 1914A, 783.

The full faith and credit required to be given to the judgments of another state do not preclude recovery of damages from a creditor who has seized a debtor's exempt wages through garnishment proceedings instituted in another state without personal service upon the debtor. *Anderson v. Canaday*, 131 P. 697, 37 Okl. 171.

A Texas judgment reciting that a notice was duly given and jurisdiction acquired held conclusive as against collateral attack. *Barnes v. Brownlee*, 155 P. 962, 97 Kan. 517.

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diction of the subject-matter which turns on the construction of a statute of the foreign state where the judgment was rendered is not maintainable, where the judgment has been affirmed by the court of last resort of that state.⁴⁶

The record of a judgment rendered in another state is not admissible to prove the determination of a fact involved in the case being tried, when such record shows that such judgment was rendered without jurisdiction of one of the necessary parties.⁴⁷

§ 1481. Judgment in rem

Court of chancery, acting in personam, may adjudicate rights of parties as to lands in another state, but can only make its decree effective by requiring conveyance by party of lands in question.⁴⁸

§ 1482. Fraud

Defendant in an action on a judgment of a sister state may defend on the ground that he was induced to submit himself to jurisdiction of the court of the sister state by fraud of the plaintiff.⁴⁹

§ 1483. Conclusiveness

A judgment of a court of another state may be pleaded in bar of an action for the same cause in this state which was pending prior to its rendition.⁵⁰

⁴⁶ *McLain v. Parker*, 129 P. 1140, 88 Kan. 717, judgment affirmed on rehearing 131 P. 153, 88 Kan. 873.

⁴⁷ *Looney v. Reeves*, 48 P. 606, 5 Kan. App. 279.

In an action on a judgment rendered in Nebraska, the defense cannot be made that the court erred in rendering such judgment. *Blumle v. Kramer*, 79 P. 215, 14 Okl. 366; *Id.*, 79 P. 1134, 14 Okl. 373.

⁴⁸ *Sharp v. Sharp* (Okl.) 166 P. 175, L. R. A. 1917F, 562.

⁴⁹ *Abercrombie v. Abercrombie*, 67 P. 539, 64 Kan. 29.

⁵⁰ *Union Pac. Ry. Co. v. Baker*, 47 P. 563, 5 Kan. App. 253.

An action in another state to have certain conveyances by a debtor set aside, and the property subjected to the payment of plaintiff's judgment and the claims of all other creditors who may come in and set up their demands, is not a bar to an action brought by one of such creditors in this state on a note owned by him, though he may have appeared in the former action, filed a cross-petition, and obtained a finding of the amount due him on the note, if he did not obtain a personal judgment against the defendant in that action, nor receive anything from the sale of the property, since, to constitute a merger, there must be a valid and subsisting judgment rendered on the cause of action. *Cackley v. Smith*, 28 P. 617, 47 Kan. 642, 27 Am. St. Rep. 311; *Same v. Parry*, 28 P. 618, 47 Kan. 647.

A judgment in the circuit court of Illinois in habeas corpus for the cus-

A decree of a court of a sister state adjusting the rights of persons to a note is not inadmissible in an action on the note against the maker merely because the maker was not a party to the suit in which the decree was rendered.⁵¹

In an action in a sister state to foreclose, where the court has jurisdiction and the mortgage is foreclosed, and a return of order of sale shows a deficiency, but no motion is made for deficiency judgment until after limitations run, but the statute is not pleaded to an application for deficiency judgment, it will be deemed waived, and cannot be pleaded in defense to an action in the territory on such foreign judgment.⁵²

§ 1484. Divorce and alimony

A judgment or decree of divorce rendered on publication service in another state, in conformity to the laws thereof, is entitled to the same faith and credit as to marital status as if rendered by a court of this state;⁵³ but it will not affect the rights of the defendant as to property located in this state.⁵⁴

today of a child is *res judicata*, and cannot be questioned by the party thereto in subsequent proceedings in a court in Kansas on the same state of facts. *Beakley v. Barclay*, 89 P. 906, 75 Kan. 462, 10 L. R. A. (N. S.) 230.

An Illinois judgment on notes for a patent right held conclusive as to their validity in a subsequent action in Kansas on collateral notes. *Illinois Title & Trust Co. v. McCoy*, 121 P. 1090, 86 Kan. 588.

⁵¹ *Graham v. Troth*, 77 P. 92, 69 Kan. 861.

⁵² *Blumle v. Kramer*, 79 P. 215, 14 Okl. 366; *Id.*, 79 P. 1134, 14 Okl. 373.

⁵³ *Miller v. Miller*, 130 P. 681, 89 Kan. 151.

A judgment of divorce rendered upon publication against a resident of Kansas by a court of Utah having jurisdiction in proceedings regular cannot be collaterally impeached in Kansas, on the ground that plaintiff was in fact a resident of Kansas and not of Utah. *Miller v. Miller*, 130 P. 681, 89 Kan. 151.

Under Laws 1907, c. 184, providing that any judgment or decree of divorce

⁵⁴ A foreign divorce decree obtained by a husband on constructive notice without the actual knowledge of the wife cannot affect the rights of the wife and children in property located in Oklahoma. *Gooch v. Gooch*, 38 Okl. 300, 133 P. 242, 47 L. R. A. (N. S.) 480.

Where a husband deserted his wife and children, leaving them in the occupation of a homestead in Kansas, and, going to another state, procured a divorce in accordance with law, but without actual notice to the wife, though such decree was effectual as to the status of the parties, it was not a bar to the allowance of alimony in the homestead, nor as to the custody of the children, in a subsequent action brought by the wife here. *Rodgers v. Rodgers*, 43 P. 779, 56 Kan. 483.

A decree of a court of another state in divorce suit in which both parties appeared, settling defendant's equitable rights to lands in Oklahoma, was as to that matter void, and not *res adjudicata*.⁵⁵

An order for alimony, payable in installments, made in a divorce action in another state, subject under the laws of such state to a modification, will not support an action as on a judgment in that state as the same is not a final order for a fixed sum.⁵⁶

Where the grounds for alimony have been decided in an action for divorce, they cannot thereafter be the basis of an action for alimony.⁵⁷

rendered upon service by publication in any state in conformity with the law thereof shall be given full faith and credit in Kansas, and shall have the same force with regard to persons now, or heretofore, residents or hereafter to become residents of the state as if it had been rendered by a court of Kansas, foreign divorce decrees legally based on publication service must be recognized and enforced the same as judgments of the courts of Kansas with respect to all persons. *McCormick v. McCormick*, 107 P. 546, 82 Kan. 31.

Where decree in a Kentucky divorce suit to the extent of dissolving a marriage was conceded to be valid, the Supreme Court of Oklahoma, under the full faith and credit clause of the federal Constitution, may properly give force to it only as determinative of their marital status. *Spradling v. Spradling* (Okla.) 181 P. 148.

⁵⁵ *Sharp v. Sharp* (Okla.) 166 P. 175, L. R. A. 1917F, 562.

⁵⁶ *Bleuer v. Bleuer*, 110 P. 736, 27 Okl. 25.

On a decree for divorce, a Missouri court required defendant to keep his life insured for \$1,000 for the benefit of his divorced wife. In an action on the judgment, plaintiff averred that defendant had permitted the policy to lapse, and judgment was allowed against him for \$1,000. Held error. In an action on a foreign judgment for alimony payable in installments, it was error to render judgment for installments not due at the beginning of the action, but which fell due during its pendency. Decrees of Missouri courts for future payments of alimony are not subject to modification by those courts as to past-due installments so as to deprive such decrees of the full faith and credit clause of the federal Constitution. *Campbell v. Campbell*, 115 P. 1111, 28 Okl. 838.

⁵⁷ A wife sued for alimony in the district court of a county in Kansas, under the statute authorizing the maintenance of such an action for any of the causes for which a divorce may be granted. Subsequently the husband brought an action against the wife for a divorce in the county of his residence in the territory of Oklahoma. In this action the wife personally appeared and filed her cross-petition, asking for a divorce and alimony, setting up as grounds therefor the same causes which she charged in her petition for alimony. The divorce action was tried before the action for alimony, and on such trial the court found the husband to be without fault, and granted him a divorce on the allegations of his petition. Held, that the wife could not thereafter maintain her action for alimony, since the truth of her causes

While the action of a court of another state in modifying a decree in a divorce suit after death of the wife so as to give the father the custody of his child was not conclusive, in habeas corpus in the state to obtain its custody on the question of his fitness, it was competent evidence thereof.⁵⁸

§ 1485. Enforcement in other states

Where, on the death of the plaintiff in an action on a foreign judgment, the action is properly revived in the name of the personal representative, a recovery will not be prevented by a failure to revive the foreign judgment.⁵⁹

ARTICLE XV

TRANSCRIPT

Sections

- 1486. Filing judgment in district court—Forms.
- 1487. Certificate of amount paid.
- 1488. Revivor.

§ 1486. Filing judgment in district court—Forms

"In all cases in which a judgment shall be rendered by a county court or justice of the peace, the party in whose favor the judgment shall be rendered may file an abstract or transcript of such judgment in the office of the clerk of the district court of the county in which the judgment was rendered; and thereupon the clerk shall, on the day on which the same shall be filed, enter the case on the appearance docket, together with the amount of the judgment and time of filing the abstract or transcript; and shall also enter the same on the judgment docket, as in case of a judgment rendered in the court of which he is clerk."⁶⁰

therefor had been decided against her by the Oklahoma court, and the decree was res judicata. *Phillips v. Phillips*, 76 P. 842, 69 Kan. 324.

⁵⁸ *Pinney v. Sulzen*, 137 P. 987, 91 Kan. 407, Ann. Cas. 1915C. 649.

⁵⁹ *McLain v. Parker*, 129 P. 1140, 88 Kan. 717, judgment affirmed on rehearing 131 P. 153, 88 Kan. 873.

⁶⁰ Rev. Laws 1910, § 5217.

Where plaintiff, after recovering judgment in the probate court of L. county filed a transcript thereof in the office of the district clerk of O. county, he was entitled to all the benefits of the Code of Civil Procedure which he would have had on a judgment rendered in the district court of O. county,

(1418)

ABSTRACT OF JUDGMENT FOR DOCKETING IN DISTRICT COURT

State of Oklahoma, }
 County of ———, } ss.:

A. B., Plaintiff. }
 v. }
 C. D., Defendant. }

Before ———, Justice of the Peace, of District No. ———, said
 County

Judgment entered for ———. Debt, \$——.
 \$——.

I hereby certify that the foregoing is a full and correct abstract
 of a judgment rendered by me in the suit above entitled.

———, Justice of the Peace.

§ 1487. Certificate of amount paid

"The county judge or justice of the peace shall certify on the
 abstract or transcript the amount, if any, paid on such judgment." ⁶¹

§ 1488. Revivor

"If such judgment becomes dormant, or if any of the parties there-
 to die before the same is satisfied, it may be revived in the same
 manner as other judgments in the district court; and a certified
 copy of the entry of such abstract or transcript may be filed in the
 office of the clerk of the district court of any other county, and shall
 be a lien on the real estate of the debtor in such county, from the
 date of the filing of such copy; and execution may issue thereon
 from said court, in the same manner as if said judgment had been
 originally rendered therein." ⁶²

including the right of execution together with the procedure under Code Civ.
 Proc. art. 25, tit. "Executions" (St. 1890, p. 861). St. 1893, pp. 1190, 1191,
 "regulating liens of judgments rendered in probate court," approved March
 7, 1893, do not limit the jurisdiction of the probate court, or the right to
 have execution on a transcript of judgment filed in the clerk's office of the
 district court of any county in the territory from a judgment of any probate
 court in the territory. *Lowenstein v. Young*, 57 P. 164, 8 Okl. 216.

⁶¹ Rev. Laws 1910, § 5220.

⁶² Rev. Laws 1910, § 5221.

For forms in action to revive judgment, see ante, § 1340.

CHAPTER XIX

NEW TRIAL

Sections

- 1489-1493. Article I.—Scope of remedy,
1494-1505. Article II.—Grounds.
1506-1528. Article III.—Procedure.

ARTICLE I

SCOPE OF REMEDY

Sections

1489. Inherent power.
1490. Discretion.
1491. Waiver.
1492. Second application.
1493. Pendency of application—Its effect.

§ 1489. Inherent power

The inherent power to grant a new trial at the same term for prejudicial error will not be deemed taken away by statute unless the intent to do so is clear.¹

§ 1490. Discretion

Whether a new trial shall be granted or refused rests largely within the sound discretion of the trial court.² By “discretion of the court” is meant a legal discretion, to be exercised in discerning the course prescribed by law according to principles ascertained by adjudged cases.³ This discretion is not an arbitrary one.⁴ A new

¹ Todd v. Orr, 44 Okl. 459, 145 P. 393.

² O'Neil Engineering Co. v. City of Lehigh, 75 Okl. 227, 182 P. 659; Crouch v. Crouch, 59 Okl. 181, 158 P. 573; St. Paul Fire & Marine Ins. Co. v. Peck, 59 Okl. 195, 158 P. 595; Missouri, K. & T. Ry. Co. v. James, 61 Okl. 1, 159 P. 1109; Sipes v. Dickinson, 136 P. 761, 39 Okl. 740; Crowder State Bank v. American Powder Mills, 46 Okl. 105, 148 P. 698.

³ Vickers v. Philip Carey Co., 49 Okl. 231, 151 P. 1023, L. R. A. 1916C, 1155.

⁴ The discretion committed to a trial court to set aside a verdict and grant a new trial is not an arbitrary one, and does not exist unless authorized by law or established precedent. Sovereign Camp, Woodmen of the World, v. Thiebaud, 69 P. 348, 65 Kan. 332.

trial should be granted to effect substantial justice,⁵ but not otherwise.⁶

The trial court is not compelled to grant a new trial, though the parties unite in asking for it, but in its discretion may deny the motion.⁷

"A new trial shall not be granted on account of the smallness of the damages, in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained."⁸

⁵ A new trial should be granted whenever, in the opinion of such court, the party asking for it has not probably had a reasonably fair trial and has not probably obtained substantial justice. *Trower v. Roberts*, 89 P. 1113, 17 Okl. 641.

Where the district court might have been satisfied that plaintiff did not have a reasonable opportunity to present his case, where some improper evidence was admitted, and where court might have believed jury should not have accredited some evidence, its grant of new trial was not an abuse of its discretion. *Decker v. Bailey*, 171 P. 636, 102 Kan. 538.

Where, in a contest over the probate of a will on the ground that the testator was of unsound mind at the time of making it, the evidence is in substantial conflict as to such issue, the trial court did not abuse its discretion in granting a new trial from a judgment refusing the probate. *In re Smith's Estate*, 33 P. 744, 98 Cal. 636.

On an issue as to the due execution and subscribing of a will, one of the subscribing witnesses testified that he and the other witness signed after testator. The other witness testified that the name of the first witness was not on the will when he signed it; that he did not think testator's name was on; that he first commenced to entertain the belief in November, 1900. The will was dated June 1, 1897. Witness admitted that he told a third party in August, 1900, that he thought the other names were on the will when he signed, etc. The jury found that the will was not duly executed. Held not an abuse of discretion to grant a new trial. *In re Motz's Estate*, 69 P. 294, 136 Cal. 558.

In a will contest contestants claimed that a contract conveying all their interest in the estate to proponents was induced by fraud. The court found that the contract was executed for a fair consideration, which contestants had not offered to return, and that contestants were estopped. A new trial was granted on the ground that under a recent decision the court was of opinion that the failure to return the consideration was immaterial, and that the evidence, which was conflicting, was insufficient to justify the finding that there was no fraud. Held, that the granting of a new trial was not an erroneous exercise of discretion. *In re Wickersham's Estate*, 70 P. 1076, 138 Cal. 355, rehearing denied 71 P. 437, 138 Cal. 355.

⁶ A trial judge should set aside a verdict unless he is satisfied that substantial justice has been done. *Linderman v. Nolan*, 83 P. 796, 16 Okl. 352.

⁷ *Gunn v. Durkee*, 21 P. 156, 41 Kan. 144.

⁸ Rev. Laws 1910, § 5034.

§ 1491. Waiver

Ordinarily any ground for which new trial may be granted is waived by failure to demand it.⁹

A defendant does not waive a motion for new trial filed in due time by subsequently filing an unauthorized supplemental motion for new trial.¹⁰

A motion for a judgment on special findings, notwithstanding the general verdict, and one for a new trial, may be filed by the defendant at the same time; and the submission and decision of the former motion will not operate as a waiver of the latter.¹¹

The mere payment of a judgment into court, without acceptance by plaintiff, does not oust the court of jurisdiction to grant plaintiff's motion for a new trial.¹²

§ 1492. Second application

Under some circumstances there may be a second application for a new trial;¹³ but striking from the files a second petition for new trial for newly discovered evidence merely cumulative to that offered on the first petition is not error.¹⁴

To authorize granting a second motion for a new trial filed after the expiration of the time for filing such motion, on the ground that movant's attorney was not notified of the hearing on the first motion, and given an opportunity to except, want of notice must appear affirmatively, and not by mere inference.¹⁵

⁹McClain v. Chicago, R. I. & P. Ry. Co., 130 P. 646, 89 Kan. 24, Ann. Cas. 1914C, 699.

¹⁰Pinkston v. Marlow, 58 Okl. 280, 159 P. 488.

¹¹Atchison, T. & S. F. R. Co. v. Holland, 49 P. 71, 58 Kan. 317.

A favorable decision on a motion for judgment on findings notwithstanding the general verdict is not a waiver of a motion for new trial while the decision of the former motion is subject to review. Linker v. Union Pac. R. Co., 123 P. 745, 87 Kan. 186.

¹²Spottsville v. Western States Portland Cement Co., 146 P. 356, 94 Kan. 258.

¹³The court may during the term at which judgment was rendered grant new trial for misconduct of prevailing party in treating juror, though motion for new trial on other grounds has been previously overruled, and the court may set aside order denying new trial within the term on second motion of party. Jones v. Frank, 161 P. 795, 62 Okl. 28.

¹⁴Lookabaugh v. Bowmaker, 122 P. 200, 30 Okl. 242.

¹⁵Boorigle v. Boyd, 139 P. 253, 41 Okl. 550.

§ 1493. Pendency of application—Its effect

The pendency of a motion for a new trial, in an action wherein judgment has been rendered, will not stay execution.¹⁶ However, after verdict and rendition of a judgment during pendency of a motion for new trial, the court may reserve the case for future argument, and either stay or arrest all process until disposition of the motion for new trial.¹⁷

ARTICLE II**GROUNDS****Sections**

- 1494. Statutory power.
- 1494a. Errors and irregularities in general.
- 1495. Misconduct.
- 1496. Rulings and instructions.
- 1497. Jurors—Disqualification—Misconduct—Communications.
- 1498. Defective verdict or findings.
- 1499. Verdict contrary to instructions.
- 1500. Verdict contrary to evidence.
- 1501. Special findings.
- 1502. Amount of recovery.
- 1503. Mistake, passion or prejudice.
- 1504. Surprise, accident or mistake.
- 1505. Newly discovered evidence.

§ 1494. Statutory power

"A new trial is a re-examination in the same court, of an issue of fact, after a verdict by a jury, the approval of the report of a referee, or a decision by the court. The former verdict, report or decision shall be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party:

"First. Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial.

"Second. Misconduct of the jury or prevailing party.

"Third. Accident or surprise, which ordinary prudence could not have guarded against.

¹⁶ Powell v. Bradley, 119 P. 543, 86 Kan. 198.

¹⁷ Barnett v. Bohannon, 112 P. 987, 27 Okl. 368.

"Fourth. Excessive damages, appearing to have been given under the influence of passion or prejudice.

"Fifth. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property.

"Sixth. That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law.

"Seventh. Newly-discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial.

"Eighth. Error of law occurring at the trial, and excepted to by the party making the application.

"Ninth. When, without fault of complaining party, it becomes impossible to make case-made."¹⁸

The grounds for a new trial as enumerated in this statute, are exclusive.¹⁹

§ 1494a. Errors and irregularities in general

A person is not entitled to a new trial as of right on motion.²⁰

Where no objections are made, and exceptions saved to alleged errors at the trial, though assigned in the motion for new trial as grounds therefor, the motion is merely addressed to the discretion of the court.²¹

¹⁸ Rev. Laws 1910, § 5033.

On refusal of the reporter to furnish a transcript of his notes, the party is presumptively entitled to a new trial. *Cherry v. Brown*, 79 Okl. 215, 192 P. 227.

¹⁹ *Baker v. Citizens' State Bank of Okean* (Okl.) 177 P. 568; *St. Louis, I. M. & S. Ry. Co. v. Lewis*, 136 P. 396, 39 Okl. 677; *First Nat. Bank v. Farmers' State Guaranty Bank of Thomas*, 62 Okl. 30, 161 P. 1063.

²⁰ *Brown v. Parker*, 39 P. 567, 2 Okl. 258.

²¹ *Muskogee Electric Traction Co. v. Reed*, 130 P. 157, 35 Okl. 334.

A petition set forth the manner of the indebtedness of defendant to plaintiff, and defendant's answer was a general denial only. At the trial defendant's evidence tended to establish a counterclaim. Held, that an objection to such evidence, made for the first time on a motion for a new trial, was too late. *Fiedler v. Motz*, 22 P. 561, 42 Kan. 519.

Where the attention of the trial court is not in any manner called to the claim of a party that the referee is biased or prejudiced, until after the referee has made his report, and judgment has been rendered thereon, the question cannot be raised by motion for a new trial. *Brewer v. Asher*, 56 P. 714, 8 Okl. 231.

The question of a defect of or misjoinder or excess of parties plaintiff can-

A new trial will not ordinarily be granted to afford a party an opportunity to shift his ground of action or defense.²² However, a new trial has been ordered where, in an action for injuries arising from a defective railroad crossing, the only theory on which a judgment can be sustained is that defendant was negligent in making the crossing, and it appears that the action was not tried on such theory, but on the theory that after the construction of the crossing it had got out of repair, and was negligently allowed to remain so.²³

A new trial will be granted for an erroneous ruling on a demurrer to the evidence.²⁴

Though several defendants whose interests are not entirely similar have in earlier stages of the case been represented by same counsel, refusal to allow one of them to have adverse witnesses cross-examined by separate counsel requires a new trial.²⁵

Where the judge assailed in the presence of the jury, counsel for defendant with offensive language, such as to imply that he was an intruder in court, and the verdict was against defendant, a new trial should be granted.²⁶

In action for possession of real estate, objection for want of verification of reply denying execution of deed cannot be first raised on motion for new trial.²⁷

Where, on the trial of a question of fact, material facts have been proved, but not found, the district court should be requested, before motion for new trial, to modify the findings to include addi-

not be raised for the first time on a motion for a new trial. *Choctaw, O. & G. R. Co. v. Burgess*, 97 P. 271, 21 Okl. 653. Under the rule in force in Indian Territory prior to its admission as a part of the state of Oklahoma, the question of misjoinder of parties could not be raised for the first time by motion for a new trial, but must have been taken advantage of either by motion or answer. *Id.*

²² *Mallows v. Mallows*, 144 P. 829, 93 Kan. 551.

²³ *Union Pac. Ry. Co. v. Springsteen*, 21 P. 774, 41 Kan. 724.

²⁴ A ruling on demurrer to the evidence being a decision occurring at the trial, to review which a motion for a new trial is necessary, on such a demurrer being sustained and a motion for a new trial filed, the court has power to grant it. *Insurance Co. of North America v. Little*, 125 P. 1098, 34 Okl. 449.

²⁵ *Angell v. Chicago, R. I. & P. Ry. Co.*, 156 P. 763, 97 Kan. 688, rehearing denied 157 P. 1196, 98 Kan. 268.

²⁶ *Walker v. Coleman*, 55 Kan. 381, 40 P. 640, 49 Am. St. Rep. 254.

²⁷ *Effenberger v. Durant*, 57 Okl. 445, 156 P. 212.

tional facts, or to make further findings covering such facts, and only on refusal to make the correction does ground for a new trial exist.²⁸

Where a jury was waived by defendant prior to the beginning of the trial, and no request having been made for a withdrawal of the waiver after an amendment of pleadings, defendant cannot complain for the first time on motion for a new trial that he had been deprived of the right of trial by jury.²⁹

The fact that the clerk of the court, in issuing a summons, by mistake required defendant to answer in less time than required by law, which necessitated the issuance of an alias summons to bring defendant into court, is not ground for granting plaintiff a new trial, since the error was cured by the alias, and in no way affected the rights of plaintiff at the trial.³⁰

§ 1495. Misconduct

A motion for new trial for misconduct of counsel, jurors, and parties is addressed primarily to the trial judge.³¹

In order that the misconduct of counsel for the successful party may furnish sufficient ground for a new trial, it should appear that the verdict of the jury was probably influenced thereby.³²

Misconduct of the prevailing party as ground for new trial may include acts amounting to misconduct, which, though occurring before, operate at the trial.³³

That plaintiff's counsel was frequently interrupted in his argument by objections interposed by defendant's counsel does not require a new trial.³⁴

Where counsel for plaintiff, in his closing argument to the jury,

²⁸ *Shuler v. Lashhorn*, 74 P. 264, 67 Kan. 694.

²⁹ *Alcorn v. Dennis*, 105 P. 1012, 25 Okl. 135.

³⁰ *Menger v. North British & Mercantile Ins. Co.*, 61 P. 874, 10 Kan. App. 575.

³¹ *Myers v. Cabiness*, 44 Okl. 671, 146 P. 33.

³² *Holman v. Raynesford*, 44 P. 910, 3 Kan. App. 676.

A new trial will not be granted for misconduct of an attorney unless the circumstances raise a reasonable suspicion that such misconduct improperly influenced the verdict. *Easterly v. Gater*, 87 P. 853, 17 Okl. 93, 10 Ann. Cas. 888.

³³ *Phares v. Krhut*, 91 P. 52, 76 Kan. 238.

³⁴ *Engelkemeier v. Lillis*, 54 Okl. 282, 153 P. 877.

repeatedly makes improper remarks, prejudicial to the interests of the adverse party, over the objections of the adverse party, and the verdict is rendered in favor of plaintiff, and may have been procured by reason of such remarks, a new trial should be granted.³⁵

Where, after a trial, there is evidence that the prevailing party may have exercised an unlawful interference with the drawing of the jury, the court should set aside the verdict and order a new trial without proof that the rights of the other parties have been materially affected by such misconduct.³⁶

§ 1496. Rulings and instructions

A new trial should be granted for rulings or acts of the court prejudicial to the rights of the unsuccessful party, whether they be rulings made on the examination of witnesses,³⁷ a ruling on a demurrer to the evidence,³⁸ the direction of a verdict,³⁹ or the giving

³⁵ *Huckell v. McCoy*, 15 P. 870, 38 Kan. 53.

³⁶ *Phares v. Krhut*, 91 P. 52, 76 Kan. 238.

³⁷ Refusal to allow defendant to cross-examine on an important matter is a ground for a new trial without showing the answers plaintiff would have returned. *McIntosh v. Standard Oil Co.*, 131 P. 151, 89 Kan. 289, 47 L. R. A. (N. S.) 730, Ann. Cas. 1914D, 112.

Where there is competent testimony tending to establish a defense, and incompetent testimony has been offered by the plaintiff of such character as to be likely to influence the jury, and a verdict is rendered in his favor, a new trial must be ordered. *Missouri Pac. Ry. Co. v. Johnson*, 40 P. 641, 55 Kan. 344.

³⁸ Where a demurrer to the evidence of the plaintiff is erroneously sustained, and the plaintiff files a motion for a new trial, the court should grant the same. *Missouri Pac. Ry. Co. v. Goodrich*, 16 P. 439, 38 Kan. 224.

The court has power to grant a new trial, though a demurrer has been sustained to the evidence. *Shawnee Mut. Fire Ins. Co. v. School Board of School Dist. No. 31, Grady County*, 44 Okl. 3, 143 P. 194.

A ruling on a demurrer to the evidence is a decision of law which is subject to reconsideration on motion for new trial. *Buoy v. Clyde Milling & Elevator Co.*, 75 P. 466, 68 Kan. 436. Where a new trial is granted on the ground that error was committed in overruling a demurrer to the evidence, the court is governed by the same rules in passing on the evidence as when the demurrer was originally considered, and if there was substantial evidence to sustain the cause of action in plaintiff's petition, the granting of a motion was erroneous. *Id.*

³⁹ A new trial is properly granted where the court has disregarded pleaded defenses sustained by evidence and instructed a verdict for plaintiff. *State Sav. Bank of Iola v. Michael*, 154 P. 271, 97 Kan. 73.

of other instructions,⁴⁰ providing objection is made and exception saved at the time.⁴¹

It is not ground for new trial that the court failed to permit the jury to take the written instructions to the jury room, where neither the jurors nor counsel requested that that be done.⁴²

An instruction which might be misleading, but which has become immaterial by reason of the findings of the jury, is not a ground for new trial.⁴³

When incompetent evidence has been admitted over the objection of the adverse party, a motion for a new trial on that ground should be sustained, unless it clearly appears that the same verdict must necessarily have been returned had such evidence been excluded.⁴⁴

§ 1497. Jurors—Disqualification—Misconduct—Communications

Whether a juror's alleged disqualification or misconduct requires a new trial is to be determined by the usual rules and depends upon

⁴⁰ The granting of a new trial because of an instruction wherein the court expressed an opinion on the facts is not error. *Busalt v. Doidge*, 136 P. 904, 91 Kan. 37.

Giving of an instruction to find for defendant if the evidence showed that the date of the conversion was different from that alleged in bill of particulars is ground for new trial. *Missouri, O. & G. Ry. Co. v. Diamond*, 48 Okl. 424, 150 P. 175.

As a division of function between court and jury is essential to the safe administration of justice, a new trial will be granted where the judge interferes with the lawful province of the jury. *St. Louis & S. F. R. Co. v. Wilson*, 124 P. 326, 32 Okl. 752.

Where the court gave an instruction not justified by the evidence, and another which was improper, and perhaps prejudicial, and the verdict was in favor of defendant, at whose instance such instructions were given, it is not error to grant plaintiff a new trial. *Kansas City Belt Line Ry. Co. v. Cain*, 44 P. 995, 56 Kan. 786.

In an action for damages for wrongful death of his son, an instruction that in considering damages, jury might consider the fact that plaintiff inherited an allotment belonging to the son is prejudicial, and warrants new trial. *Missouri, K. & T. Ry. Co. v. James*, 61 Okl. 1, 159 P. 1109.

⁴¹ An erroneous instruction is an error of law occurring at the trial, and, unless excepted to, is not ground for new trial. *St. Louis & S. F. R. Co. v. Werner*, 78 P. 410, 70 Kan. 190.

Exceptions to the giving or refusing of instructions must be taken at the time, and they are not open on a motion for a new trial, unless so taken. *Berry v. Smith*, 35 P. 576, 2 Okl. 345.

⁴² *Lowenstein v. Holmes*, 40 Okl. 33, 135 P. 727.

⁴³ *Kershaw v. Schafer*, 129 P. 1137, 88 Kan. 691.

⁴⁴ *Marshall v. Weir Plow Co.*, 45 P. 621, 4 Kan. App. 615.

the facts of the particular case. For example, a new trial will be granted where it is shown that a juror, who had been informed concerning one of the principal disputed facts in the case, failed to disclose such knowledge when he was examined, but, after testimony on the fact had been given, he remarked outside of court that he knew more about the fact than the witnesses did;⁴⁵ but a verdict for plaintiff will not be disturbed because a juror was a creditor of a person interested with plaintiff in the result of the suit, although defendant did not learn of the indebtedness before the trial.⁴⁶

Where two members of a jury trying a land damage case, after the evidence was submitted, but before argument, went without the direction of the court, and examined the land, they were guilty of such misconduct as authorized a new trial.⁴⁷

The mere fact that some members of the jury, during a recess of the trial, took up and examined a transcript of the evidence given in the former trial of the case, will not require a new trial, when it is not shown that the jurors read any part of what was written in such transcript.⁴⁸

To support an application for a new trial on the ground of misconduct of jurors, it is not sufficient to show that during the trial they read newspaper comments relating to the case, without showing that the comments were such that they might have resulted in prejudice to the losing party.⁴⁹

The misconduct of jurors during a view of a street alleged to be defective, causing an injury to a traveler thereon, consisting of talking with an outsider about which way the sewer ran, and of one juror making measurements at the manhole, and of another juror digging into the earth near it with a knife, and saying that he had struck gravel, was not prejudicial, and was not ground for a new trial.⁵⁰

Refusal of a new trial on evidence of jurors. that some unknown juror stated in jury room that during a recess he examined defend-

⁴⁵ *Murphy v. Hindman*, 15 P. 182, 37 Kan. 267.

⁴⁶ *Schrader v. Saline County Alliance Exch. Co.*, 54 P. 513, 7 Kan. App. 813.

⁴⁷ *Ortman v. Union Pac. Ry. Co.*, 4 P. 858, 32 Kan. 419.

⁴⁸ *State v. Miller*, 10 P. 865, 35 Kan. 328.

⁴⁹ *Fields v. Dewitt*, 81 P. 467, 71 Kan. 676, 6 Ann. Cas. 349.

⁵⁰ *City of Emporia v. Juengling*, 96 P. 850, 78 Kan. 595, 19 L. R. A. (N. S.) 223.

ant's car and found a rear fender bent was not error, where such evidence was only cumulative upon an unimportant matter.⁵¹

A new trial will be granted where it is shown that after the case was submitted, and the jury had retired to the jury room, one of the jurors separated from his fellows, and that afterwards the remaining members of the jury were called to the court room, admonished, and allowed to separate, and the absent juror remained away without charge or admonition from the court for about two hours, and until the jury reassembled.⁵²

That a jury in a civil case had been permitted to separate during a few minutes' recess, without being then admonished, is not ground for a new trial, if they had been previously admonished as to their conduct during separation, and there is no evidence of misconduct.⁵³

The action of the court in orally instructing the jury in the jury room in the absence of and without notice to plaintiff or his attorney where such oral instructions are not in the record, requires a new trial, under Rev. Laws 1910, § 5033.⁵⁴

A verdict for a party who, after impaneling of jury and before verdict, treats or entertains the jury or any member thereof, will be set aside.⁵⁵

It is no ground for setting aside a verdict for plaintiff that the jurors, some 24 hours before they retired to consider the case, chanced to meet him at a fair, and took several glasses of beer with him, for which he did not pay, where no reference was then made to the case, and the jurors make affidavit that drinking with him had no effect on their verdict.⁵⁶

On a trial it became necessary that the jury should view the premises, and the judge announced that plaintiff had carriages ready to convey the jury. These carriages were hired from a livery stable owned by a juror of whom plaintiff was a regular customer. This was held insufficient to require setting aside a verdict for plaintiff.⁵⁷

Where the successful party, after the impaneling of the jury and

⁵¹ Rudy v. Headley, 103 Kan. 417, 173 P. 913.

⁵² Murphy v. Hindman, 15 P. 182, 37 Kan. 267.

⁵³ Gleason v. Strauss, 48 P. 881, 5 Kan. App. 80.

⁵⁴ Osage Mercantile Co. v. Harris, 52 Okl. 78, 152 P. 408.

⁵⁵ Jones v. Frank, 62 Okl. 26, 161 P. 795.

⁵⁶ St. Paul Fire & Marine Ins. Co. v. Kelly, 23 P. 1046, 43 Kan. 741.

⁵⁷ Missouri Pac. Ry. Co. v. Bowman, 75 Mo. 482, 68 Kan. 489.

before verdict, took two of the jurors to a restaurant kept by a third juror, and paid for their dinners, and also for the dinner of another juror who afterwards came in, the verdict will be set aside.⁵⁸

Where the bailiff, while the jury are viewing the locus in quo, distributes to such of the jurors as choose to take them cigars furnished to the bailiff by plaintiff, and the bailiff states that it is his treat, and the testimony of several jurors all tends to show that the jury were not influenced, and had no thought that there was any impropriety in the transaction, the action of the trial court in overruling defendant's motion for a new trial, founded on the distribution of the cigars, will be affirmed on appeal.⁵⁹

Where the evidence in an action for damages to an automobile at a crossing tended to show the value of the machine to have been from \$1,000 to \$1,200 before the injury, and practically nothing thereafter, a verdict for only \$550 did not entitle defendant to a new trial on the grounds that it was evidently the result of compromise,⁶⁰ since a verdict for unliquidated damages for an amount less than any evidence tends to show will not be set aside on the ground that it was necessarily the result of compromise.⁶¹

That after the jury had retired to deliberate one member said, "Boys, let's hurry up and sign the verdict and go see the balloon ascension," whereupon nine of the jurors signed the verdict and returned it into court, the verdict cannot be impeached four days later by affidavit of one of the three who refused to sign the verdict that the jury did not give proper deliberation to the case.⁶²

Where a party neglects to examine on voir dire examination into the qualifications of proposed jurors, and to show their unfitness or disqualification, and fails to challenge for cause where cause exists, he cannot thereafter make the disqualification of a juror ground for new trial.⁶³

Statement of a juror to other jurors that he had heard a rumor

⁵⁸ *Garvin v. Harrell*, 113 P. 186, 27 Okl. 373, 35 L. R. A. (N. S.) 862, Ann. Cas. 1912B, 744.

⁵⁹ *Wichita & W. R. Co. v. Fechheimer*, 31 P. 127, 49 Kan. 643.

⁶⁰ *St. Louis & S. F. R. Co. v. Model Laundry*, 141 P. 970, 42 Okl. 501.

⁶¹ *Id.*

⁶² *Wade v. Sumner*, 30 Okl. 784, 120 P. 1011.

⁶³ *Bristow v. Carrigar*, 132 P. 1110, 37 Okl. 740.

that one party to the action had offered to compromise, treated by the jury as a rumor, is not sufficient ground for reversal.⁶⁴

Where it appears that the prevailing party has attempted to tamper with or influence the jury, a verdict in his favor should be set aside without a showing that such attempt has influenced the jury.⁶⁵ A verdict should be set aside where it appears that an innocent act of the prevailing party outside the issues has improperly influenced the jury in his behalf.

In an action for damage from fires along a railroad right of way, that two jurors who had experience in running engines talked with the other jurors about their conclusions from their experience was not ground for a new trial, where it did not appear what the conclusions of such jurors were; plaintiff not being shown to have been prejudiced thereby.⁶⁶

It is not error to refuse a new trial for misconduct of jurors where no prejudice could have resulted to the unsuccessful party.⁶⁷

§ 1498. Defective verdict or findings

A new trial will be granted for material inconsistency of special findings with each other, or because special findings are inconsistent with the general verdict.⁶⁸ But after return of a general verdict

⁶⁴ *Madison v. Kansas City, M. & O. Ry. Co.*, 129 P. 1157, 88 Kan. 784.

⁶⁵ *Missouri Pac. Ry. Co. v. Bowman*, 75 P. 482, 68 Kan. 489.

⁶⁶ *Lillard v. Chicago, R. I. & P. Ry. Co.*, 98 P. 213, 79 Kan. 25.

⁶⁷ *Root v. Coyle*, 82 P. 648, 15 Okl. 574; *City of Lawton v. McAdams*, 83 P. 429, 15 Okl. 412; *Easterly v. Gater*, 87 P. 853, 17 Okl. 93, 10 Ann. Cas. 888.

⁶⁸ *Roediger v. Union Pac. R. Co.*, 147 P. 837, 95 Kan. 146.

In action for malicious prosecution and false imprisonment, granting of plaintiff's motion for new trial because special findings were inconsistent with each other and with general verdict, is not error. *Tersina v. Liverpool & London & Globe Ins. Co.*, 102 Kan. 87, 169 P. 559.

Where special findings returned with the general verdict are inconsistent with each other and with the general verdict, a new trial must be granted. *Francis v. Brock*, 102 P. 472, 80 Kan. 100; *Union Pac. Ry. Co. v. Fray*, 3 P. 550, 31 Kan. 739; *Atchison, T. & S. F. R. Co. v. Harvey*, 3 P. 568, 31 Kan. 750.

Where findings of the jury are incapable of being harmonized, and some of them are inconsistent with the general verdict, a new trial should be granted. *Wood v. Union Pac. R. Co.*, 129 P. 193, 88 Kan. 477; *Burnett v. Topeka Ry. Co.*, 133 P. 534, 90 Kan. 282; *Blevins v. Atchison, T. & S. F. R. Co.*, 41 P. 92, 3 Okl. 512; *Martin v. Atchison, T. & S. F. Ry. Co.*, 145 P. 849, 93 Kan. 681.

Where plaintiff sued on two notes assigned to him having the same history, and judgment was denied on one note because due when transferred to plaintiff, but he relied on the title of his assignor, who received both notes before due, the question whether the assignor was an innocent holder for value was

and special findings and discharge of the jury without motion for more specific answers to questions submitted, a motion for new trial on the ground that certain findings are irreconcilable should be overruled, if the findings can be fairly reconciled under the evidence or by assuming the negative of a fact, the burden of proving which devolved upon the moving party, and of which he failed to produce any evidence.⁶⁹

Objections to the form of verdict in replevin, not made until some days later in the motion for new trial, come too late.⁷⁰

The findings of fact of a referee, where not challenged within a proper time and manner, become final, and exceptions to a judgment rendered thereon are of law and not fact, and cannot be raised on a motion for a new trial.⁷¹

The fact that doubt is expressed by the trial court as to the correctness of findings made by the jury does not render its action in refusing a new trial erroneous.⁷²

§ 1499. Verdict contrary to instructions

A verdict is contrary to law, so as to be ground for a new trial, when it is rendered in disobedience or disregard of the court's instructions.⁷³

material; and, the findings being inconsistent on that question, plaintiff was entitled to a new trial. *Underwood v. Fosha*, 133 P. 866, 89 Kan. 768. Where from inconsistencies in the findings on a material matter a sound basis for a judgment does not exist, a new trial should be allowed. *Id.*; *Gwin v. Gwin*, 48 P. 295, 5 Idaho, 271; *Chicago, R. I. & P. Ry. Co. v. Williams*, 54 P. 1047, 59 Kan. 700; *Shoemaker v. St. Louis & S. F. Ry. Co.*, 2 P. 517, 30 Kan. 359; *St. Louis & S. F. Ry. Co. v. Shoemaker*, 17 P. 584, 38 Kan. 723; *Atchison, T. & S. F. R. Co. v. Weber*, 6 P. 877, 33 Kan. 543, 52 Am. Rep. 543; *Southern Kansas Ry. Co. v. Gorsuch*, 28 P. 703, 47 Kan. 583; *Kansas City v. Brady*, 36 P. 726, 53 Kan. 312, modifying judgment on rehearing 34 P. 884, 52 Kan. 297, 39 Am. St. Rep. 849; *Bank of Topeka v. Miller*, 54 P. 1070, 59 Kan. 743, reversing 51 P. 964, 7 Kan. App. 55; *Anderson v. Pierce*, 64 P. 633, 62 Kan. 756.

⁶⁹ *Brower v. Western Union Telegraph Co.*, 81 Kan. 109, 105 P. 497; *Anthony v. Atwood*, 62 P. 720, 10 Kan. App. 578.

⁷⁰ *Evans v. Smith*, 50 Okl. 285, 150 P. 1096.

⁷¹ *First Nat. Bank of Shawnee v. Oklahoma Nat. Bank of Shawnee*, 118 P. 574, 29 Okl. 411.

⁷² *Middleton v. Drumm*, 48 P. 579, 58 Kan. 813.

⁷³ *Constantin Refining Co. v. Thwing Instrument Co. (Okl.)* 178 P. 111; *Crowder State Bank v. American Powder Mills*, 46 Okl. 105, 148 P. 698; *Galbreath v. Mayo (Okl.)* 174 P. 517.

Where the court properly instructs as to the measure of damages, and the jury brings a verdict contrary to the instruction, a new trial should be granted. *Myers v. Fear*, 96 P. 642, 21 Okl. 498, 129 Am. St. Rep. 795.

(1433)

Where the evidence on the trial establishes the fact so clearly and indisputably that the court may instruct the jury to bring in a particular verdict, but neglects so to do, and is not requested to do so, and the jury returns a verdict contrary to what the law demands, then, and then only, should the court set aside the verdict of the jury.⁷⁴

§ 1500. Verdict contrary to evidence

A motion for a new trial should be granted where the trial court, after weighing the evidence,⁷⁵ is satisfied that the verdict is contrary to the weight of the evidence,⁷⁶ or insufficiently supported by the evidence,⁷⁷ or based on conjecture,⁷⁸ but not where the evidence

⁷⁴ Chicago, R. I. & P. Ry. Co. v. Groves, 93 P. 755, 20 Okl. 101, 22 L. R. A. (N. S.) 802.

⁷⁵ The fact that the jury are the exclusive judges of all questions of fact submitted to them does not justify the judge of the trial court in declining to examine the sufficiency of the evidence upon which the verdict rests, when it is challenged by a motion for a new trial; and whenever it is manifest that the jury have found against the clear weight of the evidence, and that the party asking for a new trial has not in all probability had a fair trial, nor received substantial justice, it is his imperative duty to set the verdict aside and grant a new trial. Cherokee & P. Coal & Mining Co. v. Stoop, 43 P. 766, 56 Kan. 426.

⁷⁶ Loth-Hoffman Clothing Co. v. Schwartz (Okl.) 176 P. 916; Shields v. Colonial Trust Co., 61 Okl. 163, 160 P. 719; Union Pac. Ry. Co. v. Diehl, 6 P. 566, 33 Kan. 422; McIntosh v. Crane, 61 P. 331, 9 Kan. App. 314.

In action by boy for injury from explosion of dynamite cap which he helped take from defendants' box near their stone-crushing plant, where verdict for defendants is unsatisfactory to trial court, its grant of a new trial is not error. Goehenour v. Brown, 104 Kan. 808, 180 P. 776.

On motion for new trial challenging the verdict as contrary to the evidence, the court must disapprove the verdict if he cannot conscientiously approve it. White v. Dougal, 60 Okl. 200, 159 P. 907. Not only must the evidence satisfy the jury, but it must be such as the trial court can approve of the verdict rendered thereon. *Id.*

⁷⁷ Chicago, R. I. & P. Ry. Co. v. Boring-Kim Produce Co., 57 Okl. 495, 157 P. 351; Chicago, R. I. & P. Ry. Co. v. Reardon, 40 P. 931, 1 Kan. App. 114; Gano v. Prindle, 50 P. 110, 6 Kan. App. 851; Wendt v. Diemer, 58 P. 1003, 9 Kan. App. 481.

Grant of new trial where one ground of motion is insufficiency of evidence is not abuse of discretion, where evidence would have sustained verdict for either party when approved by court. Walden v. Gardner, 56 Okl. 774, 156 P. 643.

Where there is no legal evidence reasonably tending to support the verdict

⁷⁸ Ingram v. Dunning, 60 Okl. 233, 159 P. 927.

reasonably tends to support the verdict,⁷⁹ though the evidence is conflicting, and even though the judge, if trying the case without a jury, might have reached a different conclusion.⁸⁰

An order granting a new trial on the ground that the verdict is

of the jury, it should be set aside. *Schafer v. Midland Hotel Co.* (Okla.) 171 P. 337; *Quinton v. Cutlip*, 32 P. 269, 1 Okla. 302.

On motion for new trial because verdict is contrary to evidence, trial court must weigh evidence and approve or disapprove verdict, and if it cannot conscientiously approve verdict, and believes that it should have been for opposite party, must set it aside and grant new trial. *De Meglio v. Studebaker Corporation of America* (Okla.) 175 P. 342.

The trial court should, where new trial is sought for insufficiency of the evidence, grant a new trial, if he cannot conscientiously approve the verdict. *Rison v. Harris*, 50 Okla. 764, 151 P. 584.

It is the duty of the court on a motion for a new trial for insufficiency of the evidence to either approve or disapprove the verdict, and, if it is such that its own mind refuses to concur in it and the court believes that the verdict should have been for the adverse party, it should grant a new trial. *Yarnell v. Kilgore*, 82 P. 990, 15 Okla. 591; *Ball v. Collins*, 165 P. 273, 100 Kan. 448; *White v. Dougal*, 60 Okla. 200, 159 P. 907; *Horton v. Prague Nat. Bank*, 60 Okla. 240, 159 P. 930; *Hennessey Oil & Gas Co. v. Neely*, 62 Okla. 101, 162 P. 214; *Ingalls v. Smith*, 145 P. 846, 93 Kan. 814.

Where the evidence is conflicting, it is the duty of the court on a motion for a new trial to weigh the facts, and set aside the verdict if it is against the weight of the evidence. *Franz v. Mendonca*, 63 P. 361, 131 Cal. 205; *Ireton v. Ireton*, 63 P. 429, 62 Kan. 358.

Under the old Code (Code Civ. Proc. § 306; Gen. St. 1901, § 4754) that the verdict was not sustained by the evidence was a ground for a new trial. The new Code (Code Civ. Proc. § 305; Gen. St. 1909, § 5899) provides that a new trial may be granted if the verdict is in whole or in part contrary to the evidence. Held, that both forms of expression mean the same thing; that is, when the weight of evidence as a whole is insufficient to justify the verdict. *Knote v. De Shirley*, 84 Kan. 738, 115 P. 539.

On a motion for new trial, the trial judge must exercise his own judgment as to credibility of witnesses and probative force of their testimony, and if of opinion that verdict is not warranted by testimony, must set it aside and

⁷⁹ *J. Rosenbaum Grain Co. v. Pond Creek Mill & Elevator Co.*, 98 P. 331, 22 Okla. 555.

Where the uncontradicted evidence in a case points only to the conclusion of fact found by the verdict, a motion for new trial, based on the ground that the verdict was not sustained by the evidence, should be overruled. *Sovereign Camp, Woodmen of the World, v. Thiebaud*, 69 P. 348, 65 Kan. 332; *Minneapolis Steel & Machinery Co. v. Schalansky*, 165 P. 289, 100 Kan. 562.

⁸⁰ When there is a conflict of testimony, the court ought not to set the verdict of a jury aside and grant a new trial, even though the judge would have reached a different verdict on the same evidence. *Atchison, T. & S. F. R. Co. v. Matthews*, 58 Kan. 447, 49 P. 602, judgment affirmed 19 S. Ct. 609, 174 U. S. 96, 43 L. Ed. 909.

not sustained by the evidence will not be reversed where the evidence points to any rational conclusion of fact other than the one found by the verdict.⁸¹

It is only where a verdict cannot be justified upon any hypothesis that it should be set aside as a compromise verdict.⁸²

When a case is tried on a certain theory, and the jury return answers to special questions of fact submitted to them by the court, and there is no evidence in the record to support or authorize a finding that is essential to a recovery, it is error to overrule a motion for a new trial.⁸³

§ 1501. Special findings

A verdict must be set aside where special findings material to its support are determined by court to be contrary to the evidence.⁸⁴

Where a finding on which the verdict may have been based in part is set aside, a new trial must be granted, unless the remaining findings require the judgment.⁸⁵

Where special findings of a jury, returned with a general verdict

grant a new trial. *Hudson v. Riley*, 104 Kan. 534, 180 P. 198; *Tersina v. Liverpool & London & Globe Ins. Co.*, 102 Kan. 87, 169 P. 559.

It is error to overrule a motion for new trial where the material fact necessarily involved in the verdict is wholly unsustained by the evidence. *Prinz v. Moses*, 91 P. 785, 76 Kan. 232.

A general verdict and special findings of fact unsupported by any evidence should be set aside, and a judgment entered thereon will be reversed. *King v. Western Union Telegraph Co.*, 105 P. 449, 81 Kan. 223; *Buchanan v. Fireman's Ins. Co. of Newark, N. J.*, 146 P. 411, 94 Kan. 132.

⁸¹ *White v. Chicago, R. I. & P. Ry. Co.*, 138 P. 589, 91 Kan. 526.

⁸² *Woolsey v. Ziegler*, 123 P. 164, 32 Okl. 715.

⁸³ *Southern Kansas Ry. Co. v. Duncan*, 20 P. 195, 40 Kan. 508.

⁸⁴ *Brice-Nash v. Hutchinson Interurban Ry. Co.*, 102 Kan. 36, 169 P. 189; *St. Louis & S. F. Ry. Co. v. Clark*, 29 P. 312, 48 Kan. 321, 329.

Where a special finding on a material issue is submitted to the jury, and the answer is in direct opposition to the evidence, the court should set aside the verdict and award a new trial. *Atchison, T. & S. F. Ry. Co. v. Holland*, 49 P. 71, 58 Kan. 317; *Same v. Davis*, 67 P. 441, 64 Kan. 127; *Atchison, T. & S. F. Ry. Co. v. Hine*, 47 P. 190, 5 Kan. App. 748; *Burton v. I. M. Yost Milling Co.*, 51 P. 67, 6 Kan. App. 921; *Parker v. Gilmore*, 63 P. 20, 10 Kan. App. 527.

⁸⁵ *Goff v. Goff*, 158 P. 26, 98 Kan. 201, rehearing denied 158 P. 662, 98 Kan. 700.

Where the remaining findings and evidence sustain the verdict, the setting aside of a special finding for lack of support in the evidence does not require the setting aside of the verdict nor the granting of a new trial. *Wyrick v.*

and essential to a recovery, are unsupported by any evidence, a motion for a new trial should be granted.⁸⁶

The statute requiring a new trial when a verdict has been vacated does not apply to the vacation of a special verdict returned in an equity suit which the court has set aside as contrary to the evidence and made findings in disregard thereof.⁸⁷

A defendant is entitled to a new trial, where the special findings would require a judgment for him, except for the possible existence of facts not negated by the evidence, and not covered by the general verdict against him.⁸⁸

Material special findings inconsistent with the general verdict require a new trial.⁸⁹

§ 1502. Amount of recovery

The principle requiring a verdict to be set aside which is not justified by any hypothesis presented by the evidence in respect to the amount of same applies only where the damages sought are liquidated.⁹⁰ However, where the trial judge is not satisfied with the amount of the verdict, after a consideration of the evidence,⁹¹ and believes it to be excessive⁹² or grossly inadequate, he should grant a new trial.⁹³

Parsons Ry. & Light Co., 100 Kan. 122, 163 P. 1059. Where a verdict rests in part upon a special finding which is set aside for lack of support in the evidence, a new trial should be granted. *Id.*

⁸⁶ *Atchison, T. & S. F. R. Co. v. Long*, 26 P. 682, 46 Kan. 260.

⁸⁷ *Butts v. Butts*, 114 P. 1048, 84 Kan. 475.

⁸⁸ *McMahon v. Joplin & P. Ry. Co.*, 150 P. 586, 96 Kan. 271.

⁸⁹ Where, in a brakeman's action for injuries, certain findings of fact showed proper care and others negligence, and the general verdict was inconsistent with due care, a new trial should have been granted. *Anders v. Atchison, T. & S. F. Ry. Co.*, 137 P. 966, 91 Kan. 378.

⁹⁰ *St. Louis & S. F. R. Co. v. Model Laundry*, 141 P. 970, 42 Okl. 501.

⁹¹ *Thompson v. Burtis*, 70 P. 603, 65 Kan. 674; *Cincinnati Discount Co. v. Asher*, 101 Kan. 253, 166 P. 476; *Hart v. Gerretson Co.*, 138 P. 595, 91 Kan. 569.

Where a verdict in conversion is for a gross sum in excess of the combined value of the property, and the time and money expended in its recovery, and it cannot be known what sum was allowed as actual and what as exemplary damages, and the evidence of expenses of pursuit was indefinite, the verdict should be set aside. *Fitch v. Green*, 39 Okl. 18, 134 P. 34.

⁹² *Yard v. Gibbons*, 149 P. 422, 95 Kan. 802; *Chicago, B. & Q. R. Co. v. Guild*, 45 P. 452, 3 Kan. App. 736; *Collins v. Morris*, 165 P. 862, 101 Kan. 135.

In an action against a city for injuries caused by a defective sidewalk, a

⁹³ See note 93 on following page.

It is error to overrule a motion for a new trial, and render judgment upon a verdict based on two causes of action, which is in excess of the amount recoverable on the first, and when the second does not state facts sufficient to constitute a cause of action.⁹⁴

§ 1503. Mistake, passion, or prejudice

The verdict will not be set aside, unless the jury was biased or palpable error was committed.⁹⁵

A verdict which is the result of prejudice should never be the basis for a judgment, but it is the duty of the court to set it aside, and award a new trial.⁹⁶

Where some of the material findings of the jury are against the evidence, and others are unsatisfactory, and it appears thereby that the findings have been given under the influence of passion or prejudice, or at least that the jury have not intelligently or fairly considered the evidence, a new trial will be granted.⁹⁷

Error in computing the number of months of services where the value of services per month had been determined and there was no substantial dispute as to the period of services would not indicate prejudice of the jury.⁹⁸

Excessive damages are not ground for a new trial, unless so great

verdict was rendered for \$7,500. The trial court found the verdict excessive, and permitted a remittitur of \$5,000, and rendered judgment for \$2,500. The jury were not advised of any basis by which they might estimate the probable duration of plaintiff's life. Held, that the error of the jury might be attributed to a mistake of judgment, free from unfair intent, and the refusal of a new trial was not error. *City of Argentine v. Bender*, 80 P. 935, 71 Kan. 422.

⁹⁴ *Miller v. Miller*, 105 P. 544, 81 Kan. 397; *Jackson v. City of Humboldt*, 113 P. 1047, 84 Kan. 445.

Where the sole question is whether plaintiff is entitled to recover on the contract, and there is no dispute on the amount, or basis for a finding that defendant owes a less sum than claimed, a verdict for half the amount should be set aside at the instance of either party. *Bressler v. McVey*, 108 P. 97, 82 Kan. 341.

⁹⁵ *Fish Keck Co. v. Redlon*, 53 P. 72, 7 Kan. App. 93.

⁹⁶ *Muskogee Electric Traction Co. v. Wimmer*, 80 Okl. 11, 194 P. 107.

⁹⁷ *Drumm v. Cessnum*, 58 Kan. 331, 49 P. 78; *Atchison v. Plunkett*, 59 P. 646, 61 Kan. 297, reversing 55 P. 677, 8 Kan. App. 308.

Knowledge of the jurors as to value of land and statement made relative thereto in the jury room held not to show that the verdict was given under the influence of passion and prejudice. *Hamilton v. Atchison, T. & S. F. Ry. Co.*, 148 P. 648, 95 Kan. 353.

⁹⁸ *Southern Kansas Ry. Co. v. Michaels*, 30 P. 408, 49 Kan. 388.

⁹⁹ *In re Jewell's Estate*, 103 Kan. 381, 173 P. 923.

as per se to indicate that they were given under the influence of passion or prejudice."⁹

§ 1504. Surprise, accident, or mistake

It is not error to overrule a motion for a new trial on the ground of surprise which ordinary prudence could not have guarded against, where it appears from the record that reasonable diligence on the part of defendants would have prevented the possibility of the alleged surprise and that no surprise was manifested at the trial and no delay was asked on account of any supposed surprise, and it does not appear that the new trial would necessarily or even probably lead to a different decision.¹

Thus a new trial will not be granted for accident and surprise

⁹⁹ St. Louis, I. M. & S. Ry. Co. v. Lewis, 136 P. 396, 39 Okl. 677.

¹ Board of Regents of Kansas State Agricultural College v. Linscott, 1 P. 81, 30 Kan. 240; Beachley v. McCormick, 21 P. 646, 41 Kan. 485; Beal v. Codding, 4 P. 180, 32 Kan. 107.

One is entitled to his day in court, and to a fair and reasonable opportunity to present and establish his claim or defense, and his failure to do so when given an opportunity affords no basis for a new trial, without exceptional facts excusing his failure. Missouri, K. & T. Ry. Co. v. Taylor (Okl.) 170 P. 1148.

Laches of party in failing to appear when case was called for trial held no ground for new trial. Cherry v. Millam (Okl.) 168 P. 241.

Refusal to grant a new trial sought for negligence of defendant corporation's agent in misplacing copy of summons and not notifying defendant of service is not an abuse of discretion; such negligence not being "accident or surprise," etc., within the meaning of the statute. Missouri, K. & T. Ry. Co. v. Ellis, 53 Okl. 264, 156 P. 226, L. R. A. 1916E, 100.

In action for price of law books, application for new trial for surprise by defendant's production of letter modifying written order, held not supported by a sufficient showing of diligence. Edward Thompson Co. v. Foster, 165 P. 841, 101 Kan. 14.

Where, upon the trial, plaintiff discovered a misprint in the statute upon which he had brought his action, thereby requiring him to change his theory and necessitating new witnesses, if he fails to at once call the attention of the court to the misprint and his mistake caused thereby, and the necessity of delay to procure witnesses, he cannot obtain a new trial upon the ground of "accident and surprise" arising from his discovery of the misprint, nor procure as "newly-discovered evidence" the witnesses to make his proof. City of Argentine v. Simmons, 52 P. 424, 59 Kan. 164.

Refusal of new trial on the ground that plaintiff had been away and did not expect the trial to be reached so soon held not error, where it did not appear that plaintiff had used proper diligence. Daly v. Gregg, 138 P. 614, 91 Kan. 506.

caused by the evidence, where the pleading discloses the facts which that evidence tends to prove.²

The fact that perjured testimony was given by the plaintiff on the trial is not ground for a new trial, where the testimony was strictly in support of the allegations of the party's petition, and the applicant was not therefore surprised.³

Where the defendant's evidence is admitted without objection, and no application for a postponement of the trial is made, plaintiff cannot urge, as ground for a new trial, that there was a variance between the answer and the evidence, by which he was surprised.⁴

A party surprised during a trial, upon a discovery of a mistake that will prejudice his interest, should immediately move for continuance or for such delay as will permit him to meet properly the issue, and cannot be permitted to speculate upon the verdict and afterwards for the first time on motion for new trial raise the question of surprise.⁵

Where a new trial is sought on account of the absence of a material witness at the trial, diligence to ascertain the whereabouts of such witness and secure his attendance must be shown.⁶

A party against whom judgment is rendered for any default of appearance may file a motion for new trial.⁷

Where, in an action on a note, plaintiff alleged that he was the owner and holder, and one of the makers entered his voluntary ap-

² *Tiger Drill Mfg. Co. v. Rice*, 149 P. 742, 95 Kan. 816; *Washington v. Byers*, 53 P. 150, 7 Kan. App. 812.

A new trial for surprise in the evidence of adversary's witnesses on the issue in the case, where they had made no statements prior to the trial, will not be granted. *Knuffke v. Knuffke*, 56 P. 826, 8 Kan. App. 857.

³ *Marshall v. Marshall*, 54 P. 461, 7 Okl. 240.

⁴ *Tripp & Moore Boot & Shoe Co. v. Martin*, 26 P. 424, 45 Kan. 765.

⁵ *McCants v. Thompson*, 115 P. 600, 27 Okl. 706; *Herring v. Hood*, 55 Okl. 737, 155 P. 253.

One submitting a case without asking opportunity to procure further testimony cannot ask for a new trial as a matter of right because surprised by the evidence. *Owensboro Wagon Co. v. D. A. Wilson & Co.*, 101 P. 4, 79 Kan. 633.

A new trial for inability to procure a witness is properly denied, where no application for continuance was made when the case was called for trial. *Hanson v. Kendt*, 146 P. 1190, 94 Kan. 810; *Burford v. Benton*, 44 Okl. 283, 144 P. 349.

⁶ *Pasho v. Blitz*, 162 P. 1161, 99 Kan. 421.

⁷ *Laclede Oil & Gas Co. v. Miller* (Okl.) 172 P. 84.

pearance, and judgment was rendered against him by default, and the note filed with the judgment showed a material alteration, it was error to refuse a new trial on the ground of accident and surprise.⁸

A judgment will be reversed, because of the court's refusal to grant a new trial, where, in plaintiff's absence, a trial was had at a term prior to that at which the action first became triable,⁹ or where a case which had been set for trial was reset for an earlier date and the party objecting was not given notice prior to the day the case was called.¹⁰

The district court is authorized to grant new trials only for the causes, in the manner, and within the time set forth in the statute, and it is manifest error to grant a new trial because the complaining party is unable to procure any one who can transcribe a stenographer's shorthand notes of the proceedings¹¹ or because the stenographer, who took the testimony at a trial, has lost his notebook and is unable to make a transcript.¹²

If errors properly presented on appeal from a judgment necessitate a review of the evidence and it is impossible to make a case-made incorporating the testimony, through no fault of such party, a new trial will be granted.¹³

It is a condition precedent to entitle complaining party to new trial under the statute that he be without fault as to the cause rendering it impossible to make a case-made, and when impossibility is due to lost papers, and such papers can be and are not substituted, the complaining party is not entitled to a new trial.¹⁴

Miscarriage of a case-made, in transmission from one firm of attorneys to another, preventing appeal, is not an unavoidable casualty and misfortune preventing parties from prosecuting or defending, and does not authorize a new trial.¹⁵

⁸ *Nolen v. McCue*, 142 P. 958, 92 Kan. 870, rehearing denied 144 P. 255, 93 Kan. 306.

⁹ *Bostwick v. Blair*, 43 P. 297, 2 Kan. App. 89.

¹⁰ *Leighton v. Dixon*, 22 P. 732, 42 Kan. 616.

¹¹ *Butts v. Anderson*, 91 P. 906, 19 Okl. 367.

¹² *Farmers' & Merchants' Bank v. Welborn*, 121 P. 620, 32 Okl. 1.

¹³ *Laclede Oil & Gas Co. v. Miller* (Okl.) 172 P. 84.

¹⁴ *Peck v. McClelland* (Okl.) 166 P. 78.

¹⁵ *Bucy v. Ardmore Brick & Tile Co.*, 61 Okl. 302, 160 P. 1128, L. R. A. 1917B, 1073.

Where, under the law in force at the time of a trial, the presiding judge was the only one authorized to settle and sign a case-made, and he died before completion of the trial and before the case-made had been signed and settled, the unsuccessful party, without his fault, was deprived of his constitutional right to a review, and is entitled to a new trial.¹⁶

"Accident or surprise which ordinary prudence could not have guarded against," as a ground for new trial, does not include ignorance, mistakes, nor misapprehension of an attorney, not occasioned by the adverse party, nor mismanagement of the defense by the attorney, through design, ignorance, or negligence.¹⁷

A party to the action, who was present during a portion of the trial, and who is compelled to be absent during a portion, and who proceeds without objection or motion for continuance, will not be heard, after verdict, to urge such absence as a ground for new trial.¹⁸

That the defendants were not in court at the trial is not ground for a new trial.¹⁹

¹⁶ J. W. Ripsey & Son v. Art Wall Paper Mill, 112 P. 1119, 27 Okl. 600.

Where, prior to the passage of Sess. Laws 1910, c. 39, a trial judge died within the time allowed to sign and settle the case-made, his successor was not authorized to perform such duty; and the aggrieved party will be given a new trial. Duffield v. Ingraham, 128 P. 111, 35 Okl. 11.

¹⁷ Holderman v. Jones, 34 P. 352, 52 Kan. 743; Lindsey v. Goodman, 57 Okl. 408, 157 P. 344.

When evidence in support of motion for new trial showed that appellant's attorney received case-made on last day for service and failed to show that it could not have been served on said day, nor an extension of time for service obtained, a new trial was properly denied. Adams Oil, Gas & Development Co. v. Hivick (Okl.) 176 P. 938.

The granting of a new trial after judgment, in the absence of plaintiff and his counsel, is not an abuse of discretion, where just before trial one of plaintiff's counsel was called away by sickness and his partner, engaged in other trials, overlooked the case, and defendant's counsel had previously suggested that additional time might be needed to take depositions. Turner v. Elbing State Bank, 136 P. 917, 91 Kan. 123.

The failure of defendant to receive a telegraphic message in time for him to attend the trial is not such an accident as will warrant the granting of a new trial, when the delay in delivery was occasioned by the negligence of his own agents. Griffin v. O'Neil, 27 P. 826, 47 Kan. 116, judgment reversed (1892) 29 P. 143, 48 Kan. 117.

¹⁸ Huster v. Wynn, 58 P. 736, 8 Okl. 569.

¹⁹ Walker v. Love, 62 Okl. 28, 161 P. 787.

§ 1505. Newly discovered evidence

A rule of wide recognition regarding the granting of new trials on the ground of "newly discovered evidence" exacts that the evidence fulfill the following requirements: It must be such as will probably change the result if a new trial be granted;²⁰ it must have been discovered since the trial;²¹ it must be such as could not

²⁰ *City of Sapulpa v. Deason* (Okl.) 196 P. 544; *Swan v. Duncan*, 78 Okl. 305, 190 P. 678; *Stilwell v. State* (Okl. Cr. App.) 192 P. 253; *Yukon Mills & Grain Co. v. Imperial Roller Mills Co.*, 127 P. 422, 34 Okl. 817; *Shores v. United Surety Co.*, 114 P. 1062, 84 Kan. 592; (1896) *Titus v. Mitchell*, 45 P. 99, 3 Kan. App. 90; *Huster v. Wynn*, 58 P. 736, 8 Okl. 569; *Mowatt v. Butler*, 132 P. 329, 37 Okl. 365; *Roeser v. Pease*, 131 P. 534, 37 Okl. 222; *Lewis v. Sells-Koto Shows Co.*, 157 P. 397, 98 Kan. 145; *Pruitt v. Butterfield*, 128 P. 130, 36 Okl. 270; *Brock v. Corbin*, 146 P. 1150, 94 Kan. 542; *Burford v. Benton*, 44 Okl. 283, 144 P. 349; *Lookabaugh v. Bowmaker*, 122 P. 200, 30 Okl. 242; *Sharshontay v. Hicks*, 62 Okl. 1, 166 P. 881; *Harlow v. Propes*, 102 Kan. 424, 170 P. 983; *Spriggs v. McCarty*, 63 Okl. 45, 161 P. 1073; *Ellis v. Mid-Continent Oil & Gas Co.* (Okl.) 165 P. 177; *First Nat. Bank v. Farmers' State Guaranty Bank of Thomas*, 62 Okl. 30, 161 P. 1063; *Flesner v. Cooper*, 62 Okl. 263, 162 P. 1112; *Eskridge v. Taylor*, 75 Okl. 139, 182 P. 516; *Hotchkiss v. Patterson*, 48 P. 435, 5 Kan. App. 358; *Strong v. Moore*, 89 P. 895, 75 Kan. 437; *Finfrock v. Ungeheuer*, 54 P. 504, 8 Kan. App. 481; *Morgan v. Bell*, 21 P. 255, 41 Kan. 345; *White v. Atchison, T. & S. F. Ry. Co.*, 104 Kan. 120, 178 P. 255; *McKee v. Rowley*, 173 P. 284, 103 Kan. 257.

Where defendant does not complain of amount of verdict, and newly discovered evidence would not bar a recovery, trial court properly refused a new trial. *City of Ada v. Smith* (Okl.) 175 P. 924.

In brakeman's action for personal injury, refusal of new trial for newly discovered evidence, not bearing on main issue, but only on measure of damages, was not an abuse of discretion, unless evidence was so convincing that had it been offered at trial verdict would have been excessive. *Missouri, K. & T. Ry. Co. v. Taylor* (Okl.) 170 P. 1148.

In an action by the buyer of corn for failure of the seller to deliver, where it appeared that the contract called for payment in cash which the buyer refused to make, it was error to grant a new trial to plaintiff on the ground of newly discovered evidence on the question whether the seller really delivered or intended to deliver the corn, as such evidence would still leave plaintiff without right to recover. *Thompson v. Seek*, 115 P. 397, 84 Kan. 674.

Failure of the defendant insurance company to discover and prove at the trial that the insured was living does not preclude it from proving such fact on a retrial. *Caldwell v. Modern Woodmen of America*, 133 P. 843, 90 Kan. 175, reversing judgment on rehearing 130 P. 642, 89 Kan. 11.

In action on defendant's agreement in a deed to pay a mortgage on property conveyed newly discovered evidence of a mistake by plaintiff's cashier as to an extension agreement by defendant's grantor is sufficient to require a new trial, with terms. *Colorado Sav. Bank v. Bales*, 165 P. 843, 101 Kan. 100.

²¹ *Wilson v. State* (Okl.) 175 P. 829; *First Nat. Bank v. Farmers' State*

have been discovered before the trial by the exercise of due diligence;²² it must be material to the issue;²³ it must not merely be

Guaranty Bank of Thomas, 62 Okl. 30, 161 P. 1063; *Ellis v. Mid-Continent Oil & Gas Co.* (Okl.) 165 P. 177; *Holland Banking Co. v. Dicks* (Okl.) 170 P. 253; *Comstock-Castle Stove Co. v. Galland*, 49 P. 692, 6 Kan. App. 833; *Thisler v. Miller*, 36 P. 1060, 53 Kan. 515, 42 Am. St. Rep. 302; *Morgan v. Bell*, 21 P. 255, 41 Kan. 345.

Where applicant for new trial had in his possession at the trial a letter purporting to be signed by opposite party by his stenographer, his failure to locate the stenographer until after trial so as to offer such letter was negligence precluding new trial. *J. S. Mayfield Lumber Co. v. Mann*, 59 Okl. 249, 158 P. 1190.

Where suit is brought on unregistered school warrants, and after judgment they are registered under judgment in mandamus, such latter judgment is not newly discovered evidence authorizing new trial on original action. *Bank of Chelsea v. School Dist. No. 1, Rogers County*, 62 Okl. 185, 162 P. 809.

Where a lost writing is found after the trial of an action thereon, in which the secondary evidence as to its provisions was conflicting, it is newly discovered evidence of such a character as to entitle the unsuccessful party to a new trial. *McMullen v. Winfield Building & Loan Ass'n*, 46 P. 410, 4 Kan. App. 459.

In an action to recover the loss due on an insurance policy, alleged by the insurance company to be void for several reasons, to which allegation there was a reply that the matters averred in the answer rendering the policy void were waived by the company, plaintiff was permitted, over objection, to prove that an installment of the premium note that fell due after the loss had been demanded by and paid to the company by sending to the general office of the company a registered letter containing the amount. On the hearing of the motion for a new trial, it appeared that the amount sent by the agents of plaintiff had been promptly returned, and was received by them, but they concealed the fact of its return in their evidence, and this fact was, at the time, unknown to the attorneys of the company, a new trial should have been granted. *Continental Ins. Co. v. Hillmer*, 21 P. 1044, 42 Kan. 275, 287.

²² *Carson v. Henderson*, 8 P. 727, 34 Kan. 404; *Cudahy Packing Co. v. Hays*, 85 P. 811, 74 Kan. 124; *Ott v. Anderson*, 61 P. 330, 9 Kan. App. 320; *Armstrong v. Aragon*, 79 P. 291, 13 N. M. 19; *B. S. Flersheim Mercantile Co. v. Gillespie*, 77 P. 183, 14 Okl. 143; *Straughan v. Cooper*, 139 P. 265, 41 Okl. 515; *Bank of Chelsea v. School Dist. No. 1, Rogers County*, 62 Okl. 185, 162 P. 809; *Herring v. Hood*, 55 Okl. 737, 155 P. 253; *Smith v. Autry* (Okl.) 169 P. 623; *Ford v. Perry* (Okl.) 168 P. 221; *City of Ada v. Smith* (Okl.) 175 P. 924; *Wiers v. Treese*, 117 P. 182, 27 Okl. 774; *Hobbs v. Smith*, 115 P. 347, 27 Okl. 830, 34 L. R. A. (N. S.) 697; *Boddington v. Kansas City*, 148 P. 252, 95 Kan. 189; *Sinopoulos Oil Co. v. Bell*, 61 Okl. 93, 160 P. 448; *Stilwell v. State* (Okl. Cr. App.) 192 P. 253; *Board of Regents v. Linscott*, 1 P. 81, 30 Kan. 240; *City of Olathe v. Horner*, 16 P. 468, 38 Kan. 312; *Collins v. Belford*, 130 P. 662, 89 Kan. 92.

When the record and showing made upon the application for a new trial disclose that the moving party, by the use of due diligence, might have obtained the evidence, it being upon transactions to which he was a party, and

²³ See note 23 on following page.

cumulative to the former evidence;²⁴ and it must not merely be to impeach or contradict the former evidence.²⁵

If newly discovered evidence is material on that issue alone on

of which he had knowledge, a new trial should not be granted. *Lukens v. Garrett*, 44 P. 23, 2 Kan. App. 722; *Lillard v. Chicago, R. I. & P. Ry. Co.*, 98 P. 213, 79 Kan. 25; *Mattern v. Suddarth*, 70 P. 874, 65 Kan. 862.

A party cannot procure a new trial on the ground of newly discovered evidence where such newly discovered evidence is to be found in the testimony of the witnesses who were on the stand at the trial of the case, where an opportunity was given, but not embraced, to procure such evidence. *Hindman v. Askew Saddlery Co.*, 57 P. 1050, 9 Kan. App. 98.

Where a party fails to attend at the taking of depositions and cross-examine the witness, he cannot, on the hearing of a motion for a new trial, allege as newly discovered evidence facts which could have been brought out if he had attended and cross-examined the witness. *Bowling v. Floyd*, 48 P. 875, 5 Kan. App. 879.

Where plaintiff's petition and affidavit in attachment state that his claim is due, and defendant answers that it is not due, and moves on that ground to dissolve, plaintiff cannot have a new trial on the ground of newly discovered evidence that the claim is due, the evidence having been accessible at any time had it been sought for. *Carson v. Henderson*, 8 P. 727, 34 Kan. 404.

Newly discovered evidence held not ground for new trial, in the absence of a showing of diligence, where movant had access to all, and took the depositions of part, of the witnesses disclosing such evidence. *Tiger Drill Mfg. Co. v. Rice*, 149 P. 742, 95 Kan. 816.

Where newly discovered material evidence would probably produce a different result, and no lack of diligence is shown, a new trial should be granted. *Roesser v. Pease*, 131 P. 534, 37 Okl. 222; *City of Topeka v. Smelser*, 44 P. 435, 3 Kan. App. 17.

In an action for damages sustained from personal injuries, where the only evidence as to the extent of the injuries is that of the injured party, and after the trial new evidence is discovered, unknown to the defendant before the trial, conclusively showing that the injuries were not serious and that the judgment had been procured by false testimony, it was error to refuse a new trial. *St. Louis & S. F. R. Co. v. Hurley*, 30 Okl. 333, 120 P. 568.

Where, in an action for damages from a flood by the breaking of a dam, witnesses testified that the dam was standing after the injury, a new trial for newly discovered eyewitnesses, who would contradict such testimony, should be granted, where due diligence was shown. *Davis v. Sim*, 140 P. 851, 92 Kan. 264, L. R. A. 1916C, 1152.

Where the newly discovered evidence consisted largely of statements of the prevailing party to third persons and it was shown that the other party had no knowledge of the same until after the trial, and only discovered it from clues developed at the trial, it was not necessary to show a high degree of diligence in seeking to obtain evidence of that nature. *Missouri Pac. Ry. Co. v. Lovelace*, 45 P. 590, 57 Kan. 195.

²⁴ *Dodson & Williams v. Parsons*, 62 Okl. 298, 162 P. 1090.

Newly discovered evidence that lessee had sought to dispose of his interest

²⁴⁻²⁵ See notes 24 and 25 on following page.

which the verdict is based, it is sufficiently material to justify the granting of a new trial.²⁸

If a petition for new trial is heard by the successor to the trial judge, it is not his duty to grant the petition as of course when a

in rental contract, the subject-matter of the action, was not ground for a new trial. *Schmucker v. Clifton*, 62 Okl. 249, 162 P. 1094.

A witness stated in his deposition that the amount of a certain excavation was 888 square yards, but in an exhibit attached thereto the amount was correctly stated as 888 cubic yards. Held, that evidence that the witness meant to say 888 cubic yards was immaterial. *City of Olathe v. Horner*, 16 P. 468, 38 Kan. 312.

In suit for assault, charging that defendant forcibly attempted to have carnal intercourse, where there was due diligence in defending under a general denial, defendant's motion for new trial upon newly discovered evidence that plaintiff shortly after assault voluntarily stated that defendant did not assault her, should have been granted; the evidence being material, and not cumulative. *Weber v. Weber* (Okl.) 179 P. 31.

²⁴ *Chortney v. Curry*, 78 Okl. 206, 190 P. 387; *Vickers v. Philip Carey Co.*, 49 Okl. 231, 151 P. 1023, L. R. A. 1916C, 1155; *Sharshontay v. Hicks*, 62 Okl. 1, 166 P. 881; *Smith v. Autry* (Okl.) 169 P. 623; *O'Leary v. Reed*, 2 P. 114, 30 Kan. 749; *State v. Rohrer*, 8 P. 718, 34 Kan. 427; *Bower v. Self*, 75 P. 1021, 68 Kan. 825; *City of Emporia v. White*, 86 P. 295, 74 Kan. 864; *Titus v. Mitchell*, 45 P. 99, 3 Kan. App. 90; *Twine v. Kilgore*, 39 P. 388, 3 Okl. 640; *Huster v. Wynn*, 58 P. 736, 8 Okl. 569; *Bilby v. Cathcart*, 51 Okl. 189, 151 P. 688; *Hankins v. Lewis*, 153 P. 1107, 98 Kan. 572; *J. S. Mayfield Lumber Co. v. Mann*, 59 Okl. 249, 158 P. 1190; *Shawnee-Tecumseh Traction Co. v. Newcome*, 59 Okl. 271, 158 P. 1193; *Biernacki v. Ratzlaff*, 171 P. 672, 102 Kan. 573; *Winfield Building & Loan Ass'n v. McMullen*, 53 P. 481, 59 Kan. 493; *Bodding-ton v. Kansas City*, 148 P. 252, 95 Kan. 189; *Montgomery v. Gray*, 144 P. 646, 26 Idaho, 583; *Daly v. Gregg*, 138 P. 614, 91 Kan. 506; *Slimmons v. Shaft*, 138 P. 614, 91 Kan. 553; *Pasho v. Blitz*, 162 P. 1161, 99 Kan. 421; *Sheahan v. Kansas City*, 102 Kan. 252, 169 P. 957; *McKee v. Rowley*, 173 P. 284, 103

²⁵ *Chortney v. Curry*, 78 Okl. 206, 190 P. 387; *Lagneau v. Bource*, 165 P. 844, 101 Kan. 170; *Kennedy v. Pulliam*, 60 Okl. 16, 158 P. 1140; *State v. Smith*, 11 P. 908, 35 Kan. 618; *Lee v. Birmingham*, 18 P. 218, 39 Kan. 320; *Titus v. Mitchell*, 45 P. 99, 3 Kan. App. 90; *Knuffke v. Knuffke*, 56 P. 326, 8 Kan. App. 857; *Huster v. Wynn*, 58 P. 736, 8 Okl. 569; *Bice v. Nelson*, 105 Kan. 23, 180 P. 206; *Taylor v. Holyfield*, 104 Kan. 587, 180 P. 208; *Schriber v. Maxwell*, 92 Kan. 306, 140 P. 865, judgment modified on rehearing *Schriber v. Maxwell*, 144 P. 191, 93 Kan. 211; *Morgan v. Bell*, 21 P. 255, 41 Kan. 345; *Ely v. Jones*, 101 Kan. 572, 168 P. 1102; *Elvin v. Blubaugh*, 132 P. 994, 89 Kan. 726.

²⁶ *McMullen v. Winfield Building & Loan Ass'n*, 46 P. 410, 4 Kan. App. 459.

Where the first trial turned wholly on a question of veracity between the parties, a new trial should be granted for newly discovered evidence to give an opportunity to produce a disinterested witness on the vital issue. *Herra'd v. Paris*, 89 Kan. 131, 130 P. 684.

transcript of the evidence is presented and considered with newly discovered evidence.²⁷

Kan. 257; *Douglass v. Anthony*, 25 P. 853, 45 Kan. 439; *Brown v. Wheeler*, 64 P. 594, 62 Kan. 676.

Where witnesses testified that they had inspected a bond which could not be found, the execution of which was in issue; that it contained the signature of defendant; that they were acquainted with his signature; and that it was genuine—newly-discovered evidence, consisting of the bond, and of affidavits of said witnesses that they have the bond before them, that it contains defendant's signature, that they are acquainted with his signature, and that it is genuine, is cumulative. *McMullen v. Winfield Building & Loan Ass'n*, 46 P. 410, 4 Kan. App. 459.

In a suit on account of \$25 per week for services, where plaintiff recovered the full amount, newly discovered evidence that plaintiff during his term of service had admitted that he was drawing \$20 per week was new evidence, and not cumulative. *Goldie v. Corder*, 129 P. 3, 35 Okl. 247.

On an issue whether a stone discovered by a surveyor is one set by a prior survey, evidence of witnesses describing the stone is not cumulative to the description of the stone given in the notes of the survey. *Haughton v. Bilson*, 113 P. 400, 84 Kan. 129.

On appeal from the report of a county surveyor establishing boundary lines, he testified that he was unable to find the government corner between the sections, and that he established the corner about 50 feet distant from where plaintiffs claimed was the true corner. The controversy turned upon the location of the government corner, which plaintiffs sought to prove by circumstantial evidence; no witness testifying where the stone marking the corner actually was located. The court rendered judgment approving the surveyor's report. In support of a motion for a new trial, plaintiffs produced the affidavit of a witness that he knew the true location of the corner; that he had been road overseer 20 years before, and graded the road; that the corner was then marked by a stone in the middle of the road, and was visible; that in grading the road he plowed over and covered up the stone; that after the trial he went to the place, and stepped the distance from the edge of the road to where he calculated the stone would be, and there dug down and found it; that it was the same stone in the same location as when he graded the road; and that it was placed there to mark the corner between the sections. Held, that the newly discovered evidence was not cumulative, and it was error to refuse a new trial. *Dent v. Simpson*, 105 P. 542, 81 Kan. 217.

Evidence is not noncumulative so it will afford a basis for a new trial on the ground of newly discovered evidence because furnished by a stranger to the litigation on a matter otherwise covered only by the testimony of the parties. *Horne v. Schinstock*, 96 P. 143, 77 Kan. 663.

On hearing of a motion for a new trial, evidence that a physician testified that, in the progress of an operation involving the opening of the abdomen of a patient, he found an intestine ruptured, is not cumulative merely to that of a physician that on an external examination he concluded that such rupture probably existed. *Bousman v. City of Stafford*, 81 P. 184, 71 Kan. 648.

In an action concerning certain real estate, a new trial was properly grant-

²⁷ *Lookabaugh v. Bowmaker*, 122 P. 200, 30 Okl. 242.

The granting of a new trial because of newly discovered evidence is largely in the trial court's discretion,²⁸ and a petition therefor will ordinarily be viewed with disfavor.²⁹

A motion for a new trial on the ground of newly discovered evidence, filed more than three days after the verdict, must be accompanied by an affidavit.³⁰

ed for newly discovered evidence of an affidavit on obtaining a widow's pension, in which claimant stated that the real estate in controversy belonged to a brother, it not being cumulative, though witnesses testified that she had stated that she was not the owner of the property, and that her brother was *Carpenter v. Means*, 142 P. 957, 92 Kan. 986.

In an action upon a bond, the defense was that defendant had not signed it. At the time of the trial the bond was lost and could not be produced in evidence. Testimony was offered as to its existence, and witnesses acquainted with the handwriting of defendant, who had seen the bond, testified that one of the names thereon was his signature. The verdict was in favor of defendant, after which the bond was found. Held, that a new trial was properly granted, on the ground that the bond was newly-discovered material evidence, and was not cumulative. *Winfield Building & Loan Ass'n v. McMullen*, 53 P. 481, 59 Kan. 493.

²⁸ *Stilwell v. State* (Okl. Cr. App.) 192 P. 253; *Missouri, K. & T. Ry. Co. v. Taylor* (Okl.) 170 P. 1148; *Waller v. State* (Okl. Cr. App.) 199 P. 224; *Jones v. S. H. Kress & Co.*, 54 Okl. 194, 153 P. 655; *Jones v. Oklahoma Planing Mill & Mfg. Co.*, 47 Okl. 477, 147 P. 999.

²⁹ *Vickers v. Philip Carey Co.*, 49 Okl. 231, 151 P. 1023, L. R. A. 1916C, 1155.

³⁰ *Rock v. Craig & Osborne*, 78 Okl. 254, 190 P. 388.

(1448)

ARTICLE III.

PROCEDURE

Sections

- 1506. Application.
- 1507. When motion is proper—Form.
- 1508. Ruling of court on motion—Right to new trial.
- 1509. Time for making.
- 1510. Requisites—Application.
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- 1512. Parties.
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- 1516. As to newly discovered evidence—Form.
- 1517. Transcript of evidence.
- 1518. Amendment.
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- 1521. Setting aside.
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- 1526. Petition for new trial—Form.

§ 1506. Application

"The application must be by motion upon written grounds, filed at the time of making the motion. The causes enumerated in subdivisions two, three, seven and nine of section 5033 must be sustained by affidavits, showing their truth, and may be controverted by affidavits."²¹

The office of a motion for a new trial and of a petition for a new trial is the same.²² A motion for a new trial to review an order denying a new trial is unauthorized; the proceeding by motion or petition for new trial, not being an action as defined by the statute, does not extend beyond the term the time within which the trial court can reconsider its order denying a petition for new trial filed pursuant to the statute.

²¹ Rev. Laws 1910, § 5036.

²² Owen v. District Court, Oklahoma County, 143 P. 17, 48 Okl. 442, Ann. Cas. 1917C, 1147.

The purpose of a motion for new trial is to show what errors are relied on that the court by granting a new trial may correct any error shown to exist. Collins v. Morris, 155 P. 51, 97 Kan. 264.

The court has inherent power to grant a new trial at the same term on its own motion.³³ A motion for a new trial, continued until the judge who tried the case has gone out of office, may be heard by his successor in office,³⁴ unless the consideration of a motion for new trial involves a review of the evidence, and then the successor of the trial judge may determine the same if the record gives him access to all essential facts.³⁵

A joint motion for new trial, in which parties who disclaim are included, will be sustained as to those who do not disclaim, if the grounds are sufficient.³⁶

§ 1507. When motion is proper—Form

A motion for a new trial to review an order denying a motion to set aside a judgment is unauthorized by statute;³⁷ also such motion is unauthorized in a case tried on an agreed statement elim-

³³ The district courts have the inherent power on their own motion to set aside a verdict and grant a new trial for prejudicial error at the same term at which verdict or judgment was rendered. *Shields v. Colonial Trust Co.*, 61 Okl. 163, 160 P. 719. The grant of a new trial on court's own motion, where verdict is rendered in the absence of counsel, exceptions and rights of appeal being saved, does not show an abuse of discretion. *Id.*

The trial court may at the same term at which judgment is entered grant a new trial on its own motion. *Hamra v. Fitzpatrick*, 55 Okl. 780, 154 P. 665; *Todd v. Orr*, 44 Okl. 459, 145 Pac. 393, overruling *Long v. Board of County Com'rs*, 47 P. 1063, 5 Okl. 128.

A granting of a new trial 20 days after verdict on the court's own motion, no collusion or fraud being shown, is erroneous. *Anderson v. Chrisman*, 130 P. 539, 37 Okl. 73.

If the trial judge believes that the verdict has been secured through perjury of witnesses, or through the insincerity or prejudice of jury, he is bound to grant the motion for new trial, and to set aside such a verdict on his own motion. *Schaefer v. Arkansas Valley Interurban Ry. Co.*, 104 Kan. 740, 181 P. 118.

Where plaintiff had judgment against city for personal injury, granting new trial because of special findings where no motion therefor had been filed by either party was reversible on appeal, where Supreme Court found no conflict between verdict and such finding. *Weaver v. City of Cherryvale*, 102 Kan. 475, 170 P. 997.

³⁴ *American Cent. Ins. Co. v. Neff*, 23 P. 606, 43 Kan. 457.

³⁵ *Price & Miller v. Ratcliffe*, 47 Okl. 370, 148 P. 153; *Chandler v. Chandler*, 140 P. 858, 92 Kan. 355, L. R. A. 1916E, 830.

³⁶ *Equitable Mortg. Co. v. Gray*, 74 P. 614, 68 Kan. 100.

³⁷ *Continental Gin Co. v. Arnold* (Okl.) 167 P. 613, L. R. A. 1918B, 511.

inating all questions of fact,³⁸ the decision involving only a question of law.³⁹ However, the court has a right to grant a new trial during the term where it has rendered a judgment on an agreed statement of facts.⁴⁰

On trial de novo of a case appealed from justice court, the county court has power to grant a new trial, notwithstanding the statutory limitation on the power of the justice.⁴¹

When an appeal is taken from a justice of the peace, and then the person taking the appeal fails to give it any further attention, and the case is decided against him in his absence, and without his knowledge, and he files his motion for a new trial more than three days after said trial and judgment thereon, he is not entitled, as a matter of right, to have said motion allowed.⁴²

A motion for a new trial calls for a re-examination of facts, and is distinguished from a motion to set aside a judgment by default where there was no trial on an issue of fact.⁴³ But after trial of an issue of fact the rule is otherwise, and a motion for new trial may be filed after a judgment by default, in such case, where the default consists merely of failure to appear at the trial after pleading.⁴⁴

MOTION FOR NEW TRIAL

(Caption.)

Comes now the above named defendant and moves the court to vacate, set aside and hold for naught, the verdict rendered herein on the ——— day of ———, 19—, and the judgment entered thereon, and to grant a new trial of this cause, for the following reasons, and upon the following grounds which materially affect the substantial rights of the said defendant, to wit:

1. Irregularities in the proceedings of the court and abuse of discretion upon the part of the court by which this defendant was prevented from having a fair trial.

³⁸ *Dunlap v. C. T. Herring Lumber Co.*, 44 Okl. 475, 145 P. 374; *Durant v. Nesbit*, 59 Okl. 11, 157 P. 353.

³⁹ *Sheets v. Henderson*, 93 P. 577, 77 Kan. 761; *Noble v. Harter*, 49 P. 794, 6 Kan. App. 823.

⁴⁰ *Shallenberger v. Brady*, 131 P. 1096, 37 Okl. 440.

⁴¹ *Horton v. Prague Nat. Bank*, 60 Okl. 240, 159 P. 930.

⁴² *Ward v. Morrison*, 49 P. 635, 6 Kan. App. 54.

⁴³ *Price & Miller v. Ratcliffe*, 47 Okl. 370, 148 P. 153.

⁴⁴ *Lovejoy v. Stutsman*, 46 Okl. 122, 148 P. 175.

2. Error of the court in overruling defendant's demurrer to plaintiff's petition.
3. Accident or surprise which ordinary prudence could not have guarded against.
4. Abuse of discretion upon the part of the trial court in refusing to allow this defendant permission to amend its answer as requested during the trial of this cause.
5. Error in the assessment of the amount of recovery; this being an action upon contract.
6. Error in the verdict in that it is not sustained by sufficient evidence.
7. Errors of law occurring at the trial and duly excepted to by this defendant at the time.
8. Admission of incompetent, irrelevant and immaterial testimony over the objection and exception of this defendant.
9. Exclusion of competent and material testimony offered by this defendant.
10. Error of the court in denying motions made by this defendant to strike out evidence and answers of witnesses.
11. Error of the court in giving instructions numbered ———.
12. Error of the court in refusing to give defendant's requested instructions numbered ———.
13. Error of the court in overruling and denying defendant's demurrer to the plaintiff's evidence.
14. Error of the court in refusing to sustain and grant the defendant's motion to direct a verdict in favor of the defendant and against the plaintiff.
15. Admission of testimony over the objection and exception of this defendant.
16. Newly discovered evidence material to this defendant, which it could not, with reasonable diligence, have discovered and produced at the trial.
17. Error in the verdict in that it is contrary to law.
18. Excessive damages, appearing to have been given under the influence of passion or prejudice.
19. Inability of the defendant to procure a case-made, without fault of defendant, on account of the death of the reporter (or other reason).

(1452)

20. (Insert any other specific errors not covered by any of the above.)
———, Attorneys for Defendant.

§ 1508. Ruling of court on motion—Right to new trial

A motion for new trial calls for court's re-examination of the issues of fact.⁴⁵ It is addressed to the discretion of the trial court.⁴⁶

Where a verdict of a jury does not meet the approval of the trial judge, it is his duty to set aside the verdict and grant a new trial.⁴⁷

New trials are favored where any question can arise as to the correctness of the verdict.⁴⁸

It is not error to refuse to set aside a verdict for damages where the several items are proved and the findings of the jury are consistent with each other and with the general verdict.⁴⁹

Failure of defendant to appear and defend an action after being duly served is no ground for granting a new trial, under the statute authorizing the granting of a new trial where fraud is practiced in obtaining the judgment.⁵⁰

In an action for damages against two joint tortfeasors, the court may, after verdict against both, refuse a new trial to one while allowing it to the other.⁵¹

It is not error to grant a new trial on one or more issues and sustain findings on other issues.⁵²

Where, under a correct instruction, the jury were bound to return a verdict in plaintiff's favor as to one of two separable parts of the matter in controversy, it was error to set aside the verdict as a whole on account of plaintiff's refusal to remit that part not affected by such instruction.⁵³

⁴⁵ Choctaw Lumber Co. v. Waldock, 78 Okl. 232, 190 P. 866.

⁴⁶ Swan v. Duncan, 78 Okl. 305, 190 P. 678.

⁴⁷ Pierson v. Thompson, 45 P. 944, 4 Kan. App. 173; Myers v. Knabe, 46 P. 472, 4 Kan. App. 484; Halverson v. Blosser, 101 Kan. 683, 168 P. 863, L. R. A. 1918B, 498.

⁴⁸ Ten Cate v. Sharp, 57 P. 645, 8 Okl. 300.

⁴⁹ Jackson v. Uncle Sam Oil Co. of Kansas, 156 P. 756, 97 Kan. 674.

⁵⁰ Williamson v. Williamson, 83 P. 718, 15 Okl. 680.

⁵¹ City of Kansas City v. File, 55 P. 877, 60 Kan. 157.

⁵² Hartman v. Baldwin, 103 Kan. 764, 176 P. 115.

⁵³ Ord Nat. Bank v. Massey, 51 P. 570, 7 Kan. App. 680, judgment affirmed 62 P. 166, 8 Kan. App. 861.

§ 1509. Time for making

"The application for a new trial must be made at the term the verdict, report or decision is rendered, and, except for the cause of newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, or impossibility of making a case-made, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented."⁵⁴

This statute is mandatory,⁵⁵ and, in the absence of a showing that the party filing the motion has been unavoidably prevented from filing it within the time specified in said statute, the Supreme Court

⁵⁴ Rev. Laws 1910, § 5035.

⁵⁵ *Clark v. Cawdell* (Okl.) 181 P. 285; *Ewert v. Wills* (Okl.) 178 P. 87; *Roberts v. Seals*, 143 P. 199, 43 Okl. 467; *Kelley & Lysle Milling Co. v. Schreiber*, 102 Kan. 172, 169 P. 222; *Duggan v. Missouri Pac. Ry. Co.*, 150 P. 557, 96 Kan. 249; *Dudley v. Barney*, 46 P. 178, 4 Kan. App. 122.

The statute requires an application for a new trial, except for newly discovered evidence, to be filed within three days after the verdict, unless unavoidably prevented. *Board of Com'rs of Pottawatomie County v. Grace*, 99 P. 653, 23 Okl. 35.

Where the case-made shows that judgment was entered March 19th, and a bare recital follows that a motion for a new trial was filed, presented, and overruled on March 23d, and no copy of the motion is to be found in the case-made, even if the motion for new trial had been presented, it affirmatively appears that it was not filed within three days, and, in the absence of any excuse, error assigned on account of overruling of the motion will not be considered by the Supreme Court. *Eggleston v. Williams*, 30 Okl. 129, 120 P. 944.

Unless it appears that the party making a motion for a new trial has been unavoidably prevented, the motion must be filed within three days after verdict as provided by statute, and, in the absence of such a showing, the court cannot consider or review errors occurring during the trial. *United States v. Choctaw, O. & G. R. Co.*, 41 P. 729, 3 Okl. 404.

Where a motion for a new trial is filed four days after verdict, and no showing is made to excuse the delay, no ground for a new trial can be considered, except that of newly discovered evidence, though the action is forcible entry and detainer certified to the district court by a justice of the peace. *Douglas v. Anthony*, 25 P. 853, 45 Kan. 439.

If the court renders an erroneous judgment on the pleadings and evidence, dismissing the action, plaintiff's remedy, if aggrieved, is to file a timely motion for new trial, containing appropriate assignments, and, on its denial, to appeal; and where such a motion is filed, and abandoned, the judgment rendered is final, and it is error to grant a second motion for new trial, filed after the term, on the ground of newly discovered evidence, especially where such evidence, if produced, would have been incompetent. *Board of Education of City v. Lawton v. School Dist. No. 49*, 114 P. 742, 28 Okl. 321.

cannot consider it, or review the errors occurring at the trial;⁵⁶ nor can the time be extended by the court⁵⁷ or agreement of counsel,⁵⁸ but failure to move for a new trial within three days or within the term may be excused by showing that the party was unavoidably prevented from so doing.⁵⁹

A motion for a new trial has been held to be in time, where the three days had not run after judgment on special findings,⁶⁰ after entry of a verdict pursuant to a mandate,⁶¹ or after approval of the report of a referee.⁶²

While a court of general jurisdiction has the power to set aside a verdict and grant a new trial any time during the term at which the verdict was received upon proper showing,⁶³ the showing as to being "unavoidably prevented" must be substantial and convinc-

⁵⁶ Johnson v. Henshaw, 80 Okl. 58, 193 P. 998.

⁵⁷ Roberts v. Seals, 143 P. 199, 43 Okl. 467; Allen v. Gates, 38 Okl. 408, 134 P. 51; Joiner v. Goldsmith, 107 P. 733, 25 Okl. 840.

⁵⁸ Roberts v. Seals, 143 P. 199, 43 Okl. 467.

⁵⁹ Riely v. Robertson, 115 P. 877, 29 Okl. 181; Gaffney v. Stanard, 122 P. 510, 31 Okl. 541.

Under Code Civ. Proc. 1890, a motion for a new trial was filed in time if filed during the term at which the judgment was rendered. Thwing v. Doye, 44 P. 381, 2 Okl. 608.

⁶⁰ Where a jury return a general verdict for plaintiff, and upon motion of defendant the court sets aside such verdict, and renders judgment for defendant on special findings by the jury, a motion by plaintiff for a new trial, made within three days thereafter, is in time. Severy v. Chicago, R. I. & P. Ry. Co., 50 P. 162, 6 Okl. 153.

⁶¹ Where the court refused to receive a verdict for plaintiff until a mandate of the supreme court was presented to it, requiring it to do so, defendant had three days after the entry of the verdict, as so directed, in which to file a motion for a new trial. Kansas City, Ft. S. & M. R. Co. v. Berry, 40 P. 288, 55 Kan. 186.

⁶² A motion for new trial filed within three days after approval of report of referee is filed in time. Jarvis v. Great Bend Oil Co., 49 Okl. 175, 152 P. 372.

Exceptions to the report of referees, and a motion to set it aside, filed April 24th, were overruled and judgment entered on the report, November 3d. no time being then given within which to make and serve a case-made. Motions to vacate the judgment and grant a new trial were made and filed on November 6th. Held, that the motion for a new trial was within three days after a "decision of a court," within Code Civ. Proc. § 318, and was in time to give the Supreme Court jurisdiction of the appeal. Blevins v. Morledge, 47 P. 1068, 5 Okl. 141.

⁶³ O'Neill Engineering Co. v. City of Lehigh, 75 Okl. 227, 182 P. 659.

ing,⁶⁴ and not be a mere cloak for carelessness or negligence.⁶⁵

A court on affidavits for a new trial filed the first day of the succeeding term cannot set aside verdict rendered at the previous term.⁶⁶

The filing of a written motion for new trial with the clerk, containing the grounds therefor, within three days after verdict, is sufficient as to the time within which the application has been made without an actual presentation thereof to the court.⁶⁷

Where a motion for new trial has been under consideration, and is continued until next term, it will be considered filed in time, though it did not come into the hands of the clerk until a few moments after the announcement of the adjournment for the term was made.⁶⁸

⁶⁴ *Hastings v. Donnell*, 38 Okl. 341, 132 P. 1085; *Eggleston v. Williams*, 30 Okl. 129, 120 P. 944; *Hopkins v. Watson*, 74 P. 233, 67 Kan. 858.

Where motion for new trial is filed four days after verdict and no showing made that its filing in time was unavoidably prevented or based on newly discovered evidence within Rev. Laws 1910, § 5035, the motion should be stricken. *Farmers' Grain & Supply Co. v. Isaac*, 60 Okl. 26, 158 P. 562.

When a party sends his written motion for a new trial properly drawn up, signed, and inclosed in a letter, to the post office where the clerk of the district court receives his mail, and such letter is not received at the post office until 7 o'clock p. m. of the last day on which the motion can be filed in time, and the clerk does not call for it, or receive it until the next day, and then files it the next day, such motion is not filed in time; and, in the absence of any other showing, it does not appear that the party sending the motion by mail was unavoidably prevented from filing it within time. *Mercer v. Ringer*, 19 P. 670, 40 Kan. 180.

⁶⁵ That motion for new trial was prepared the day verdict was rendered and effort made to file but failed because clerk was not found, and motion was left with another attorney, who promised to file it in time but failed to do so, does not show that party was unavoidably prevented from filing motion in time. *Farmers' Grain & Supply Co. v. Isaac*, 60 Okl. 26, 158 P. 562.

Under Code, § 308 (Gen. St. 1901, § 4756), providing that an application for a new trial, except for newly discovered evidence, shall be made within three days after decision rendered, unless unavoidably prevented, a motion to set aside a judgment for irregularity in the conduct of the court came too late, where the only reason assigned in the affidavit for not filing the motion in time was that petitioner had been informed that the mandate of the Supreme Court had not been filed in the district court. *Brown v. Dann*, 97 P. 862, 78 Kan. 211.

⁶⁶ *J. R. Watkins Medical Co. v. Lizar*, 78 Okl. 302, 190 P. 552.

⁶⁷ *Burcham v. Edwards*, 131 P. 528, 37 Okl. 194.

⁶⁸ *Glover v. Ratcliff*, 77 P. 89, 69 Kan. 423.

Special findings by a jury in an equitable action are not effective until adopted by the court, and the time for filing a motion for a new trial should be computed from the date of that event.⁶⁹

A motion for a new trial of a partnership accounting not filed within the time limited after the referee's report was confirmed, or after the sale of the property was confirmed and final judgment ordered, is too late, though within the time after the formal entry of the judgment.⁷⁰

Where a motion is heard and overruled two months after verdict, and the record is silent as to when it was filed, it will be presumed that it was not filed within the statutory time.⁷¹

Where a jury after reporting its verdict and special findings is sent back to make one of the latter more definite, a motion for new trial, filed while the jury is out for that purpose, is not prematurely filed where there is evidence that the clerk was requested to hold it until the return of the jury, and indorsements on the motion and the special findings show a simultaneous filing, and the trial court having heard the motion on the merits.⁷²

The court does not abuse its discretion in granting defendant a new trial on a motion filed seven days after judgment when such motion is sustained by affidavits showing a good defense, and that defendant was absent from trial on account of dangerous illness in his family, and could not appear in court sooner to defend the action, or ask for new trial.⁷³

Where a jury finds for plaintiff, and also makes special findings, and defendant immediately moves for judgment on the findings, and the hearing of this motion is continued to the third day, and the fourth day is Sunday, and the fifth day defendant appears and files a motion for a new trial, setting forth nearly all the statutory grounds, and showing that he was unavoidably prevented from filing the motion on the third day, the court does not err in entertaining the motion.⁷⁴

⁶⁹ *Jenkins v. Kirtley*, 79 P. 671, 70 Kan. 801.

⁷⁰ *Alexander v. Clarkson*, 150 P. 576, 96 Kan. 174.

⁷¹ *Burtiss v. La Belle Wagon Co.*, 25 P. 852, 45 Kan. 413.

⁷² *Atchison, T. & S. F. Ry. Co. v. Davis*, 79 P. 130, 70 Kan. 578.

⁷³ *Hemme v. School Dist. No. 4*, 1 P. 104, 30 Kan. 377.

⁷⁴ *Fudge v. St. Louis & S. F. Ry. Co.*, 1 P. 141, 31 Kan. 146.

The pendency of a motion for judgment on the special findings of the jury, a general verdict being also rendered, affords no excuse, within Gen. St. 1897,

The filing of a written motion for a new trial, containing the grounds therefor, with the clerk of the court in which a case has been tried, within three days after the verdict or decision was rendered, is a sufficient compliance with the statute, relating to the time within which an application for a new trial must be made, without an actual presentation of such motion to the court within the three days.⁷⁵

In proceeding under the statute to determine paternity of bastard child and to enforce support, the time for filing a motion for a new trial runs from return of verdict, and not from judgment.⁷⁶

§ 1510. Requisites—Application

It is sufficient to set forth the grounds for new trial in the language of the statute;⁷⁷ but it is not necessary to use the language of the statute as a ground for new trial if definite and specific causes coming within one of the statutory grounds are alleged.⁷⁸

Where exceptions to charge are properly saved, it is not necessary to set them out in separate paragraphs in motion for new trial.⁷⁹

Where, after verdict, the defeated party files a motion "to set aside and vacate the verdict of the jury," on the grounds that the verdict is not sustained by sufficient evidence and is contrary to law, and for errors of law occurring at the trial and excepted to, although the motion does not in terms purport to be a motion for a new trial, but only "to set aside and vacate the verdict of the jury," the supreme court will treat it as a motion for a new trial, where it has been so treated by both parties and by the trial court.⁸⁰

A motion for new trial for newly discovered evidence should set forth the names and place of residence of the witnesses, what they would testify to, and facts must be set out showing diligence and

c. 95, § 318, for failure to file the motion for a new trial within three days after the rendition of the verdict. *Clement, Bane & Co. v. Hartzell*, 56 P. 504, 60 Kan. 317.

⁷⁵ *Freelove v. Gould*, 45 P. 454, 3 Kan. App. 750.

⁷⁶ *Powelson v. State (Okl.)* 169 P. 1093.

⁷⁷ *Spadra-Clarksville Coal Co. v. Nicholson*, 93 Kan. 638, 145 P. 571, Ann. Cas. 1916D, 652.

⁷⁸ *Glaser v. Glaser*, 74 P. 944, 13 Okl. 389.

⁷⁹ *St. Louis & S. F. Ry. Co. v. Dobyns*, 57 Okl. 643, 157 P. 735.

⁸⁰ *Hartley v. Chidester*, 13 P. 578, 36 Kan. 363.

negating fault of movant;⁸¹ but the motion need not be verified. It is sufficient if it is sustained by an affidavit presented at the hearing of the motion.⁸²

§ 1511. Statement of grounds and specification of errors

The eighth statutory cause for new trial, viz., "error of law occurring at the trial and excepted to by the party making the application," will, when embraced in the motion for new trial, present to the trial court any objection or exception properly made and saved during the progress of the trial.⁸³

A motion on the ground that the court failed to admonish the jury upon adjournments as required by law should allege such failure, and the allegations should be supported by competent evidence showing that fact.⁸⁴

A motion because "the verdict is contrary to law," because of insufficiency of evidence, adds nothing to the further ground that the verdict is not sustained by sufficient evidence.⁸⁵

A motion, assigning as grounds that the verdict was unsupported by evidence and is contrary to weight thereof, authorizes trial court to set aside verdict which is contrary to weight of evidence.⁸⁶

A motion assigning "excessive damages" which did not charge that they were given under the influence of passion or prejudice, does not comply with the requirements of the statute.⁸⁷

But a motion for a new trial on the ground of error in the assessment of the amount recovered, and that the findings are not sustained by sufficient evidence, is sufficient to challenge the correctness of the judgment as to the amount thereof, and as to wheth-

⁸¹ *McCants v. Thompson*, 115 P. 600, 27 Okl. 706.

A motion on the ground of newly discovered evidence for a new trial must set forth the witness' name and residence and testimony. *Rock v. Craig & Osborne*, 78 Okl. 254, 190 P. 388.

A motion for new trial on the ground of newly discovered evidence, must show that applicant used due diligence to procure and present the evidence on the trial, and the facts constituting such diligence must be stated, so that the court may pass upon the question. *Burns v. Vaught*, 113 P. 906, 27 Okl. 711.

⁸² *St. Louis & S. F. R. Co. v. Gaston*, 72 P. 777, 67 Kan. 217.

⁸³ *Boyd v. Bryan*, 65 P. 940, 11 Okl. 56.

⁸⁴ *Brink v. Territory*, 41 P. 614, 3 Okl. 588.

⁸⁵ *Norman v. Lambert*, 64 Okl. 238, 167 P. 213.

⁸⁶ *Horton v. Prague Nat. Bank*, 60 Okl. 240, 159 P. 930.

⁸⁷ *St. Louis, I. M. & S. Ry. Co. v. Lewis*, 136 P. 396, 39 Okl. 677.

er or not there is any evidence to support the findings of fact on a particular issue.⁸⁸

Where a number of special findings are made against the party in whose favor a general verdict is rendered, a motion for a new trial, on the ground that the verdict is against the evidence, means that the special findings are against the evidence.⁸⁹

Where a motion recites "erroneous rulings" as one of its grounds, appellant can have a review of any ruling respecting the admission of evidence.⁹⁰

Any matter for which a new trial may be granted is waived, if not embraced in the motion therefor.⁹¹

Where a motion for a new trial is sustained and the report of a referee entirely set aside the effect of the order is to grant a new trial, and it is erroneous for court to make other findings of fact and render judgment thereon.⁹²

§ 1512. Parties

The statute implies the existence of some one having the right to sue and be sued, and where, after death of a plaintiff recovering judgment, defendant's petition for new trial was filed before a representative of plaintiff's estate was appointed, the petition was a nullity, and could not be entertained on process thereunder and service upon the administrator more than one year after judgment.⁹³

§ 1513. Extrinsic evidence

The statute providing that, where the ground of a motion for new trial is the exclusion of evidence, such evidence shall be produced at the hearing, does not apply where it appears from the testimony at the trial what the excluded evidence would have been.⁹⁴

Where at a trial it was discovered that certain depositions were missing, and the trial was proceeded with without objection, the

⁸⁸ Richardson v. Mackay, 46 P. 546, 4 Okl. 328.

⁸⁹ Swan v. Bevis Rock Salt Co., 119 P. 871, 86 Kan. 280.

⁹⁰ Spadra-Clarksville Coal Co. v. Nicholson, 93 Kan. 638, 145 P. 571, Ann. Cas. 1916D, 652.

⁹¹ Baker v. Citizens' State Bank of Okean (Okl.) 177 P. 568; First Nat. Bank v. Farmers' State Guaranty Bank of Thomas, 62 Okl. 30, 161 P. 1063; St. Louis, I. M. & S. Ry. Co. v. Lewis, 136 P. 396, 39 Okl. 677.

⁹² James v. Coleman, 64 Okl. 99, 166 P. 210.

⁹³ Monson v. Battelle, 103 Kan. 470, 173 P. 927.

⁹⁴ Treiber v. McCormack, 136 P. 268, 90 Kan. 675, Ann. Cas. 1915B, 943.

overruling of a motion for a new trial supported by such depositions, afterwards found, was not an abuse of discretion.⁹⁵

Refusal to permit the introduction of oral testimony in support of a motion for a new trial has been held not an abuse of discretion.⁹⁶

The mere expression of the opinions of witnesses that the court entertained bias and prejudice for and against some of the parties in the action, without a statement of the facts and grounds on which such opinions were founded, cannot be regarded as testimony, and is entitled to no consideration in an application for a new trial.⁹⁷

§ 1514. — Jurors

Affidavits of jurors are admissible to establish facts connected with their deliberations, which do not inhere in the verdict and are not alone within the personal consciousness of a juror; but affidavits that they took with them to their jury room a bank book, a part of which had been introduced in evidence, and that they considered the entire book, could not be considered in support of motion for new trial.⁹⁸

A juror cannot in support of a motion for new trial give testimony to impeach his verdict.⁹⁹

Declarations and admissions of jurors, made subsequent to the rendition of their verdict, are not admissible in support of a motion to set it aside.¹

⁹⁵ Woolsey v. Ziegler, 123 P. 164, 32 Okl. 715.

⁹⁶ Myers v. Cabiness, 44 Okl. 671, 146 P. 33.

⁹⁷ Winfield Nat. Bank v. Croco, 26 P. 939, 46 Kan. 620.

⁹⁸ Carter State Bank v. Ross, 52 Okl. 642, 152 P. 1113; Missouri, O. & G. Ry. Co. v. Smith, 55 Okl. 12, 155 P. 233.

On a motion for a new trial in condemnation proceedings, a juror was asked if the jury did not first agree on a general verdict, and then answer the special interrogatories with a view to agreeing to the general verdict without reference to the particular damages to any particular part of the land taken. Held, that the question was improper, as the reasons for a verdict, or any element that goes to make it up, or the particular ideas of the jurymen, are not open to inquiry. Leroy & W. Ry. Co. v. Anderson, 21 P. 588, 41 Kan. 528; Brice-Nash v. Barton Salt Co., 83 Kan. 447, 111 P. 462.

⁹⁹ Chicago, R. I. & P. Ry. Co. v. Brown, 55 Okl. 173, 154 P. 1161; Kennedy v. Pulliam, 60 Okl. 16, 158 P. 1140; Tulsa St. Ry. Co. v. Jacobson, 136 P. 410, 40 Okl. 118; Bauble v. Verde, 50 Okl. 609, 150 P. 876.

Affidavits of three jurors held insufficient to impeach verdict on the ground that the effect thereof was misunderstood. Pitchlynn v. Cherry, 121 P. 196, 32 Okl. 77.

¹ Cain Bros. Co. v. Wallace, 26 P. 445, 46 Kan. 138.

A juror's statements made after the trial in the presence of defendant's attorney, tending to show that he was an incompetent juror, cannot be shown by the attorney's testimony.²

The statements made by jurymen after the verdict has been rendered, of what was said to them during the trial, is hearsay, and, when the testimony of the jurymen themselves is not offered, should not be considered.³

§ 1515. — Affidavits—Form

Striking of scandalous and impertinent affidavits offered in support of a motion for a new trial is not error.⁴

Where a motion for a new trial, for misconduct of the prevailing party, is not supported by affidavits showing the alleged charge to be true, a denial thereof is proper.⁵

An affidavit for a new trial, alleging disqualification of a juror because of an expression of opinion as to the merits of the case before trial, is insufficient if it fail to show that the rights of the mover have been prejudiced, and that he did not know of the expression of opinion when the jury was impaneled, and have full opportunity to challenge the juror for cause or peremptorily.⁶

AFFIDAVIT ACCOMPANYING MOTION FOR NEW TRIAL

(Caption.)

State of Oklahoma, }
County of ———, } ss.:

E. F., of lawful age, being first duly sworn, upon oath says: That he is the owner and manager of the ——— Café in the city of ———, ——— county, Oklahoma; that he is acquainted with A. B., the plaintiff in the above entitled action, and is acquainted with G. H., M. N., and X. Y., who were jurors in the trial of the above entitled cause; that he was also a juror in said cause; that after the jury for the trial of said cause was impaneled, and during the noon recess, on the ——— day of ———, 19—, when said cause was on

² Chicago, R. I. & P. Ry. Co. v. Brown, 55 Okl. 173, 154 P. 1161.

³ Sharpe v. Williams, 20 P. 497, 41 Kan. 56.

⁴ Schriber v. Maxwell, 140 P. 865, 92 Kan. 306, judgment modified on rehearing 144 P. 191, 93 Kan. 211.

⁵ Atchison, T. & S. F. R. Co. v. Rowan, 39 P. 1010, 55 Kan. 270; Bell v. Day, 57 P. 1054, 9 Kan. App. 111.

⁶ Berry v. Smith, 35 P. 576, 2 Okl. 345.

trial, the said plaintiff, A. B., took the said jurors G. H. and M. N. to said ——— Café, and that after arriving there the said juror X. Y. entered, and that said plaintiff A. B., and said jurors, G. H., M. N., and X. Y., all had dinner together, and that the said plaintiff, A. B., paid for the dinners of all of said jurors.

(Jurat.)

E. F.

§ 1516. — As to newly discovered evidence—Form

The statute requiring that a motion for new trial for newly discovered evidence be verified by affidavit, is meant to secure a prima facie case, and, where a motion was not verified and affidavits of newly discovered witnesses were not attached or filed and made a part thereof, the submission of the oral testimony of such witnesses on the hearing of the motion and its embodiment in the case-made was not a compliance with the statute.⁷

An affidavit made on information and belief, and stating no facts within affiant's knowledge, is insufficient to require a new trial for newly discovered documentary evidence in possession of the adverse party, for the statute requires one seeking a new trial for newly discovered documentary evidence in possession of the adverse party to produce such evidence as is available relative to the existence and contents of the document.⁸

A motion for a new trial on the ground of newly discovered evidence should contain the affidavit of the new witness, or satisfactorily account for its absence.⁹

On the hearing of the motion the court may properly consider affidavits for and against the same.¹⁰ The affidavits must contain a statement of the facts showing diligence.¹¹

⁷ *Eskridge v. Taylor*, 75 Okl. 139, 182 P. 516; *Dodson & Williams v. Parsons*, 62 Okl. 298, 162 P. 1090.

⁸ *Cowley County Nat. Bank v. Rawlins-Dobbs Elevator Co.*, 152 P. 647, 96 Kan. 461.

⁹ *Elliott v. Martin*, 71 P. 756, 27 Mont. 519; *Huster v. Wynn*, 58 P. 736, 8 Okl. 569; *McCants v. Thompson*, 115 P. 600, 27 Okl. 706; *Wilkes v. Wolback*, 2 P. 503, 30 Kan. 375; *Pinschower v. Hanks*, 1 P. 454, 18 Nev. 99; *Twine v. Kilgore*, 39 P. 388, 3 Okl. 640.

Newly discovered evidence set out in conflicting affidavits on a motion for a new trial held insufficient to warrant a new trial. *Wilson v. Lane*, 144 P. 230, 93 Kan. 178.

¹⁰ *Culp v. Mulvane*, 71 P. 273, 66 Kan. 143.

¹¹ *B. S. Flersheim Mercantile Co. v. Gillespie*, 77 P. 183, 14 Okl. 143.

AFFIDAVIT AS TO NEWLY DISCOVERED EVIDENCE ACCOMPANYING
MOTION FOR A NEW TRIAL

(Caption.)

State of Oklahoma, }
County of ———, } ss.:

A. B., of lawful age, being first duly sworn, upon oath says: That he is the plaintiff in the above entitled action. That the verdict in this case was secured in part by the false and untrue testimony of defendant that (setting forth facts testified to by defendant). That since the trial of said cause, and on ———, 19—, plaintiff has discovered that he can prove that (stating newly discovered evidence) by the testimony of E. F., who resides at ———. That said E. F. has assured this plaintiff that if a new trial is granted he would attend and testify as follows: (Setting forth same.) That all of the above facts are material and important to plaintiff's case, and all of the above testimony is very material and important facts to establish plaintiff's claim. That said newly discovered evidence is not merely cumulative or corroborative, but is new and important and material, and affiant believes that it would be likely to change the verdict of the jury and the result of a new trial. That before the trial of this cause great diligence was used by plaintiff to discover this and any other important testimony material to its case. That prior to said trial plaintiff sent his agent to the vicinity of where said E. F. lived in ——— county, during ———, 19—, and said agent, one G. H., there made search for all material testimony in the case. That by reason of the natural reticence of people, including the witness above named, and his desire to avoid being brought into court as a witness, said agent was not able to learn of the knowledge of the above facts possessed by said witness. But after the trial of this case said witness, learning that injustice had been done the plaintiff by the verdict, has finally informed the plaintiff of his knowledge of the above facts, and of his willingness to testify to said facts as above stated. By reason of the inability of the plaintiff to discover the above testimony before said trial, and before the adjournment of said term of court, great injustice has been done plaintiff by said verdict. If a new trial is granted herein, the testimony of the above named witness will be procured upon the points above mentioned for use on the further trial of this cause.

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Wherefore plaintiff prays that the court will grant a new trial herein to the end that justice may be done.

(Jurat.)

A. B.

§ 1517. Transcript of evidence

Statutes providing that, where the ground for a motion for new trial is the exclusion of evidence, such evidence shall be produced at hearing do not apply, where documents examined and excluded were before the court and hence there was no necessity for their production on the hearing of motion.¹² Likewise such statute does not apply where the evidence was admitted and afterwards withdrawn.¹³

A motion for a new trial for newly discovered evidence is properly denied where none of the testimony offered on the trial is preserved.¹⁴

§ 1518. Amendment

After the expiration of the three days allowed, a motion for a new trial may be amended to clarify the grounds originally set up, but not to set up new and independent grounds.¹⁵

§ 1519. Abandonment of motion

A litigant may successfully abandon a motion for new trial. Where a jury returns a verdict in a civil action in favor of plaintiff, and also returns certain findings of fact, and plaintiff files no motion for a new trial, but defendant makes a motion for judgment on the special findings, which is overruled by the trial court, and also files a motion for a new trial, which, before action is taken thereon, he asks to withdraw, and, when this is refused, in open court waives all errors committed on the trial against him as alleged in the motion for a new trial, and thereafter plaintiff confesses the grounds

¹² Security State Bank of Wichita v. Seaunier, 104 Kan. 7, 178 P. 239.

¹³ Cornwell v. Moss, 147 P. 824, 95 Kan. 229.

¹⁴ Hopkins v. Watson, 74 P. 233, 67 Kan. 858.

¹⁵ Wiggins v. Jackson, 52 Okl. 723, 153 P. 879; Rogers v. Quabner, 137 P. 361, 41 Okl. 107; Rice v. Folsom, 122 P. 236, 32 Okl. 496; Perry v. Eaves, 45 P. 718, 4 Kan. App. 26.

Defendant filed his motion for a new trial within the three days allowed by statute, but nearly two months thereafter he asked leave of the court to amend his motion by adding thereto, "Errors of law occurring at the trial, and excepted to by the defendant," which leave was refused by the court. Held not error. Culp v. Steere, 28 P. 987, 47 Kan. 746.

of the motion which have been waived by defendant, an order granting a new trial must be reversed, it not appearing from the record that there was any sufficient reason for granting a new trial.¹⁶

§ 1520. Order—Form

Upon a motion for new trial on several grounds, the trial court, in sustaining the motion, should state the specifications which are upheld and those which are overruled.¹⁷

Where a motion based on several grounds was sustained on one of them and "no other," it was an explicit overruling of the motion on all other grounds.¹⁸

Where the amount of a verdict is manifestly too small, and the deficiency can be ascertained by adding the agreed rate of interest on a note, it is not error, as against the plaintiff, for the court to refuse a new trial and correct the mistake by rendering the judgment for the proper amount in addition to the verdict.¹⁹

Where the court deems the damages excessive, it may impose the alternative of accepting a reduction or submitting to a new trial; but rendering judgment for a reduced amount if the successful party objects is error as to both parties.²⁰

Where demurrer to the evidence of plaintiff has been overruled, and the trial proceeds to judgment in his favor, the court cannot, on a motion for a new trial, set aside the verdict and judgment and sustain a demurrer to the evidence and enter a judgment against plaintiff for costs, unless it appears that the deficiency in the evidence cannot be supplied by plaintiff.²¹

A statement of an order granting a new trial, that the sole ground of the ruling was that a finding was not sustained by sufficient evidence, does not imply that the court would have approved the find-

¹⁶ *Atchison, T. & S. F. R. Co. v. Brown*, 32 P. 630, 51 Kan. 6.

¹⁷ *Bourquin v. Missouri Pac. Ry. Co.*, 127 P. 770, 88 Kan. 183.

¹⁸ *Clyde Milling & Elevator Co. v. Buoy*, 80 P. 591, 71 Kan. 293.

¹⁹ *Marsh v. Kendall*, 68 P. 1070, 65 Kan. 48.

²⁰ *Atchison, T. & S. F. Ry. Co. v. Cogswell*, 99 P. 923, 23 Okl. 181, 20 L. R. A. (N. S.) 837.

²¹ Where a motion for a new trial has been pending for several years, and there is no record or memorandum to indicate that it has ever been acted upon by the court, oral evidence is insufficient on which to base an entry *nunc pro tunc*. *Boynton v. Crockett*, 69 P. 869, 12 Okl. 57.

²¹ *Thomas v. Kansas City Elevated Ry. Co.*, 90 P. 816, 76 Kan. 141.

ing if it had been sufficiently sustained.²² A written statement of the grounds of a decision granting new trial may aid in interpreting the recitals of the journal entry, though it cannot overcome such recitals.

ORDER OVERRULING MOTION FOR NEW TRIAL

(Caption.)

And now on this —— day of ——, 19——, the same being a regular judicial day of the ——, 19——, term of this court, there comes on for hearing in the above entitled cause the motion of the said defendant, A. B., for a new trial, the same having been filed herein on this date; and the said plaintiff being present in person and by his attorneys, ——, and the said defendant, A. B., appearing by his attorneys, ——, the said motion for new trial is taken up, submitted, and presented to the court; and the court having heard the argument of counsel thereon and being fully advised in the premises, finds that said motion for a new trial should be overruled.

It is therefore by the court ordered, adjudged, and decreed that the motion of the defendant, A. B., for a new trial herein, be and the same is hereby in all things overruled, to which action and ruling of the court the defendant, A. B., duly excepts, and exceptions are by the court allowed and the same noted on the records of said court, and thereupon the said defendant, A. B., gives notice in open court of his intention to appeal from said judgment and decree of said court rendered and entered herein on the —— day of ——, 19——, and the order and judgment of said court overruling said motion for a new trial, to the Supreme Court of the state of Oklahoma. And the court directs the clerk of this court to make entry upon the trial docket of said court of said notice of appeal of the said defendant, A. B. And the said defendant, A. B., praying an appeal to the Supreme Court of Oklahoma and an extension of time within which to make and serve case-made on appeal to the Supreme Court of Oklahoma, and for good cause shown and sufficient and satisfactory reasons, the court doth order that the said defendant, A. B. be granted an extension of —— days from this date to make and

²² Goff v. Goff, 158 P. 26, 98 Kan. 201, rehearing denied 158 P. 662, 98 Kan. 700.

serve a case-made on appeal to the Supreme Court, plaintiff to have ten (10) days thereafter to suggest amendments, and the same to be settled on five (5) days' notice by either party.

Done in open court the day and year first above written.

_____, District Judge.

§ 1521. — Setting aside

When a motion has been heard and decided, the court has no jurisdiction at a subsequent term, to reopen and reconsider the motion.²³

In the absence of a showing of irregularity, fraud, unavoidable casualty, or misfortune, the district court cannot set aside its order overruling a motion for a new trial upon a reconsideration of the motion; a reversal of such order can be had only by proceedings in error.²⁴

A trial court, after a judgment and after the overruling of a motion for a new trial and the extension of time to make a case-made, may, at the same term, entertain a motion to set aside its denial of a new trial and grant new trial.²⁵

Where, after the expiration of the term, a motion is made to set aside an order overruling a motion for new trial for unavoidable casualty, and it does not comply with the statutory requirements, a refusal to vacate was justified.²⁶

An order vacating an order granting a new trial is not void for

²³ *Kingman & Co. v. Chubb*, 55 P. 474, 8 Kan. App. 167.

After the expiration of the term at which judgment was rendered, the district court has no jurisdiction to set aside an order overruling a motion for a new trial. *Missouri Pac. Ry. Co v. Mayberry*, 64 P. 989, 63 Kan. 881.

²⁴ *Lookabaugh v. Cooper*, 48 P. 99, 5 Okl. 102.

District court has jurisdiction to set aside an order denying a motion for a new trial and thereafter at same term to grant a new trial. District court is justified in vacating an order denying a motion for a new trial and in thereafter granting the motion at same term, when, because of a mental breakdown, movant's attorney failed to notify him of time that case had been set for trial or to properly present his case. *Chamberlain Metal Weather-Strip Co. v. Bank of Pleasanton*, 103 Kan. 845, 176 P. 978.

Ordinarily a party's right to new trial is exhausted on failure to file motion at term and within three days after verdict or decision, or on overruling a motion made, but the court may set aside an order denying new trial within the term on its own motion. *Jones v. Frank*, 62 Okl. 26, 161 P. 795.

²⁵ *Barnes v. Bruce*, 63 Okl. 270, 165 P. 405.

²⁶ *McKee v. Howard*, 38 Okl. 422, 134 P. 44.

want of jurisdiction, being appealable if erroneous, though it was made several months after new trial granted.²⁷

§ 1522. Hearing

Where counsel are not present when a motion for new trial is regularly reached, and the court passes on the motion, a refusal of a request on the same day to argue the motion is not an abuse of discretion.²⁸

Where the trial court refuses to hear any argument on a motion for a new trial of a case tried to a jury on conflicting oral testimony, and overrules the motion, and enters judgment on the verdict, the judgment will be reversed without inquiry into its merits.²⁹

It is not reversible error to peremptorily overrule a motion for a new trial, where no error is shown to have occurred in the trial.³⁰

On motion for new trial, on ground that verdict is contrary to evidence, trial court must weigh evidence and approve or disapprove verdict.³¹

If the ground is newly discovered evidence, the inquiry is not limited to matters known when the motion was filed, but may include any that have been developed since that time.³²

In deciding a motion for new trial for newly discovered evidence, the court considers the pleadings and the evidence at the trial in connection with the newly discovered evidence offered. The court is not obliged, on request, to state findings of fact and conclusions of law separately, when ruling finally on a petition for new trial for newly discovered evidence.³³

Where the court requests the applicant to point out specifically the defects complained of, and he neglects to do so, it is a waiver of any error in overruling a motion.³⁴

²⁷ *Farmers' & Merchants' Nat Bank of El Dorado v. Wright*, 157 P. 1178, 98 Kan. 248.

²⁸ *Chicago, R. I. & P. Ry. Co. v. Baroni*, 122 P. 926, 32 Okl. 540.

²⁹ *Atchison, T. & S. F. R. Co. v. Consolidated Cattle Co.*, 52 P. 71, 59 Kan. 111.

³⁰ *Oklahoma Portland Cement Co. v. Anderson*, 115 P. 767, 28 Okl. 650.

The overruling of a motion for a new trial pro forma is not error sufficient to require a reversal. *Terry v. Parnell*, 119 P. 629, 29 Okl. 846.

³¹ *Chicago, R. I. & P. Ry. Co. v. Warren*, 63 Okl. 190; 163 P. 705.

³² *Bousman v. City of Stafford*, 81 P. 184, 71 Kan. 648; *Chicago, R. I. & P. Ry. Co. v. Mosher*, 92 P. 554, 76 Kan. 590.

³³ *Haughton v. Bilson*, 133 P. 722, 90 Kan. 360.

³⁴ *Riverside Tp. v. Bailey*, 82 Kan. 429, 108 P. 796.

A motion for new trial for misconduct of the prevailing party, on conflicting evidence is addressed to the trial court's discretion.³⁵

Where a motion for new trial is filed, and the trial judge retires from the bench leaving it undisposed of, his successor will ordinarily grant a new trial, where the motion involves a review of the evidence, and the same has not been preserved by bill of exceptions or other record.³⁶

§ 1523. — Time

A motion for new trial filed at one term may be taken under advisement and granted at the succeeding term.³⁷

§ 1524. Conditions to granting

When a new trial is sought and awarded on the ground of error on the part of the court or jury, or misconduct on the part of the prevailing party, such new trial should be awarded absolutely, and without condition.³⁸

Where, after verdict, a motion for a new trial was made on the statutory grounds, and the court decided generally that defendant was entitled to a new trial, a condition that he should pay attorney's fees and expenses was erroneous.³⁹

³⁵ Ratcliff v. Sharrock, 44 Okl. 592, 145 P. 802.

³⁶ Boynton v. Crockett, 69 P. 869, 12 Okl. 57; School District No. 38, Le Flore County, v. School District No. 92, Le Flore County, 140 P. 1144, 42 Okl. 228.

Where a motion for new trial is made before a judge in a case heard by his predecessor, and the new judge is ignorant of the merits, a new trial should be granted. Bass v. Swingley, 22 P. 714, 42 Kan. 729; American Cent. Ins. Co. v. Neff, 23 P. 606, 43 Kan. 457.

Where one of the grounds of motion for new trial was that verdict was not sustained by the evidence and the trial judge had resigned, it was error for his successor not to grant a new trial. Linker v. Union Pac. R. Co., 123 P. 745, 87 Kan. 186.

³⁷ Hinchey v. Starrett, 137 P. 81, 91 Kan. 181.

Where a motion for a new trial was filed within three days after verdict, but was not disposed of at that term, court did not lose jurisdiction, and might dispose of the motion at the following term. Horton v. Prague Nat. Bank, 60 Okl. 240, 159 P. 930.

³⁸ Pierson v. Thompson, 45 P. 944, 4 Kan. App. 173.

³⁹ Metropolitan St. Ry. Co. v. McClure, 48 P. 566, 58 Kan. 109.

§ 1525. Reduction of verdict or remission of excess—Form of order

Where the trial court is of the opinion that a verdict is excessive, it may impose upon plaintiff the alternative of accepting judgment in a reduced amount or a new trial.⁴⁰

Where, in an action of tort, it clearly appears that the jury were influenced by passion or prejudice, the error cannot be cured by remitting a part of the verdict.⁴¹

An excessive verdict in a trial involving unliquidated damages is not susceptible of correction by reducing the amount thereof, but must be set aside and a new trial ordered; ⁴² but the trial court may either direct or receive a release of excessive damages, given by a jury as a condition of refusing a new trial, in cases where the amount of excess is exactly calculable from the evidence.⁴³

Where, in an action for damages, plaintiff obtains a verdict, and there is nothing to show passion or prejudice on the part of the jury, but the amount is larger than the trial court thinks allowable, plaintiff may be required to elect to take judgment for a reduced sum, suggested by the court, or to submit to a new trial.⁴⁴

⁴⁰ *Ft. Smith & W. Ry. Co. v. Hutchinson* (Okla.) 175 P. 922; *Bothe v. True*, 103 Kan. 562, 175 P. 395; *Yard v. Gibbons*, 149 P. 422, 95 Kan. 802.

Where a verdict for damages is so far beyond the compensation contemplated and provided for by law as to plainly indicate that the jury was actuated by bias, prejudice, or passion, the verdict will be reduced for excessiveness. *New v. McMillan*, 79 Okla. 70, 191 P. 160.

⁴¹ *Haldeman v. Johnson*, 54 P. 507, 8 Kan. App. 473; *Adcock v. Oregon R. Co.*, 77 P. 78, 45 Or. 173.

Where, in an action for slander, there is a verdict for \$4,000, and the trial court decides that all damages above \$500 are excessive, such excess shows that the verdict was rendered under the influence of passion or prejudice, and must be set aside, though plaintiff may have agreed to remit \$3,500. *Steinbuechel v. Wright*, 23 P. 560, 43 Kan. 307.

Where counsel in addressing the jury has brought before them facts not in evidence and extraneous matters calculated to arouse prejudice and divert their minds, and the court on motion for a new trial has stated that the verdict was grossly excessive, and probably given under the influence of passion and prejudice, it is error to allow a remittitur of one-half the verdict, and enter judgment for the remainder. A new trial should be granted. *Atchison, T. & S. F. R. Co. v. Dwell*, 24 P. 500, 44 Kan. 394.

A new trial will not be granted because of excessive damages if the excess can be determined and segregated from the verdict, unless plaintiff refuses to remit it. *Chicago, R. I. & P. Ry. Co. v. Wehrman*, 105 P. 328, 25 Okla. 147.

⁴² *Southern Pac. Co. v. Fitchett*, 80 P. 359, 9 Ariz. 128; *Atchison, T. & S. F. R. Co. v. Richards*, 49 P. 436, 58 Kan. 344.

⁴³ *Kansas City, M. & O. Ry. Co. v. Turley*, 80 P. 605, 71 Kan. 256.

⁴⁴ *Union Pac. Ry. Co. v. Mitchell*, 43 P. 244, 56 Kan. 324.

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In a personal injury action judgment may be entered for a reduced sum, accepted by plaintiff, where passion or prejudice of the jury is not shown.⁴⁵

Error in computation of the number of months of service for which the action was brought does not prevent a correction of the error by a remission of the excess awarded.⁴⁶

In a suit on an account, where defendant by cross-action pleaded certain unliquidated damages as a set-off, and the jury found for defendant in the amount of the sum sued for on the account, which was in excess of the amount laid in the ad damnum of his cross-action, it was error where defendant remitted all but \$1 of the recovery as a condition of refusing a new trial to render judgment for defendant for such amount and costs, as defendant was not entitled under the pleadings to a judgment for a balance against plaintiff in any amount.⁴⁷

CONSENT OF PLAINTIFF TO REDUCTION OF JUDGMENT

(Caption.)

To the Above Named Defendant, C. D., and His Attorney of Record, G. H.:

You and each of you are hereby notified that, judgment having been rendered in this cause for the sum of \$—— in favor of said plaintiff and against you, the said defendant, and that the said court, on the —— day of ——, 19——, upon the motion for a new trial herein, after the same was argued and submitted for decision, rendered its decision on said motion, and granted the same, unless the plaintiff, within twenty days from the rendering of said decision, consent and agree to the reduction of said judgment from said sum of \$—— to the sum of \$——:

Now, therefore, said plaintiff, A. B., and his attorney, X. Y., hereby consent to and agree that said judgment be reduced from the sum of \$—— to the sum of \$——.

Dated this —— day of ——, 19——.

A. B., Plaintiff,
By X. Y., Attorney for Plaintiff.

⁴⁵ Chicago, R. I. & P. Ry. Co. v. Brandon, 95 P. 573, 77 Kan. 612.

⁴⁶ In re Jewell's Estate, 103 Kan. 381, 173 P. 923.

⁴⁷ Frick-Reid Supply Co. v. Aggers, 114 P. 622, 28 Okl. 425.

ORDER REDUCING JUDGMENT

(Caption.)

Now, on this ——— day of ———, 19—, it appearing to the court that this court having, on the ——— day of ———, 19—, made and entered its order on defendants' motion for a new trial, to the effect that a new trial in this action would be granted, unless plaintiff within twenty days from the entry of said order consent that the verdict and judgment herein be reduced from the sum of \$——, for which said judgment was heretofore rendered and entered, to the sum of \$——, in which event an order would be made denying said motion for a new trial, and it appearing that plaintiff, by a written consent filed in open court on the ——— day of ———, 19—, has agreed to said reduction of said verdict and judgment to said sum of \$——:

It is therefore by the court ordered, adjudged, and decreed that the verdict and judgment in the above entitled action heretofore entered for the sum of \$—— be and the same is hereby reduced to the sum of \$——; this order to be entered nunc pro tunc as of ———, 19—. ———, Judge.

§ 1526. Petition for new trial—Form

"Where the grounds for a new trial could not with reasonable diligence have been discovered before, but are discovered after the term at which the verdict or decision was rendered or made or report of the referee approved, or where the impossibility of making a case-made, without fault of the complaining party, arose after said term, the application may be made by petition filed in the original case, as in other cases, not later than the second term after such discovery or occurrence; on which a summons shall issue, be returnable and served, or publication made, as in the beginning of civil actions, or such service may be made on the attorney of record in the original case. The facts stated in the petition shall be considered as denied without answer, and if the service shall be complete in vacation, the case shall be heard and summarily decided at the ensuing term, and if in term, it shall be heard and decided after the expiration of twenty days from such service. The case shall be placed on the trial docket, and the witnesses shall be examined in open court, or their depositions taken as in other cases; but no

such petition shall be filed more than one year after the final judgment was rendered.”⁴⁸

This petition, when made, should be verified.⁴⁹

A demurrer to the petition for a new trial for newly discovered evidence raises the question whether it is cumulative, but not whether it would change the result, where it is material and competent.⁵⁰

A petition for a new trial is not proper, where there has been no issue of fact raised by the pleadings or determined by the verdict on a former trial, in the same court.⁵¹

The trial judge is authorized to consider evidence that such new trial would or would not probably produce a different result.⁵²

A general allegation in a petition for a new trial that diligence had been exercised, being a mere conclusion of law, is insufficient without a statement of the facts constituting such diligence.⁵³

A petition for a new trial, which alleged that the court adjourned for the term on the same day the decision was rendered, whereby plaintiff was prevented from filing a motion for a new trial within the term, does not state facts sufficient to warrant a new trial, since it does not aver that plaintiff's counsel was not present when the decision was rendered, or that he requested the court to remain in session until he could prepare and file a motion for a new trial.⁵⁴

An issue of fact which may be re-examined on a new trial arises only on material allegations in the petition filed before judgment, controverted by answer, on new matter in answer controverted in reply, or new matter in reply considered as denied without further pleading.⁵⁵

An action in equity cannot be maintained to vacate a judgment and grant a new trial because errors were committed in the course of the trial, and that an ineffectual attempt was made to have the

⁴⁸ Rev. Laws 1910, § 5037.

⁴⁹ *Wade v. Hope* (Okl.) 176 P. 402; *Moody v. Branham*, 27 P. 975, 47 Kan. 314.

⁵⁰ *Haughton v. Blison*, 113 P. 400, 84 Kan. 129.

⁵¹ *Chivers v. Board of Com'rs of Johnston County*, 62 Okl. 2, 161 P. 822, L. R. A. 1917B, 1296.

⁵² *Lookabaugh v. Bowmaker*, 122 P. 200, 30 Okl. 242.

⁵³ *McIntyre v. American Surety Co. of New York*, 156 P. 690, 97 Kan. 629.

⁵⁴ *Menger v. North British & Mercantile Ins. Co.*, 61 P. 874, 10 Kan. App. 575.

⁵⁵ *Chivers v. Board of Com'rs of Johnston County*, 62 Okl. 2, 161 P. 822, L. R. A. 1917B, 1296.

errors corrected in accordance with the requirements of the Code,⁵⁶ nor can it be maintained when based on matters arising out of the petitioner's own negligence.⁵⁷

PETITION FOR NEW TRIAL AFTER TERM

(Caption.)

Comes now the above named plaintiff, A. B., and respectfully represents and shows to the court:

1. That on the ——— day of ———, 19—, the same being one of the regular judicial days of the ——— term, 19—, of this court, judgment was rendered in the above entitled cause in favor of the defendant and against this plaintiff.

2. That thereafter, on the ——— day of ———, 19—, this plaintiff duly filed in said cause his motion for a new trial, and said motion was by the court overruled on the ——— day of ———, 19—, at the same term of said court, and plaintiff was given an extension of sixty (60) days in which to make and serve case-made.

3. That immediately thereafter and on or about the ——— day of ———, 19—, placed an order with E. F., the court stenographer of this court, who took the evidence on the trial of this cause, for a transcript of said evidence and case-made in this case.

4. That thereafter, on the ——— day of ———, 19—, while said E. F. was transcribing the evidence in said case, and before he had completed the same, said E. F. died.

5. That this plaintiff has endeavored to obtain the services of some other person to transcribe said evidence, but has been unable to find any one who is able to read the shorthand notes of said E. F., and for that reason has been unable to obtain a transcript of

⁵⁶ Publishing House of Evangelical Ass'n v. Heyl, 60 P. 317, 61 Kan. 634.

⁵⁷ When a party takes time in which to prepare and serve a case-made for the supreme court, and his attorneys, within the time allowed by the trial court, make and serve such case-made on the attorneys for the adverse party, and the case-made so served is lost, and no explanation is made in the petition for new trial as to how such loss occurred, other than "It was mislaid and lost without the fault of the party or his attorneys," and the petition for a new trial contains no allegation as to the time of such loss, but alleges that his attorneys neglected to have his case-made settled and signed by the trial judge within time, and neglected to appeal within time, such loss and the negligence of the party's own attorneys do not constitute such unavoidable casualty or misfortune as would prevent him from prosecuting or defending, or entitle him to maintain a suit for new trial. *Marshall v. Marshall*, 54 P. 461, 7 Okl. 240.

said evidence taken on said trial, or to obtain a full and complete case-made of this case for appeal to the Supreme Court of this state.

6. That the death of said E. F. occurred after the said ——— term, 19—, of said court had expired, and that this petitioner could not with reasonable diligence have discovered before that he would be unable to obtain a case-made in this case, and that he is without fault in the premises.

Wherefore your petitioner prays the court to set aside the judgment rendered in this case, and to award him a new trial herein, to the end that justice may be done.

X. Y., Attorney for Plaintiff.

(Verification.)

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CHAPTER XX

COSTS

Sections

- 1527-1534. Article I.—Security for costs.
- 1535-1551. Article II.—Taxation of Costs.
- 1552-1562. Article III.—Items taxable as costs.
- 1563-1571a. Article IV.—Collection and payment.
- 1572-1578. Article V.—Costs on appeal.

ARTICLE I

SURETY FOR COSTS

Sections

- 1527. In general—Statute.
- 1528. Bond—Form.
- 1529. Deposit.
- 1530. Pauper affidavit—Form.
- 1531. False swearing.
- 1532. Additional security.
- 1533. Failure to give security.
- 1534. Remedies against sureties—Form of motion.

§ 1527. In general—Statute

"In any civil action filed in any court, before the clerk shall be required to issue any summons or other process thereon, there shall be filed, or on behalf of the plaintiff, a bond with one or more good and sufficient sureties, at least one of whom shall be a resident of the county, or by some bonding company, conditioned that the plaintiff will pay all costs that may be adjudged against him, or in case the same cannot be collected from the defendant, if judgment be obtained against him that the plaintiff will pay the costs incurred by such plaintiff, provided, that in any case where the plaintiff has a just cause of action against the defendant, if by reason of his poverty he is unable to give security of costs, on affidavit of the plaintiff that such is the case, no bond or security shall be required. In probate actions the administrator or executor must pay the costs out of the first funds of the estate in his hands; and upon failure to do so shall be personally liable for such payment. In lieu of bond any party may deposit such sum as the clerk may deem sufficient

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from time to time, but in no case shall the party be requested to deposit more than ten dollars at any time: Provided, that no court clerk or deputy clerk shall issue any notice, summons, process or do any other act or incur other costs until he shall have funds in hand to pay all costs accruing by reason of same, and if ample costs are not on hand when the clerk is requested to issue such process or notice, he shall refuse to issue same or to do any act until funds have been deposited with him in such sum sufficient to pay all the costs accrued and which will accrue by reason of the act requested, unless bond for costs has been filed as provided herein: Provided, that nothing herein shall be construed to require a deposit for witness fees or mileage."¹

§ 1528. Bond—Form

A cost bond, in which, after naming the parties plaintiff and defendant, the obligors undertook to pay the costs upon substantially the conditions prescribed by the Code, is not invalid, though no obligee is named.²

A bond for costs is sufficient when subscribed by the obligors, though their names are not in the body of the obligation, and the bond is not invalid because the liability of the obligors is not fixed at a stipulated sum, where they bind themselves to pay all the costs as required by the statute.³

Where a clerk of the district court accepts and files a cost bond without objection and issues a summons, it will be deemed to be approved, in the absence of any evidence of disapproval.⁴

It is not necessary that a plaintiff join in an undertaking given as security for costs. The bond is not invalid because the clerk fails to require the sureties to justify as to their qualifications.⁵

In mandamus proceedings to compel a municipal corporation to levy a tax to pay a judgment against it, a bond for costs is not re-

¹ Sess. Laws 1917, p. 404, § 1, amending Rev. Laws 1910, § 5222, effective June 14, 1917.

² *Obertino v. Fidelity Coal Mining Co.*, 124 P. 172, 87 Kan. 297, Ann. Cas. 1913D, 573.

³ *Simpson v. Rice, Friedman & Markwell Co.*, 22 P. 1019, 43 Kan. 22.

⁴ *Obertino v. Fidelity Coal Mining Co.*, 124 P. 172, 87 Kan. 297, Ann. Cas. 1913D, 573.

⁵ *Simpson v. Rice, Friedman & Markwell Co.*, 22 P. 1019, 43 Kan. 22.

quired, when such a bond has already been given in the original action.⁶

A board of county commissioners, as plaintiff in a civil action, is not exempted from the statutory requirement of filing a cost bond, or making a deposit in lieu thereof.⁷

The statute requiring plaintiff to give security for costs before summons shall issue in any civil action in the district court, is not mandatory as to the time, and the court in the exercise of its discretion may allow plaintiff to give such bond after motion by defendant to quash the summons.⁸

COST BOND

(Caption.)

Know all men by these presents, that we, ———, as principal, and ———, ———, and ———, as sureties, are held and firmly bound unto the defendant and to the officers of this court for the payment of any and all costs which may accrue in this action in this court or any other court to which this cause may be carried, in case the same are adjudged against the plaintiff, or if said costs cannot be collected from said defendant, for the payment of which costs we do bind ourselves and each of us, our heirs, executors, administrators, and assigns, jointly and severally by these presents.

The condition of the above obligation is such that the above named principal and sureties are held and firmly bound for the payment of all costs herein in case the same are adjudged against them, or if the same cannot be collected from the defendant.

Now, if the conditions aforesaid shall well and truly be made, then this obligation shall become void; otherwise, to remain in full force and effect.

In witness whereof, we have hereunto subscribed our names this ——— day of ———, 19—.

—————, Principal.

—————, ———

—————, ———

(Qualification of sureties.)

⁶ Stevens v. Miller, 43 P. 439, 3 Kan. App. 192.

⁷ Stegman v. Abbe, 54 P. 917, 8 Kan. App. 860.

⁸ Fowler v. Fowler, 82 P. 923, 15 Okl. 529.

§ 1529. Deposit

A cash deposit may be made in the place of a bond, and this is the usual method followed by litigants.⁹

§ 1530. Pauper affidavit — Form

Sometimes an affidavit is filed that the plaintiff believes his cause is just and that by reason of his poverty he is unable to give security for costs. The pauper's affidavit provided for in the statute shall be in the form following, and attached to the petition, viz.:

"State of Oklahoma, ——— County. In the District Court of Said County. I do solemnly swear that the cause of action set forth in the petition hereto prefixed is just, and I do further swear that by reason of my poverty, I am unable to give security for costs."¹⁰

The statutory provisions, which dispense with giving security for costs where plaintiff, having a just cause of action, is shown by affidavit to be unable to give such security for costs, apply to infant plaintiffs as well as to adults,¹¹ and shall as well apply to a party suing in a representative capacity.¹²

A poverty affidavit in the form prescribed by statute, sworn to before a notary public and filed with the petition in the office of the clerk of the district court, is a substantial compliance with the statute providing for an affidavit "made before the clerk."¹³

Where plaintiff files a pauper's affidavit in lieu of cost deposit or bond, the court, on proper application and where it appears that plaintiff was able to make a deposit or give bond, may require him to do so within reasonable time, and, on his default, may dismiss action.¹⁴

⁹ Woods v. Bond, 116 P. 801, 29 Okl. 241; Carr v. Osterhout, 4 P. 318, 32 Kan. 277.

¹⁰ Rev. Laws 1910, § 5223.

¹¹ Missouri Pac. Ry. Co. v. Cooper, 45 P. 587, 57 Kan. 185.

¹² Cherokee & P. Coal & Mining Co. v. Britton, 45 P. 100, 3 Kan. App. 292.

¹³ City of Hiawatha v. Warren, 55 P. 484, 8 Kan. App. 209.

¹⁴ Fried v. First Nat. Bank (Okl.) 176 P. 909.

Code Civ. Proc. § 581, provides that no summons shall issue in any case in the district court until the plaintiff has given a bond for costs, provided that, when he shall make affidavit that he has a just cause of action, and is unable to give security by reason of his poverty, no bond shall be required. The Justice's Acts, § 185, provides that the provisions of the Code of Civil Procedure which are in their nature applicable, and in respect to which no special provision is made, shall be applicable to proceedings before justices of the peace. Section 186 provides that, when the plaintiff is a nonresident

Dismissal of action on failure of plaintiff to comply with order for additional security for costs is within the discretion of the trial court, notwithstanding affidavit of poverty by plaintiff.¹⁵

Where both parties appear, and announce "Ready for trial," and both introduced evidence, and a verdict is rendered in favor of plaintiff, the rulings with reference to the form of the poverty affidavit will not be reviewed.¹⁶

There is no error in permitting plaintiff to file an amended poverty affidavit, under the Code, when his attention is called to the fact that the affidavit filed at the commencement of the case does not comply with the statutory requirements.¹⁷

of the county, the justice shall, and, in other cases, he may, require the plaintiff to give security for costs. Held, that section 581 applied to justices' courts, and that, where the plaintiff made the affidavit required thereby, the justice could not demand security for costs. *Barnett v. Lark*, 25 P. 869, 45 Kan. 428.

¹⁵ *Gieseke v. Walthall*, 123 P. 716, 87 Kan. 84.

The plaintiff, who procured service of summons by publication, failed to file a cost bond, but filed a poverty affidavit, as authorized to do under Comp. Laws 1879, § 4113, sworn to before a justice of the peace. The defendant moved to set aside the service, because the poverty affidavit was not "made before the clerk," as required by the statute, which motion was overruled; and the court at the same time "further ordered that said defendant have leave to renew said motion, unless a sufficient affidavit of poverty is filed by plaintiff herein on or before January 21, 1885." Before January 21, 1885, the plaintiff filed a sufficient poverty affidavit; and the court assumed jurisdiction of the case, and rendered judgment therein. Held, that no error, on account of insufficiency in the poverty affidavits, was committed. *Cole v. Hoeburg*, 13 P. 275, 36 Kan. 263.

After plaintiff had given security for costs as required by Civ. Code, § 581, he was required by the court to give a further bond, the first bond being insufficient to cover the accumulated costs. Plaintiff then deposited \$15 with the clerk, under a proviso of section 581 that a resident plaintiff may deposit \$15, "which sum shall be in lieu of all security for costs as herein and otherwise provided." Afterwards plaintiff made the affidavit of poverty under another proviso of section 581, which is that in any case where plaintiff, having a just cause of action against defendant, by reason of his poverty, is unable to give such security for costs, on affidavit of plaintiff made before the clerk that such is the fact, no bond shall be required. Held, that plaintiff could not be required to give additional security. *Hardesty v. Ball*, 26 P. 959, 46 Kan. 555.

¹⁶ *Dennis v. Benfer*, 38 P. 806, 54 Kan. 527.

¹⁷ *City of Atchison v. Riggle*, 49 P. 618, 6 Kan. App. 5.

§ 1531. — False swearing

Any person willfully swearing falsely in making the pauper affidavit "shall, on conviction, be adjudged guilty of perjury, and punished as the law prescribes."¹⁸

§ 1532. Additional security

"In an action in which security for costs has been given, the defendant may, at any time before judgment, after reasonable notice to the plaintiff, move the court for additional security on the part of the plaintiff; and if, on such motion, the court be satisfied that the surety has removed from this state, or is not sufficient, the action may be dismissed, unless, in a reasonable time, to be fixed by the court, sufficient security be given by the plaintiff."¹⁹

Where a party attempts to comply with the law in giving a cost bond, the cause should not be dismissed for defects therein until the party is given an opportunity to give proper security.²⁰

A plaintiff may, by showing his inability, through poverty, to comply with the rule requiring him to give additional security for costs, excuse himself therefrom, and it is not error for the court in such case to relieve him from a compliance with the rule and permit him to proceed in the cause.²¹

Where plaintiff brought an action for the benefit of certain parties on an indemnity bond given plaintiff as constable in attachment proceedings and was permitted to amend the petition to allege a cause of action in his own name, it was not necessary for him to file a new cost bond and procure a new summons.²²

¹⁸ Rev. Laws 1910, § 5224.

¹⁹ Rev. Laws 1910, § 5225.

²⁰ *Obertino v. Fidelity Coal Mining Co.*, 124 P. 172, 87 Kan. 297, Ann. Cas. 1913D, 573.

²¹ *Huey v. Brimer*, 58 P. 485, 9 Kan. App. 149; *Gieseke v. Walthall*, 123 P. 716, 87 Kan. 84.

Code Civ. Proc. § 584, investing a district court with power in its discretion to dismiss an action on failure of plaintiff to comply with an order for additional security, should be considered in connection with the other provisions of the Code exempting persons unable, by reason of poverty, to give security from any such requirement, and it is an abuse of discretion to dismiss the case where because of such poverty the security could not be given. *Stevens v. Sheriff*, 90 P. 799, 76 Kan. 124, 11 L. R. A. (N. S.) 1153; *Same v. City of Anthony*, 90 P. 800, 77 Kan. 839.

²² *Armour Packing Co. v. Orrick*, 46 P. 573, 4 Okl. 661.

§ 1533. Failure to give security

A lawyer prosecuting an action for a contingent fee is under no legal or moral obligation to give security for costs, when the client is ordered so to do and is unable to comply with the order, and the action should not be dismissed for the inability of the client to comply with the order or by reason of the neglect of his attorney so to do.²³

Where plaintiff sues under the district court procedure and fails to give security for costs before the summons issues, the remedy of the defendant is by special appearance and motion to quash the summons, and not by motion to dismiss.²⁴

§ 1534. Remedies against sureties —Form of motion

"After final judgment has been rendered in an action in which security for costs has been given, as required by this article, the court, on motion of the defendant, or any other person having a right to such costs, or any part thereof, after ten days' notice of such motion, may enter up judgment in the name of the defendant or his legal representatives, against the surety for costs, his executors or administrators, for the amount of costs adjudged against the plaintiff, or so much thereof as may be unpaid. Execution may be issued on such judgment as in other cases, for the use and benefit of the persons entitled to such costs."²⁵

Where an execution is issued reciting a judgment in favor of the plaintiff for so much costs, and on this execution a sale is made to a stranger to the action, his title will not be defeated by the mere fact that the journal entry of the judgment fails to state the amount of costs taxed. In the absence of the appearance and judgment dockets, it will be presumed that the costs were properly taxed on them, and that the amount stated in the execution is correct.²⁶

Judgment may be entered against sureties on a cost bond on motion by any person having a right to any part of the costs.²⁷

²³ *Stevens v. Sheriff*, 90 P. 799, 76 Kan. 124, 11 L. R. A. (N. S.) 1153; *Same v. City of Anthony*, 77 Kan. 839, 90 P. 800.

²⁴ *Fowler v. Fowler*, 82 P. 923, 15 Okl. 529.

²⁵ Rev. Laws 1910, § 5226.

²⁶ *Merwin v. Hawker*, 1 P. 640, 31 Kan. 222.

²⁷ *Dabney v. Comes*, 131 P. 150, 89 Kan. 299.

In an action on the cost bond, where plaintiff alleged that the penalty of the bond as executed was \$2,500, and asked a recovery in that sum, and it

MOTION FOR JUDGMENT AGAINST SURETIES FOR COSTS

(Caption.)

Comes now the above named defendant, C. D., and shows to the court that at the commencement of this action, the said plaintiff, A. B., filed herein his bond for costs, with G. H. and M. N. as sureties; that on the _____ day of _____, 19—, judgment was entered for this defendant in said cause, and said defendant was awarded costs herein in the sum of \$——.

Wherefore said defendant moves the court to make and enter an order and judgment herein in the name of this defendant, C. D., and against the plaintiff, A. B., and against said sureties, G. H. and M. N., for said sum of \$——, and that execution may be issued thereon.

X. Y., Attorney for Defendant.

appeared on the trial that the bond as executed was in the penal sum of \$1,500 only, no recovery could be had without an amendment of the declaration so as to make it correctly describe the bond, though the alteration was made by a stranger without plaintiff's knowledge. Chicago, K. & W. R. Co. v. Evans (Kan. Sup.) 46 P. 303, 57 Kan. 286.

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ARTICLE II

TAXATION OF COSTS

Sections

- 1535. Right to award.
- 1536. Costs taxed by clerk.
- 1537. Costs where defendant disclaims.
- 1538. Costs go with judgment.
- 1539. Prevailing party.
- 1540. Costs that may be taxed at discretion of court.
- 1541. On motions.
- 1542. Quo warrant.
- 1543. Defendant.
- 1544. Apportionment.
- 1545. Waiver.
- 1546. On joint liability.
- 1547. Effect of tender or offer to confess judgment.
- 1548. Settlement, stipulation and abatement.
- 1549. Costs—Corporations—Involuntary dissolution.
- 1550. Liability of representative.
- 1551. Costs on interplea.

§ 1535. Right to award

Before costs are awarded, some warrant therefor must be found in the statute.²⁸

Attorney's fees may be allowed without proof of the value of the services, where they were rendered in presence of court.²⁹

The act of the court in retaxing certain costs, while correcting the journal entry to make it speak the truth, is not error.³⁰

When an order taxing costs on account of witnesses from another county is made in the absence of a party affected, his remedy, if aggrieved, is by motion to retax.³¹

The state or a county is only liable for costs when such liability is expressly created by statute.³²

§ 1536. — Costs taxed by clerk

"The several clerks of the district court shall tax the costs in each case, and insert the same in their respective judgments, subject to retaxation by the court, on motion of any person interested."³³

²⁸ Warner v. Warner, 112 P. 97, 83 Kan. 548.

²⁹ State v. Glass, 160 P. 1145, 99 Kan. 159.

³⁰ Locke v. Cope, 146 P. 416, 94 Kan. 137.

³¹ Wallingford Bros. v. McCray, 165 P. 813, 101 Kan. 146.

³² Board of County Com'rs of Greer County v. Watson, 54 P. 441, 7 Okl. 174.

³³ Rev. Laws 1910, § 5234.

§ 1537. Costs where defendant disclaims

"Where defendants disclaim having any title or interest in land or other property, the subject matter of the action, they shall recover their costs, unless for special reasons the court decide otherwise."³⁴

§ 1538. Costs go with judgment

"Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of money only, or for the recovery of specific, real or personal property."³⁵

In an action to recover money only, it is error to give judgment against defendant for costs unless judgment be rendered for plaintiff in some amount.³⁶

Plaintiff in an action for possession under a chattel mortgage, who obtains a judgment reduced by the allowance of defendant's counterclaim, is the prevailing party, and is entitled to a judgment for costs.³⁷

In an action for the recovery of 26 acres of real property, in which judgment is rendered in favor of plaintiff for two acres thereof, plaintiff is entitled to recover all his costs.³⁸

Where a note secured by a mortgage is allowed in the county court, against the estate of the maker, and the land described in the mortgage is sold, and out of the proceeds the administrator pays the note in full, with interest, the holder cannot recover costs in an action in the district court on the note and mortgage commenced after he had made application in the probate court to sell the land.³⁹

Where a creditor of a corporation proceeds against a stockholder under the statute making the stockholder liable to creditors for the full amount of his stock, and the stockholder contests his liability, it is not error to tax the costs of the proceeding against him when the contest is decided against him.⁴⁰

³⁴ Rev. Laws 1910, § 5227.

³⁵ Rev. Laws 1910, § 5229.

³⁶ *Ranson v. Capron Hardware Co.*, 56 Okl. 278, 155 P. 1168.

³⁷ *Bank of Buffalo v. Crouch* (Okl.) 174 P. 764.

³⁸ *Meskimen v. Day*, 10 P. 14, 35 Kan. 46.

³⁹ *Graham v. Graham*, 17 P. 152, 38 Kan. 440.

⁴⁰ *Abbey v. Long*, 24 P. 1111, 44 Kan. 688.

Plaintiff in ejectment, who obtains judgment for possession, is also entitled to his costs.⁴¹

§ 1539. Prevailing party

The prevailing party is entitled to all his costs, although the jury attempt to divide the same equally between the parties.⁴²

§ 1540. Costs that may be taxed at discretion of court

"Unless otherwise provided by statute, the costs of motions, continuances, amendments and the like, shall be taxed and paid as the court, in its discretion, may direct."⁴³

§ 1541. On motions

Where a judgment debtor's motion to expunge the record of the judgment as false was sustained, the court had no discretion to tax the cost of the motion upon him.⁴⁴

It was an abuse of discretion to tax against defendants the costs of a continuance granted at plaintiff's request and for his benefit.⁴⁵

Where an administrator fails in a suit brought by him at the procurement of a nominal defendant for such defendant's benefit and not for the benefit of the estate, the costs should be taxed against such defendant.⁴⁶

Where, on trial of an interplea in attachment, the jury found for interpleader in effect that the property attached was covered by his mortgage, that neither plaintiffs nor the sheriff, before levying the writ, had paid or tendered to him the amount of the debt and interest thereby secured, as provided by the statute providing that, before mortgaged chattels are taken under attachment, the officer or attaching creditor must pay or tender to the mortgagee the amount of the mortgage debt and interest, or must deposit the amount thereof with the county treasurer, payable to the mortgagee's order, and that, if the attachment be defeated or fails and the deposit has been made, the person procuring levy of the attachment shall be subrogated to all rights of the mortgagee to the property, the court

⁴¹ *MaHarry v. Eatman*, 116 P. 935, 29 Okl. 46.

⁴² *Nation v. Littler*, 52 P. 96, 59 Kan. 773.

⁴³ *Rev. Laws 1910*, § 5228.

⁴⁴ *Nesbitt v. Chesebro*, 133 P. 545, 89 Kan. 863, judgment modified on rehearing 136 P. 793, 91 Kan. 14.

⁴⁵ *Atchison, T. & S. F. R. Co. v. Huitt*, 41 P. 1051, 1 Kan. App. 788.

⁴⁶ *Scott v. Pittman*, 132 P. 491, 37 Okl. 470.

should sua sponte, dissolve the attachment, order the property returned, and tax plaintiffs with the cost of the attachment and of the interplea.⁴⁷

§ 1542. Quo warranto

In quo warranto to try title to an office, the relator, having a right to bring the action, and having been the successful party in an election contest suit between the same parties, is entitled to a judgment for costs.⁴⁸

§ 1543. Defendant

"Costs shall be allowed of course to any defendant, upon a judgment in his favor, in the actions mentioned in the last section."⁴⁹

Where the United States is plaintiff in an action, and defendant has filed a set-off, no judgment can be rendered against the government for any costs.⁵⁰

§ 1544. Apportionment

"In other actions, the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable."⁵¹

In an action for an accounting, the court has discretionary power to apportion the costs as it may think right.⁵²

Where in cross-actions each party is defeated in respect to his own cause of action, each should pay costs.⁵³

Where separate suits are instituted against joint wrongdoers, and the judgment recovered in one is paid, plaintiff is entitled to the costs which had accrued in all of the cases up to the time when the satisfaction was made, but defendants are entitled to the costs that they may subsequently accrue in the other cases.⁵⁴

Costs in an action for libel may be divided where a set-off for libel

⁴⁷ *Dodder v. Moberly*, 114 P. 714, 28 Okl. 334.

⁴⁸ *Moss v. Patterson*, 20 P. 457, 40 Kan. 726; *Peter v. Blue*, 20 P. 852, 40 Kan. 727.

⁴⁹ Rev. Laws 1910, § 5230.

⁵⁰ *United States v. Warren*, 71 P. 685, 12 Okl. 350.

⁵¹ Rev. Laws 1910, § 5231.

⁵² *Walker v. Walker*, 88 P. 1127, 17 Okl. 467.

In action for accounting between partners taxation of costs lies within discretion of court. *McGillvray v. Moser*, 43 Kan. 219, 23 P. 96.

⁵³ *Finneran v. Coursey*, 2 P. 554, 31 Kan. 408.

⁵⁴ *Westbrook v. Mize*, 10 P. 881, 35 Kan. 299.

is pleaded and proved, and judgment is not rendered in favor of either party.⁵⁵

§ 1545. Waiver

In the absence of statute or rule, the right to have expenses incurred taxed as costs is waived if not asserted until after judgment has been satisfied, when no excuse is shown.⁵⁶

In an action to set aside a deed on the ground of fraud, where the record does not show affirmatively that there was a valid excuse for a failure to tender the consideration paid, a decree taxing the costs to plaintiff will not be disturbed.⁵⁷

In a suit to enjoin a nuisance, the statute confers discretionary power on the court in the matter of taxing costs.⁵⁸

§ 1546. On joint liability

"Where several actions are brought on one bill of exchange, promissory note or other obligation, or instrument in writing, against several parties who might have been joined as defendants in the same action, no costs shall be recovered by the plaintiff in more than one of such actions, if the parties proceeded against in the other actions were, at the commencement of the previous action, openly within the state."⁵⁹

§ 1547. Effect of tender or offer to confess judgment

"After an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action; whereupon, if the plaintiff being present, refuse to accept such confession of judgment in full of his demands against the defendant in the action, or having had such notice that the offer would be made, of its amount, and of the time of making it, as the court shall deem reasonable, fail to attend, and on the trial do not recover more than was so offered to be confessed, such plaintiff shall pay all the costs of the defendant incurred after the offer. The offer shall not be deemed to be an admission of the cause of action, or the amount

⁵⁵ *Kozel v. Kozel*, 104 Kan. 530, 180 P. 278.

⁵⁶ *Missouri, K. & T. Ry. Co. v. Jenkins*, 101 P. 630, 79 Kan. 698.

⁵⁷ *Dunbar v. Severance*, 31 P. 1055, 50 Kan. 395.

⁵⁸ *Patten v. Ramsey*, 31 Okl. 166, 120 P. 643.

⁵⁹ *Rev. Laws 1910*, § 5232.

to which the plaintiff is entitled, nor be given in evidence upon the trial." ⁶⁰

Where pending suit plaintiff accepts a sum not as a settlement but only as a tender, and this is found to be the amount actually due, defendant is liable only for costs accruing prior to the tender. ⁶¹ However, tender by defendant at the trial or after action is commenced, does not affect plaintiff's right to costs accrued prior thereto. ⁶²

An offer of judgment by defendant, unaccompanied by a tender does not relieve him from costs. ⁶³

⁶⁰ Rev. Laws 1910, § 5306.

Defendant filed in the case with the clerk of the court an offer, in writing, to confess judgment for \$213.01, and for costs of suit to date, and immediately thereafter presented the offer to plaintiff's attorneys, who, in writing and for plaintiff, declined the offer. On the trial plaintiff recovered a judgment for only \$180 and costs. All costs accruing after the offer was presented to plaintiff's attorneys should be assessed and taxed against plaintiff. *Wichita & W. R. Co. v. Beebe*, 17 P. 154, 38 Kan. 427.

Where the statute provides that defendant in an action for the recovery of money only may at any time before the trial serve on plaintiff an offer to allow judgment to be taken for the sum specified therein, held, that defendant in an action for damages arising in tort may, in his answer, offer to confess judgment for a specified sum; and, if judgment be not recovered for a larger amount, a judgment for costs of the action which accrued after the filing of the answer should be rendered against plaintiff. But all costs made before the filing of the answer should be taxed against defendant. *Kaw Valley Fair Ass'n v. Miller*, 42 Kan. 20, 21 P. 794.

An action was brought before a justice on one claim for \$30 and one for \$195. Defendant on August 9, 1907, admitted liability for \$30, paid the money into court, and pleaded payment as to the other item. Judgment for plaintiff, and, on appeal, plaintiff was defeated. The jury returned a verdict for \$30 and interest, which amounted to less than five cents, and was not included in the payment. The court taxed the costs prior to the tender to defendant and the remainder to plaintiff. Held not error. *Kerr v. Coberly*, 105 P. 520, 81 Kan. 376.

⁶¹ *Ranson v. Capron Hardware Co.*, 56 Okl. 278, 155 P. 1166.

⁶² *Talla v. Anderson*, 53 Okl. 418, 156 P. 670.

Where plaintiff's recovery in an action of account is no greater than the amount tendered and paid into court by defendant, a judgment against plaintiff for all costs accrued subsequent to the tender is proper. *Elder v. Elder*, 23 P. 600, 43 Kan. 514; *First Nat. Bank of Soper v. Beecher*, 62 Okl. 36, 161 P. 327.

Under the facts stated, held, that defendant was at least liable for the costs up to the time it answered in justice's court, where its offer to confess judgment was on condition that it be absolved from all costs. *Missouri, K. & T. Ry. Co. v. Housley*, 46 Okl. 216, 148 P. 689.

⁶³ *King v. Harrison*, 4 P. 93, 32 Kan. 215.

Defendant is not entitled to judgment for costs by reason of plaintiff's recovery of a less sum than that which defendant had tendered him, where it is not shown that the tender was ever brought to the knowledge of the court, or was kept good, or that defendant ever offered to confess judgment for that or any other sum.⁶⁴

Where the amount recovered by plaintiff was considerably more than the amount for which defendant offered to confess judgment, after the action was begun, it was not error to refuse to divide the costs.⁶⁵

By the provisions of the statute, where a defendant before trial files with the court and serves opposing counsel with notice of an offer to compromise and allow judgment to be entered for a less sum than that claimed by the plaintiff, and said offer is not accepted, and the plaintiff fails to obtain judgment for more than was offered by the defendant, he shall pay the defendant's costs from the time of the offer. And as a general rule the defendant will not be permitted to throw the plaintiff into the costs by proof of an offset purchased after the time of the offer to compromise, or by making payments after such offer. But where the demand sued on is the primary debt of another, and the plaintiff sues as assignee of the

⁶⁴ *Saum v. La Shell*, 25 P. 561, 45 Kan. 205.

On appeal from an award of commissioners to condemn a right of way for a railroad, the company offered in writing "to allow judgment to be taken against it for \$206.25, with accrued costs." Without withdrawing this offer, it subsequently offered to allow judgment to be taken for a larger sum, with accrued costs. Three successive verdicts for amounts larger than the first offer were set aside. The fourth verdict was for a smaller sum. Civ. Code, § 528, provides that "in an action for the recovery of money," defendant may offer to confess judgment, and, if plaintiff refuses to accept such confession in full satisfaction of his demand, and does not recover more than was offered, plaintiff shall pay all costs incurred after the offer. Held that, though the proceeding was not within the letter of the statute, it was within its spirit and intent, and the landowner must pay all costs incurred by the railroad company after the first offer to confess judgment. *Chicago, I. & K. R. Co. v. Townsden*, 28 P. 427, 45 Kan. 771.

In an action for the recovery of money, where defendant desires to confess judgment for a sum less than the amount claimed, for the purpose of saving costs, if plaintiff, on the trial, fail to recover judgment for a sum larger than the amount offered, he must give plaintiff notice of his intended offer, the time when he proposes to make it, and of the amount thereof, or he must call the attention of the court to the offer when plaintiff is present in court. *Van Bentham v. Commissioners of Osage County*, 49 Kan. 30, 30 P. 111.

⁶⁵ *Matheney v. City of El Dorado*, 109 P. 166, 82 Kan. 720, 28 L. R. A. (N. S.) 980.

account without having become the owner of the entire account, and the person primarily liable pays off part of the account to the person originally entitled to it, and before the plaintiff had made payment to such person, such plaintiff is in no position to claim any exemption from the rule prescribed for taxing costs.⁶⁶

§ 1548. Settlement, stipulation and abatement

In the absence of a stipulation to the contrary, where in a pending suit, plaintiff accepts a certain sum as a settlement, he is liable for all costs, including those accruing before the settlement.⁶⁷

Where parties stipulate for the settlement of an action, providing that each shall pay his own costs, the court does not thereby lose jurisdiction, but may return the same, and tax costs and render judgment in accordance with the stipulations.⁶⁸

Where an action abates because of the death of the defendant, the court should "order the action to be dismissed at the costs of the plaintiff."⁶⁹

§ 1549. Costs—Corporations—Involuntary dissolution

If judgment be rendered in an action for involuntary dissolution "against a corporation, or against a person claiming to be a corporation, the court may cause the costs therein to be collected by execution against the person claiming to be a corporation, or against the directors or other officers of such corporation."⁷⁰

§ 1550. Liability of representative

"When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceedings in which the costs were taxed was prosecuted or defended without just cause."⁷¹

"Whenever any claim is presented to an executor or administrator, or to the judge of the county court, and he is willing to allow the same in part, he must state in his endorsement the amount he is willing to allow. If the creditor refuse to accept the amount

⁶⁶ Colcord v. Conger, 62 P. 276, 10 Okl. 458.

⁶⁷ Ranson v. Capron Hardware Co., 56 Okl. 278, 155 P. 1166.

⁶⁸ Interstate Crude Oil Co. v. Young, 118 P. 257, 29 Okl. 465.

⁶⁹ New Hampshire Banking Co. v. Ball, 48 P. 137, 57 Kan. 812.

⁷⁰ Rev. Laws 1910, § 1275.

⁷¹ Rev. Laws 1910, § 6355.

allowed in satisfaction of his claim, he shall recover no costs in an action therefor, brought against the executor or administrator, unless he recovers a greater amount than that offered to be allowed." ⁷²

§ 1551. Costs on interplea

"In all cases of interpleader, costs may be adjudged for or against either party, as in ordinary cases." ⁷³

ARTICLE III

ITEMS TAXABLE AS COSTS

Sections

- 1552. Attorney's fees.
- 1553. Stenographer's fees.
- 1554. Receivership.
- 1555. Fees for legal publication—Taxed as costs.
- 1556. Contempt proceedings.
- 1557. Jurors.
- 1558. Witnesses.
- 1559. Guardian.
- 1560. Court clerks—Fees.
- 1561. Sheriffs and constables—Fees.
- 1562. County judge—Fees.

§ 1552. Attorney's fees

"In an action brought to enforce any lien, the party for whom judgment is rendered shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in the action." ⁷⁴

This liability may be escaped by payment or tender at any time before suit. ⁷⁵

⁷² Rev. Laws 1910, § 9349.

⁷³ Rev. Laws 1910, § 4702.

⁷⁴ Rev. Laws 1910, § 3877.

⁷⁵ Where tax bill issued by municipality in payment of street improvement recited that it should include reasonable attorney's fees and other costs of collection, and that on default holder might mature deferred payments and at once sue for entire principal, attorney's fees, etc., where owner offered to pay defaulted installment, interest, and penalty, holder could not demand payment of attorney's fee. The owner of property subject to tax bill issued in payment of street improvement and including reasonable attorney's fee and permitting holder on default to mature default payments and at once sue for entire principal may escape liability for attorney's fees by paying de-

Where the petition asks an allowance of a reasonable attorney's fee, and the answer asks for a reasonable attorney's fee in the same sum, the pleadings make no issue as to an attorney's fee, and the court may allow a reasonable attorney's fee to the prevailing party, not exceeding the amount so agreed upon, and tax it as costs and fix the amount thereof without further evidence.⁷⁶

In action to foreclose a lien on stock given as collateral to secure a note, the court may award the successful party an attorney's fee to be taxed as costs, but cannot make such an award without evidence as to the amount of the fee.⁷⁷

In all cases where an action is brought by any person to recover the penalty prescribed for usury, the prevailing party "shall be entitled to recover, as part of the costs, a judgment against the other party to such action for a reasonable attorney's fee in a sum not less than ten dollars, to be fixed by the court, for the use and benefit of the attorney of record of the prevailing party, together with all costs."⁷⁸

In the absence of a statute allowing it a successful plaintiff is not entitled to recover his attorney's fee even in an action for damages on account of the defendant's fraud or malicious misconduct.⁷⁹

Where an attorney's fee is provided in a note, and the jury fail to allow it, the trial court should do so by including the amount of the fee in the judgment proper or taxing it as costs.⁸⁰

Where the note provides for 10 per cent. additional as attorney's fee and the court did not submit question of attorney's fee to the jury, it was not error, in rendering judgment, to add 10 per cent. to the verdict.⁸¹

An agreement in a note to pay costs of collection authorizes recovery of a reasonable attorney's fee.⁸²

faulted installment, accrued interest, and delinquent penalty at any time before suit. *Kreager v. McCormick* (Okla.) 182 P. 78.

⁷⁶ *Neves v. Mills* (Okla.) 176 P. 509.

⁷⁷ *Holland Banking Co. v. Dicks* (Okla.) 170 P. 253.

⁷⁸ Rev. Laws 1910, § 1006.

⁷⁹ *Evans v. Central Life Ins. Co.*, 125 P. 86, 87 Kan. 641, 41 L. R. A. (N. S.) 1130.

⁸⁰ *Kerr v. McKinney* (Okla.) 170 P. 635.

⁸¹ *Futoransky v. Pope*, 57 Okla. 755, 157 P. 905, L. R. A. 1916F, 548.

⁸² *Letcher v. Wrightsman*, 60 Okla. 14, 158 P. 1152.

§ 1553. Stenographer's fees

"In all civil actions in the district court, superior court or the county court in which issue is joined and testimony taken, there shall be taxed as costs in the case the sum of two (\$2.00) dollars as stenographer's fee; also, if a jury be demanded there shall be taxed in the district and superior court the sum of five (\$5.00) dollars and in the county court three (\$3.00) dollars, as a jury fee, which shall by the clerk be collected and placed in the court fund of the county; provided that such jury fee shall not be entered on the docket until final judgment is rendered in such cause."⁸³

Stenographer's costs, as such, are not part of the costs provided for in a trial by referee under the statute. They are to be considered, if at all, as a part of such compensation as the court shall direct to be paid to the referee.⁸⁴

"A folio shall consist of one hundred words and two figures shall be counted as one word."⁸⁵

§ 1554. Receivership

A court has no authority, upon dismissing an action wherein a receiver has been appointed, to tax, as costs against plaintiffs, expenses of running the business placed in the receiver's hands, or for clerk hire, rent, or for any unpaid allowance to the receiver. These items must be recovered, if at all, in an action for that purpose.⁸⁶ But where on final hearing the court decrees that plaintiff take nothing, that the appointment of a receiver was wrongful, that he be discharged, and the property restored to defendant, it was not error to tax plaintiff with the costs of the receivership.⁸⁷

§ 1555. Fees for legal publication—Taxed as costs

"Fees for printing legal notices in all cases where publication of legal notices is required or allowed by law, the person or officer desiring such publication shall be required to pay one dollar (\$1.00) per square ten (10) lines of nonpareil type for the first insertion; each subsequent insertion, for each square of ten (10) lines, sev-

⁸³ Sess. Laws 1915, p. 638, § 1, amending Rev. Laws 1910, § 5233, effective June 22, 1915.

⁸⁴ Cummins v. Robinson, 2 Okl. 494, 37 P. 1064.

⁸⁵ Rev. Laws 1910, § 3248.

⁸⁶ Walton v. Williams, 49 P. 1022, 5 Okl. 642.

⁸⁷ Bellamy v. Washita Val. Tel. Co., 105 P. 340, 25 Okl. 18.

enty-five cents (\$0.75). Each legal advertisement under ten (10) lines shall be deemed a square and each fractional part of a square shall be counted as a full square. For publishing lists of lands upon which taxes are delinquent, each description, twenty-five cents (\$0.25). For publishing lists of town lots on which taxes are delinquent, each description, fifteen cents (\$0.15)."⁸⁸

"Whenever any notice or other legal publication is required by law to be made in any action or proceeding pending in any court of this state, the cost of such publication shall be taxed as other costs in said action or proceeding."⁸⁹

§ 1556. Contempt proceedings

"In all cases where fines or judgments are assessed against an offending corporation, person or firm for the violation of any order or requirement of the commission * * * judgment shall be rendered against the defendant for all costs, which shall include the following: Witness fees at one dollar fifty cents per day, with necessary mileage at five cents per mile, to and from the place of hearing to the residence of the witnesses; the fees of the marshal to the commission, the same as now allowed to sheriffs for like services in this state; ten dollars docket fee, including all fees for filing and certifying papers and documents, except necessary fee for transcribing the record, ten cents for each folio of one hundred words; and in the Supreme Court, the same fees as are charged in cases appealed from the district courts of this state to the Supreme Court."⁹⁰

§ 1557. Jurors

"Jurors shall be paid the following fees out of the county treasury: For each day's attendance before any court of record two dollars; for each mile necessarily traveled in going to or returning from the place of attendance five cents; each juror or witness sworn before any coroner or justice of the peace, on any inquest taken by him, one dollar and fifty cents; each juror, for attendance in any justice of the peace court, to be advanced by the party demanding the same, at the time of such demand, and taxed to the party ad-

⁸⁸ Sess. Laws 1919, c. 167, amending Rev. Laws 1910, § 3258.

⁸⁹ Sess. Laws 1913, p. 15, § 1, effective June 16, 1913.

⁹⁰ Rev. Laws 1910, § 1200.

judged to pay the costs, fifty cents; and fifty cents for each additional day he shall attend the same.”⁹¹

§ 1558. Witnesses

“Witnesses shall receive the following fees: For attending before any court, or before any judge or commissioner, per day, one dollar; for each mile actually and necessarily traveled in going to and returning from the place of attendance, five cents: Provided, that no mileage shall be allowed where the distance is less than one mile. No witness shall receive per diem or mileage in more than one case covering the same period of time, or the same travel, and each witness shall be required to make oath that the fees claimed have not been claimed or received in any other case, and no juror shall receive pay as a witness while serving as such juror.”⁹²

Since witnesses cannot be obliged to attend except by subpoena of their own district court, within their own county, a subpoena to the sheriff from the court of another county is a nullity, and neither the mileage of the witnesses nor the sheriff’s charges for serving them can be taxed as costs.⁹³

§ 1559. Guardian

“The guardian, or next friend, is liable for the costs of the action brought by him, and, when he is insolvent, the court may require security for them. Either may be a witness in an action brought by him.”⁹⁴

The statute authorizing an allowance of costs does not authorize the taxing of fees for guardians ad litem for the prevailing party.⁹⁵

§ 1560. Court clerks—Fees

“The clerk of the district court, the clerk of the superior court and the clerk of the county court shall charge and collect the following fees for services by them respectively rendered and none others:

⁹¹ Rev. Laws 1910, § 3236.

⁹² Rev. Laws 1910, § 3231.

⁹³ *Mylius v. St. Louis, Ft. S. & W. R. Co.*, 1 P. 619, 31 Kan. 232.

⁹⁴ Rev. Laws 1910, § 4687.

⁹⁵ *Warner v. Warner*, 112 P. 97, 83 Kan. 548; *Prest v. Black*, 66 P. 1017, 63 Kan. 682.

Docket fees in each case, which shall include the entry of the cause upon the appearance docket, indexing, statement of costs and all entries upon the trial docket.....	\$2.00
Filing each paper, each transcript being considered one paper10
Each entry of order, rule, motion, decree, return or verdict upon the appearance docket.....	.10
Swearing jurors and witnesses to attendance and issuing certificate including seal.....	.10
Issuing warrants of arrest.....	1.00
Issuing attachment writ.....	1.00
Issuing replevin writ.....	1.00
Issuing execution or order of sale.....	1.00
Issuing subpœna, including all names on one præcipe....	.25
Issuing summons.....	.75
Issuing regular venire for jury.....	.50
Issuing open venire for jury.....	.25
Entering daily attendance of jurors and witnesses, each...	.05
Approving bond or undertaking, including certificate and seal	1.00
Administering oath to each person in open court.....	.05
Swearing jury to try cause.....	.50
Commission to take deposition.....	.50
Docketing judgment.....	.25
Each entry of satisfaction on judgment docket.....	.10
Recording any instrument of record, per folio.....	.10
Making copy of any instrument of record or on file, per folio10
Certifying to any instrument, record or proceeding, including seal.....	.25
Writing records of proceedings, per folio.....	.10
Drawing list from jury box and recording the same, for each name.....	.05
Issuing summons to sheriff to draw jury.....	.25
Issuing commitment in felony case committed to penitentiary, including certified copies.....	1.00
Issuing commitment in any other case, including certified copies50

(1498)

Issuing release for prisoner, including certified copies...	\$.50
Issuing any order, writ or process not otherwise provided for, per folio.....	.10
Taking acknowledgment of deed, mortgage or other instrument, including seal.....	.35
Filing, docketing and indexing mechanic's, laborer's, or materialman's lien.....	.50
Receiving and paying out money in pursuance to law, or order of court.....	1%
For notice to any party of setting of case.....	.10
For drawing any bond or other instrument, per folio.....	.10
For certificate and seal to any instrument already drawn	.25" **

§ 1561. Sheriffs and constables—Fees

"The sheriff and constable shall charge and collect the following fees and none other:

For serving and returning any writ, order, process or notice, first person.....	\$.50
For each additional person.....	.25
For serving warrants for collection of delinquent taxes on personal property, but the county shall not be liable for such fees or mileage.....	.25
For making arrest of each person on warrant or as peace officer	1.00
Serving any writ of attachment or replevin.....	1.00
Serving execution or order of sale.....	1.00
For making and certifying copy of any process.....	.25
Summoning the appraisers and appraising property.....	1.00
Summoning appraisers and making appraisal on property where the value exceeds one thousand dollars.....	2.00
Making return 'No property found'.....	.25
Making return of each person 'Not found'.....	.05
Taking and approving any undertaking.....	1.00
Selling or offering for sale any property.....	.50
Taking inventory of personal property, each day.....	1.50
Sheriff's deed, including acknowledgment.....	1.50
Summoning talesman, each.....	.10

For each mile actually and necessarily traveled in his county in serving or endeavoring to serve any writ, warrant, order, process, or command, or in pursuing any fugitive from justice\$.10

Attending any court not of record, per day..... .50

Executing writ of habeas corpus..... .50

Posting each notice..... .10

Executing any order or command not otherwise provided for .25

Commission for collecting money on sale, first three hundred dollars..... 3%

Next two hundred dollars..... 2%

All in excess of five hundred dollars..... 1%

One-half the foregoing amount on collections without sale for advertising property for sale..... 1.00

All necessary expense for care of property when held by virtue of any process, to be allowed by the court issuing same. * * *

"When civil process is received from any other county, the officer may demand fees for same before service thereof. * * *"

§ 1562. County judge—Fees

"If not otherwise provided in the schedule of clerk's fees the county judge shall charge the following fees, to be collected and accounted for by the clerk:

Issuing, entering return and recording marriage license..\$3.00

Issuing letters testamentary, administration or guardianship 1.00

Examining annual or final settlement..... 1.00

For approving conveyance of full-blood Indian heirs to interest in inherited lands, same to be accounted for as other fees mentioned in this article..... 5.00

Collecting fee for solemnizing marriage rites, same to be accounted for as other fees..... 3.00

Probate of will..... 1.00

Making entry or abstract of claim..... .10

Hearing application on behalf of lunatic or habitual drunkard 1.00

97 Rev. Laws 1910, § 3197.

(1500)

Hearing on writ of habeas corpus or application for injunction\$3.00
 Hearing application for granting or refusing order of sale.. .50" **

ARTICLE IV

COLLECTION AND PAYMENT

Sections

- 1563. Fees—When due.
- 1564. Process—Fees for service.
- 1565. Cost—Proof of payment.
- 1566. Costs—Statement of.
- 1567. Fees—Receipt for.
- 1568. Execution.
- 1569. Costs—By whom held.
- 1570. Mileage—Constructive.
- 1571. Municipal corporations.
- 1571a. Apportionment of deposits and collections.

§ 1563. Fees—When due

No fees allowed by law to public officers "shall be due or demanded until the services for which such fees are chargeable shall have been performed."**

§ 1564. Process—Fees for service

"No officer serving any process shall be entitled to any fees for the same, unless he return on such process the amount of his fees and the items thereof." ¹

§ 1565. Costs—Proof of payment

"All fees and sums paid by either party for fees of witnesses and other necessary expenses, in any civil action or proceeding, shall be proved by affidavit of the party, or of some person knowing the same to have been paid; and all such fees shall be taxed and collected from the party ordered or adjudged to pay the costs." ²

§ 1566. Costs—Statement of

"Any person liable for any costs or fees shall be entitled to receive, on demand, a certified bill of the same, in which the items of service and the charge therefor shall be specially stated." ³

** Rev. Laws 1910, § 3203.

** Rev. Laws 1910, § 3249.

¹ Rev. Laws 1910, § 3240.

² Rev. Laws 1910, § 3241.

³ Rev. Laws 1910, § 3242.

§ 1567. Fees—Receipt for

"Every officer charging fees shall, if required by the person paying them, give him a receipt therefor, setting forth the items and the date of each." ⁴

§ 1568. Execution

"It shall be the duty of the sheriff or other officer collecting costs on executions, in this state, after retaining his own fees, to pay the residue of such costs collected to the clerk of the court from which the execution issued, or to the justice, and take a receipt therefor." ⁵

§ 1569. Costs—By whom held

"It shall be the duty of the clerk of the court or justice, receiving any costs belonging to any other person, to hold the same, subject to the order of the person entitled thereto, and to pay the same over on request; and if such fees shall not be called for within one year after having been received, the officer shall pay the same into the county treasury, and take a receipt therefor." ⁶

§ 1570. Mileage—Constructive

"Any county, township or district officer who shall knowingly charge, receive or collect any fees for constructive service or mileage shall be deemed guilty of a misdemeanor, and in addition to his punishment shall forfeit his office and thereafter be forever barred from holding any office of honor, trust or profit in this state." ⁷

§ 1571. Municipal corporations

The statute requiring the filing of an itemized statement of an unliquidated claim with the city council as a condition to recovery of costs against the municipality, refers only to cities and not incorporated towns. ⁸

§ 1571a. Apportionment of deposits and collections

"Whenever the amount of money deposited as security for costs in any such action or proceeding, or whenever the amount col-

⁴ Rev. Laws 1910, § 3243.

⁵ Rev. Laws 1910, § 3245.

⁶ Rev. Laws 1910, § 3246.

⁷ Rev. Laws 1910, § 3247.

⁸ *Bellevue Gas & Oil Co. v. Carr*, 61 Okl. 290, 161 P. 203.

lected therein shall be insufficient, at the termination of the action or proceeding, to pay all the costs in such action or proceeding, then the amount so deposited or collected shall be apportioned ratably among the different officers and persons entitled thereto in the same proportion that the amount due each officer or person bears to the whole amount so deposited or collected.”⁹

ARTICLE V

COSTS ON APPEAL

Sections

- 1572. In general.
- 1573. Apportionment.
- 1574. Attorney fees.
- 1575. Case-made.
- 1576. Briefs.
- 1577. Motion to retax—Form.
- 1578. Dismissal of appeal.

§ 1572. In general

“When a judgment or final order is reversed, the plaintiff in error shall recover his costs, including the costs of the transcript of the proceedings, or case made, filed with the petition in error; and when reversed in part and affirmed in part, costs shall be equally divided between the parties.”¹⁰

The statute imposing a docket fee in each cause filed in the Supreme Court, to be recoverable as costs, and providing for an advance payment to the clerk, is not invalid.¹¹

§ 1573. Apportionment

The statute provides that costs will be equally divided between the parties, where the case is reversed in part and affirmed in part.¹²

Where plaintiff in error brings up for review a judgment which includes an amount about which there is no controversy, and the part complained of is found to be erroneous, so that the judgment

⁹ Sess. Laws 1913, p. 15, § 2, effective June 16, 1913.

¹⁰ Rev. Laws 1910, § 5261.

¹¹ In re Lee, 64 Okl. 310, 168 P. 53, L. R. A. 1918B, 144; Sess. Laws 1915, c. 87, § 5.

¹² Fitch v. Green, 39 Okl. 18, 134 P. 34; Rev. Laws 1910, § 5261.

is reversed in part and affirmed in part, he is entitled to recover all of his costs which accrued in the appellate court.¹³

Separate proceedings in error by the plaintiff and defendants being improper where the relief can be obtained by cross-petition in error in the same case, where defendants by a separate petition in error subsequent to that of plaintiff show a right to some relief, the entire costs will be taxed against them on their petition in error, and the costs in the original case will be divided.¹⁴

§ 1574. Attorney fees

Plaintiff, in action for usury, cannot be allowed additional sum as attorney's fees in event cause should be appealed to Supreme Court.¹⁵

§ 1575. Case-made

The practice of filing separately each paper in the transcript or case-made and taxing a fee therefor is in conflict with the statute requiring plaintiff in error to attach and file with the petition in error the original case-made filed in the court below, or a certified transcript of the record in the court below.¹⁶

§ 1576. Briefs

Expense incurred by a successful litigant for printing briefs, required by the rules of the court, is not, in the absence of statute or rules, a proper item of costs against the losing party.¹⁷

§ 1577. Motion to retax—Form

A motion to retax costs for printing the record will be denied where movants fail to point out wherein the cost is excessive.¹⁸

The court on hearing a motion to retax costs charged by the clerk of the Supreme Court, and not fixed by law, must pass on the reasonableness of each charge, and fix a reasonable fee for the services rendered.¹⁹

¹³ Helthecker v. Fitzhugh, 21 P. 782, 41 Kan. 54.

¹⁴ Crane v. Cameron, 71 Kan. 580, 87 P. 466.

¹⁵ Security State Bank v. Lane, 64 Okl. 11, 166 P. 160.

¹⁶ Shanks v. Pinkston, 112 P. 757, 24 Okl. 848.

¹⁷ Combs v. Miller, 105 P. 322, 25 Okl. 1.

¹⁸ Bruner v. Kansas Moline Plow Co., 103 P. 673, 24 Okl. 153.

¹⁹ Shanks v. Pinkston, 112 P. 757, 24 Okl. 848.

MOTION TO RETAX COSTS

(Caption.)

Now comes the defendant, and moves the court to retax the costs in this case, and tax them against the plaintiffs, instead of the defendant, and render judgment therefor against said plaintiffs, for the reason that this action is an appeal from the decision and award of the county commissioners of said county granting to the plaintiffs ——— dollars damages for the location and establishment of a public highway over and across the lands of said plaintiffs; that a warrant of said county, duly and legally made and executed by said county, was tendered to said plaintiffs, in the sum of ——— dollars, in payment of said damages, before this case was appealed to the district court, and said warrant remained in the office of the county clerk of said county, subject to the order of said plaintiffs; that the said plaintiffs refused to accept the same and prosecuted their appeal to a final judgment in this court; that said warrant was at all times subject to the order and disposition of said plaintiffs, from the time of its execution and tender to the plaintiffs up to the verdict and judgment upon appeal to this court; that the plaintiffs, upon the trial of this case upon appeal to this court, recovered a judgment for ——— dollars and no more.

§ 1578. Dismissal of appeal

Where an appeal is dismissed because of lack of jurisdiction to entertain it, the appellee is entitled to his costs.²⁰

Where, on error from a justice of the peace to the district court, the district court has no jurisdiction to review the rulings of the justice, it should dismiss the proceeding at the cost of plaintiff in error.²¹

²⁰ Kent v. Board of Com'rs of Labette County, 42 Kan. 534, 22 P. 610.

²¹ Noyes v. Miller, 20 P. 854, 41 Kan. 153.

CHAPTER XXI

EXECUTIONS

Sections	
1579-1585.	Article I.—Nature and requisites.
1586-1594.	Article II.—Property subject.
1595-1605.	Article III.—Issuance, form, and requisites.
1606-1634.	Article IV.—Levy and enforcement.
1635-1653.	Article V.—Sale and redemption.
1654-1661.	Article VI.—Proceeds, amercement, and return.
1662-1670.	Article VII.—Supplemental proceedings.
1671.	Article VIII.—Wrongful execution.

ARTICLE I

NATURE AND REQUISITES

Sections	
1579.	Kinds.
1580.	Judgment.
1581.	Conformity to.
1582.	Enforcement of.
1583.	Contribution.
1584.	Principal and surety.
1585.	Several executions.

§ 1579. Kinds

"Executions are of three kinds:

"First. Against the property of the judgment debtor.

"Second. For the delivery of possession of real or personal property, with damages for withholding the same, and costs.

"Third. Executions in special cases."¹

§ 1580. Judgment

A valid and subsisting judgment is an essential basis of an execution.

Where the sheriff seeks, in replevin, to justify the seizure under an execution issued in another case, he must prove a valid and sub-

¹ Rev. Laws 1910, § 5150.

sisting judgment in that case, before he can attack a transfer of the property levied on as made in fraud of creditors.²

An execution issued on a dormant judgment is void.³

§ 1581. — Conformity to

"In special cases not hereinbefore provided for, the execution shall conform to the judgment or order of the court. When a judgment for any specified amount, and also for the sale of specific real or personal property, shall have been rendered, and an amount sufficient to satisfy the amount of the debt or damages and costs, be not made from the sale of property specified, an execution may issue for the balance, as in other cases."⁴

An execution may be issued, and a valid sale of land be made thereunder, after the record of the judgment has been destroyed by fire, and before it has been established by decree of court.⁵

§ 1582. — Enforcement of

"When the judgment is not for the recovery of money or real property, the same may be enforced by attachment, by the court rendering judgment, upon motion made, or by a rule of the court upon the defendant; but in either case, notice of the motion or a service of a copy of the rule shall be made on the defendant, a reasonable time before the order of attachment is made."⁶

§ 1583. Contribution

"When property, liable to an execution against several persons, is sold thereon, and more than a due proportion of the judgment is laid upon the property of one of them, or one of them pays, without a sale, more than his proportion, he may, regardless of the nature of the demand upon which the judgment was rendered, compel contribution from the others; and when a judgment is against several, and is upon an obligation of one of them, as security for another, and the surety pays the amount, or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal; in such case, the person so paying or contributing, is entitled to the benefit of the judgment, to enforce contribution or

² Cockrell v. Schmitt, 94 P. 521, 20 Okl. 207, 129 Am. St. Rep. 737.

³ Denny v. Ross, 79 P. 502, 70 Kan. 720.

⁴ Rev. Laws 1910, § 5216.

⁵ Davidson v. Beers, 25 P. 859, 45 Kan. 365.

⁶ Rev. Laws 1910, § 5215.

repayment, if within ten days after his payment he file with the clerk of court where the judgment was rendered, notice of his payment and claim to contribution or repayment. Upon a filing of such notice, the clerk shall make an entry thereof in the margin of the docket." ⁷

§ 1584. Principal and surety

"In all cases where judgment is rendered in any court of record within this state, upon any instrument of writing in which two or more persons are jointly and severally bound, and it shall be made to appear to the court, by parol or other testimony, that one or more of said persons so bound, signed the same as surety or bail, for his or their codefendant, it shall be the duty of the clerk of said court, in recording the judgment thereon to certify which of the defendants is principal debtor, and which are sureties or bail. And the clerk of the court aforesaid shall issue execution on such judgment, commanding the sheriff or other officer to cause the money to be made of the goods and chattels, lands and tenements, of the principal debtor; but for want of sufficient property of the principal debtor to make the same, that he cause the same to be made of the goods and chattels, lands and tenements, of the surety or bail. In all cases, the property, both personal and real, of the principal debtor, within the jurisdiction of the court, shall be exhausted before any of the property of the surety or bail shall be taken in execution." ⁸

§ 1585. Several executions

"In all cases where two or more executions shall be put into the hands of any sheriff or other officer, and it shall be necessary to levy on real estate to satisfy the same, and either of the judgment creditors, in whose favor one or more of said executions are issued, shall require the sheriff or other officer to levy said executions, or so many thereof as may be required, on separate parcels of the real property of the judgment debtor or debtors, giving to the officer

⁷ Rev. Laws 1910, § 5188.

Where a judgment is rendered on note against two sureties, court cannot direct levy of execution against one alone without compliance with this statute and then only to compel contribution. *Paul v. First State Bank of Pauls Valley*, 57 Okl. 430, 157 P. 319.

⁸ Rev. Laws 1910, § 5179.

making the levy on behalf of the creditors, whose execution may, by the provisions of this article, be entitled to a preference, the choice of such part of the real property of the judgment debtor or debtors, as will be sufficient, at two-thirds of the appraised value to satisfy the same; and in all cases where two or more executions, which are entitled to no preference over each other, are put in the hands of the same officer, it shall be the duty of the officer, when required, to levy the same on separate parcels of the real property of the judgment debtor or debtors, when, in the opinion of the appraisers, the same may be divided without material injury; and if the real property of said debtors will not be sufficient, at two-thirds of its appraised value, to satisfy all the executions chargeable thereon, such part of the same shall be levied on to satisfy each execution, as will bear the same proportion in value to the whole, as the amount due to the execution bears to the amount of all the executions chargeable thereon, as near as may be, according to the appraised value of each separate parcel of said real property.”⁹

ARTICLE II

PROPERTY SUBJECT

Sections

- 1586. In general.
- 1587. Interests subject.
- 1588. Crops.
- 1589. Movable property of public service corporation.
- 1590. Corporation stock—Attachment and execution.
- 1591. Corporate franchises.
- 1592. Particular estates.
- 1593. Equitable interests.
- 1594. Property in custodia legis.

§ 1586. In general

“Lands, tenements, goods and chattels, not exempt by law, shall be subject to the payment of debts, and shall be liable to be taken on execution and sold, as hereinafter provided.”¹⁰

A personal judgment for material furnished will authorize the levy of an execution on the property improved by use of the material, provided no superior interest of a third party has intervened.¹¹

⁹ Rev. Laws 1910, § 5173.

¹⁰ Rev. Laws 1910, § 5151.

¹¹ South Texas Lumber Co. v. Epps, 48 Okl. 372, 150 P. 164.

§ 1587. Interests subject

"When a judgment debtor has not personal or real property, subject to levy on execution, sufficient to satisfy the judgment, any equitable interest which he may have in real estate, as mortgagor, mortgagee, or otherwise, or any interest he may have in any banking, turnpike, bridge or other joint stock company, or any interest he may have in any money, contracts, claims or choses in action, due or to become due to him, or in any judgment or decree, or any money, goods or effects which he may have in the possession of any person, body politic or corporate, shall be subject to the payment of such judgment, by action, or as hereinafter prescribed."¹²

§ 1588. Crops

Annual crops, sown by the owner of the soil, are, while growing, personal property, subject to levy and sale on execution for his debts.¹³

§ 1589. Movable property of public service corporation

Under the express provisions of the Constitution, all movable property of any public service corporation, including street railroads, is personal property, subject to execution and sale as such.¹⁴

§ 1590. Corporate stock—Attachment and execution

"The rights or shares which any person may have in the stock of any corporation or company, or which may be held by any person in trust for or to the use of another, together with the interest and profits thereon, and including also shares or interests in any foreign corporation authorized to and doing business in this state and conducting its principal business therein, may be attached and if judgment be recovered, may be sold to satisfy the judgment, or the same may be taken upon execution or order of sale."¹⁵

§ 1591. Corporate franchises

"For the satisfaction of any judgment against a corporation authorized to receive tolls, its franchise and all the rights and privileges thereof may be levied upon and sold under execution, in the

¹² Rev. Laws 1910, § 5189.

¹³ *Voils v. Battin*, 50 P. 940, 6 Kan. App. 742.

¹⁴ Const. Okl. art. 9, § 7; *Oklahoma Ry. Co. v. Severns Paving Co.* (Okl.) 170 P. 216, 10 A. L. R. 157, Id., 170 P. 220.

¹⁵ Sess. Laws 1919, c. 89, § 1.

same manner and with the same effect as any other property, but without any exemption."¹⁶

§ 1592. Particular estates

Where power and discretion to terminate a life estate is vested in the beneficiary, this power is not property which can be subjected to forced sale on execution.¹⁷

§ 1593. Equitable interests

"If it shall appear that the judgment debtor has any equitable interest in real estate in the county in which proceedings are had, as mortgagor or mortgagee, or otherwise, and the interest of said debtor can be ascertained as between himself and the person or persons holding the legal estate, or the person or persons having a lien on or interest in the same, without controversy as to the interest of such person or persons holding such legal estate or interest therein, or lien on the same, the receiver may be ordered to sell and convey such real estate, or the debtor's interest therein. Such sale shall be conducted in all respects in the same manner as is provided by this code for the sale of real estate upon execution; and the proceedings of the sale shall, before the execution of the deed, be approved by the court in which the judgment was rendered, or the transcript has been filed as aforesaid, as in case of sale upon execution."¹⁸

Land held by equitable title may be levied on and sold by virtue of a general execution.¹⁹

When the mortgagee has sold enough of the property to satisfy the debt and expenses of the sale, the residue becomes subject to seizure upon execution against the mortgagor, and the mortgagee cannot withhold it from an officer upon the ground that he has agreed with the mortgagor to continue in possession of the property and to sell it, and out of the proceeds of the sale to pay orders drawn upon him in favor of the mortgagor's creditors, and that he has in writing accepted and agreed to pay such orders.²⁰ But personal property in possession of a chattel mortgagee, who in good

¹⁶ Rev. Laws 1910, § 1353.

¹⁷ *Ryan v. Cullen*, 150 P. 597, 96 Kan. 284.

¹⁸ Rev. Laws 1910, § 5201.

¹⁹ *Poole v. French*, 80 P. 997, 71 Kan. 391.

²⁰ *Johnson v. State Bank of Seneca*, 52 P. 800, 59 Kan. 250.

faith is selling it under the conditions of the mortgage in payment of the mortgage debt, is not subject to levy on execution against the mortgagor.²¹

§ 1594. Property in custodia legis

Property taken from an officer under a writ of replevin, and returned to him under a redelivery bond, is in custodia legis, and the sale of it under an execution issued after the property is so taken and pending the replevin proceedings will be enjoined.²²

ARTICLE III

ISSUANCE, FORM, AND REQUISITES

Sections

- 1595. Issuance.
- 1596. On abstract or transcript of justice.
- 1597. To sheriff of another county.
- 1598. After death.
- 1599. Time.
- 1600. Contents—Forms.
- 1601. Amount.
- 1602. Alias writ.
- 1603. Seal.
- 1604. Amendment.
- 1605. Collateral attack.

§ 1595. Issuance

"Executions shall be deemed process of the court, and shall be issued by the clerk, and directed to the sheriff of the county. They may be directed to different counties at the same time."²³

Except as otherwise provided by statute, an execution can issue only from the court in which the judgment was rendered.²⁴

²¹ Anderson v. Montgomery County Nat. Bank, 67 P. 1110, 64 Kan. 587.

²² Overton v. Warner, 74 P. 651, 68 Kan. 96.

²³ Rev. Laws 1910, § 5149.

²⁴ Garnett v. Goldman, 39 Okl. 516, 135 P. 410.

Where a transcript of a probate (county) court judgment has been filed in the district court of the same county, the clerk of the latter court prior to the adoption of Rev. Laws of 1910, had no authority to issue execution thereon; but section 5148, Rev. Laws 1910, expressly permits executions to be issued from the Court in which a transcript of a county court judgment is first filed. Garnett v. Goldman, 39 Okl. 516, 135 P. 410.

§ 1596. — On abstract or transcript of justice

Execution may be issued on abstract or transcript of a judgment of a justice of the peace, "to the sheriff, by the clerk of the district court, in the same manner as if the judgment had been taken in that court; and the sheriff shall execute and return the same, as other executions; and in case of sale of real estate, his proceedings shall be examined and approved by the court as in other cases."²⁵

§ 1597. — To sheriff of another county

"When an execution is issued to the sheriff of any county other than that in which the judgment was rendered, the sheriff, after indorsing the date of its reception thereon, shall deliver the same to the clerk of the district court of his county, who shall thereupon enter the same in the execution docket in the same manner as if it had issued from the court of which he is clerk; and before the sheriff shall return any such writ, he shall cause his return to be entered in like manner."²⁶

§ 1598. — After death

A sale of real estate, made under a special execution issued on judgment of foreclosure, after the death of the plaintiff in the decree, without a revivor of the judgment, is void.²⁷

An execution on a judgment revived, after the death of the defendant, against his executors, who hold title to lands under his will, can only be levied on the property bound by the lien of the judgment. It cannot be levied on personal property which passed into the hands of the executors, nor on lands to which the lien did not attach.²⁸

§ 1599. Time

"If execution shall not be sued out within five years from the date of any judgment that now is or may hereafter be rendered, in any court of record in this state, or if five years shall have intervened between the date of the last execution issued on such judgment and the time of suing out another writ of execution thereon, such judgment shall become dormant, and shall cease to operate as a lien on

²⁵ Rev. Laws 1910, § 5219.

²⁶ Rev. Laws 1910, § 5183.

²⁷ Seeley v. Johnson, 59 P. 631, 61 Kan. 337, 78 Am. St. Rep. 314.

²⁸ Mendenhall v. Burnette, 49 P. 93, 58 Kan. 355.

the estate of the judgment debtor: Provided, that this section shall not apply to judgments against municipalities." ²⁹

§ 1600. Contents—Forms

"The writ of execution against the property of the judgment debtor, issuing from any court of record in this State, shall command the officer to whom it is directed, that of the goods and chattels of the debtor he cause to be made the money specified in the writ; and for want of goods and chattels, he cause the same to be made of the lands and tenements of the debtor; and the amount of the debt, damages and costs, for which the judgment is entered, shall be endorsed on the execution." ³⁰

EXECUTION

(Caption.)

The State of Oklahoma to the Sheriff of _____ County—Greeting:

Whereas, _____, on the _____ day of _____, 19____, obtained a judgment in the district court of the county of _____, state of Oklahoma, against _____ for the principal sum of _____ dollars debt, together with interest accruing at the rate of _____ per cent. per annum from the _____ day of _____, 19____, to date of service of this writ, and for the sum of _____ dollars attorney fee, and for the sum of _____ dollars cost, and there has accrued in this court _____ costs, and the clerk's accruing costs, about _____ dollars;

And whereas, there has been paid on this judgment the sum of \$_____ and interest, and an attorney fee, \$_____:

Now, therefore, you are hereby commanded that of the goods and chattels of the said _____ you cause to be made the money specified, and for want of goods and chattels you cause the same to be made of the lands and tenements of said debtor, and make return of this execution, showing how you executed the same, within sixty days from the date thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at my office in _____, in said county, this _____ day of _____, A. D. 19____.

_____, Court Clerk,
By _____, Deputy.

²⁹ Rev. Laws 1910, § 5153.

³⁰ Rev. Laws 1910, § 5154.

EXECUTION ON TRANSCRIPT FROM JUSTICE COURT

(Caption.)

The State of Oklahoma to the Sheriff of _____ County—Greeting:

Whereas, on the _____ day of _____, 19—, in an action pending before _____, a justice of the peace of _____ township, in _____ county, Oklahoma, _____ recovered judgment against _____ for the sum of _____ dollars, and the further sum of _____ dollars, cost of suit, with interest on said judgment at the rate of _____ per cent. per annum, from the _____ day of _____, 19—, and afterwards, to wit, on the _____ day of _____, 19—, the said plaintiff duly filed a transcript of said judgment in the above entitled court; and

Whereas, there remains unpaid on said judgment the sum of _____ dollars, with interest on the sum of _____ dollars, at the rate of _____ per cent. per annum from the _____ day of _____, 19—, and costs, amounting to _____ dollars, and accruing costs amounting to _____ dollars:

Now, therefore, you are hereby commanded that of the goods and chattels of the said _____ you cause the money above specified to be made, and for want of goods and chattels you cause the same to be made of the lands and tenements of said _____, and make due return of this execution, with your certificate thereon showing the manner in which you have executed the same, within sixty days from the date hereof.

Witness my hand and the seal of said court this _____ day of _____, 19—.

_____, Court Clerk,
By _____, Deputy.

SHERIFF'S RETURNS

Received the within writ on this _____ day of _____, 19—, at _____ o'clock _____ m., and executed on the _____ day of _____, by _____.

Dated this _____ day of _____, 19—.

_____, Sheriff of _____ County,
By _____, Undersheriff.

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Sheriff's Office, _____ County, State of Oklahoma.

Received this writ this _____ day of _____, A. D. 19____, at _____ o'clock _____ m. According to the command of the within writ, finding no goods or chattels belonging to the within named defendant whereon to levy on the _____ day of _____, A. D. 19____, I did forthwith levy said writ upon the following described _____ of said debtor, situated in _____ county, and state of Oklahoma, to wit: _____, which were liable to satisfy said judgment and did cause the same to be appraised by _____, _____, and _____, three disinterested householders residing within said county wherein said lands are situated, and administer to them an oath impartially to appraise said property levied upon, upon actual view. And said householders did forthwith return to me, under three disinterested householders residing within said county wherein said lands are situated and administer to them an oath with the clerk of said district court from whence the execution issued, and did cause public notice of the time and place of sale of said _____ to be given over _____ days before the day of sale thereof, by advertisement in the _____, a newspaper printed in and of general circulation in _____ county, state of Oklahoma. A copy of said notice with the printer's affidavit is hereto attached and made part of this return.

On the _____ day of _____, A. D. 19____, at _____ o'clock _____ m., of said day, I offered the said _____ for sale at _____, in _____ county, state of Oklahoma, the time and place stated in said notice, at public action, to the highest and best bidder for cash in hand.

Sold the following _____ to wit: _____ for cash in hand to _____ for the sum of \$_____, he being the highest and best bidder for said property, and that being the highest and best price bid for the same. Said purchase money I _____.

Dated this _____ day of _____, 19____.

_____, Sheriff of _____ County,
By _____, Undersheriff.

§ 1601. Amount

The mere fact that an execution issues for more than is due on the judgment does not deprive the writ of validity; but, the court may, on application, set it aside to the extent of the excess.²¹

²¹ Bogle v. Bloom, 13 P. 793, 36 Kan. 512.

§ 1602. Alias writ

Lands levied upon under one execution, and advertised for sale for a time beyond the return day of the writ, may be sold as advertised upon a second or alias writ, issued under circumstances and containing recitals which show that it was procured under the authority of the statute, which provides that, "if lands levied on are not sold upon one execution, other executions may be issued to sell the property so levied on" for the purpose of authorizing the sale under the previous levy and advertisement.³²

§ 1603. Seal

An execution issued out of the district court, without the use of the seal of said court, is a nullity.³³

§ 1604. Amendment

An execution for the sale of property, authenticated with the seal of the court, but lacking the signature of the clerk issuing it, may be amended after its return by order of court upon the clerk to sign it, if necessary to validate proceedings under it.³⁴

Where an execution was directed to the sheriff of a county on the judgment of the district court of that county, but delivered to and executed by the sheriff of another county, to whom it should have been directed, the defect was simply an irregularity, subject to amendment, and did not make the writ or the proceedings thereunder void.³⁵

§ 1605. Collateral attack

An execution is not void, and subject to collateral attack, because of formal defects or omissions in the indorsements or description of the judgment.³⁶

³² First Nat. Bank v. Farmers' Nat. Bank, 60 P. 324, 61 Kan. 620; Gen. St. Kan. 1897, c. 95, § 468.

³³ Frankhouser v. De Witt, 58 P. 1027, 9 Kan. App. 636.

³⁴ Taylor v. Buck, 60 P. 736, 61 Kan. 694, 78 Am. St. Rep. 346.

³⁵ Christy v. Springs, 69 P. 864, 11 Okl. 710.

³⁶ Failure to indorse amount of judgment and costs on back of execution showing same upon its face does not render execution void and subject to collateral attack by third party. An execution issued on a judgment in favor of partnership only in partnership name, on præcipe signed by one of two partners who when execution issued, was sole owner of judgment, which præcipe erroneously described judgment as if in his favor, but otherwise identified it, was not void nor subject to collateral attack. An

ARTICLE IV

LEVY AND ENFORCEMENT

Sections

- 1606. Enforcement—Exemptions.
- 1607. Homestead exemption.
- 1608. Exemptions not to apply, when.
- 1609. Exemption of personalty not to apply, when.
- 1610. Pensions.
- 1611. Ministers' libraries.
- 1612. Motor vehicles—Claiming exemptions—damages.
- 1613. Benevolent corporations.
- 1614. Order to appear—Forms.
- 1615. Priorities between executions.
- 1616. Attachments and executions—Who may levy,
- 1617. Void when otherwise levied.
- 1618. The levy.
- 1619. Advance of printer's fees.
- 1620. Appraisement and return.
- 1621. Property of officer.
- 1622. Excessive levy.
- 1623. Appraisement waived.
- 1624. Mortgaged chattels.
- 1625. Corporate stock.
- 1626. Redelivery bond—Form.
- 1627. Delivery on execution.
- 1628. Quashing execution—Form.
- 1629. Injunction.
- 1630. Creation of lien.
- 1631. Dependent on levy.
- 1632. Liens prior to execution.
- 1633. Duration of lien on realty.
- 1634. Claims of third persons—Bond—Form.

§ 1606. Enforcement—Exemptions

"The judge may order any property of the judgment debtor, not exempt by law, in the hands either of himself or any other person or corporation, or due to the judgment debtor, to be applied toward the satisfaction of the judgment, and may enforce the same by proceedings for contempt in case of refusal or disobedience; but the earnings of the debtor for his personal services, at any time within three months next preceding the order, cannot be so applied,

execution bearing return of officers to whom it was issued and found among the files of the papers of the case in which it was issued is not void and subject to collateral attack, because the fact of its filing is not indorsed thereon. *Kale v. Humphrey*, 170 P. 223.

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when it is made to appear, by the debtor's affidavit or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor." ⁸⁷

"The earnings of a debtor, who is a resident of this State, for his personal services at any time within three months next preceding the issuing of an execution, attachment or garnishment process, cannot be applied to the payment of his debts when it is made to appear by the debtor's affidavit or otherwise that such earnings are necessary for the maintenance of a family supported wholly or partly by his labor: Provided, that at the time of filing such affidavit the debtor shall notify the plaintiff or his agent or attorneys thereof in writing: Provided further, that nothing herein contained shall prevent the adverse party from controverting the matters sought to be proven by such affidavit, by counter affidavit, or if sought to be proven in any other manner the same may be controverted by any competent evidence ; and, provided further, that such counter affidavit shall be filed within twenty-four hours after the notice of the filing of the said debtor's affidavit, and final hearing shall be had thereon at a time to be fixed by the court, within ten days from the notice of the filing of the debtor's affidavit, if pending in the justice's court, and if pending in the district, superior or county court, it shall be tried at the first term held after filing such affidavit." ⁸⁸

"The following property shall be reversed to the head of every family residing in the state exempt from attachment or execution and every other species of forced sale for the payment of debts, except as hereinafter provided:

"First. The homestead of the family, which shall consist of the home of the family, whether the title to the same shall be lodged in or owned by the husband or wife.

"Second. All the household and kitchen furniture.

"Third. Any lot or lots in a cemetery held for the purpose of sepulture.

"Fourth. All implements of husbandry used upon the homestead.

"Fifth. All tools, apparatus and books belonging to and used in any trade or profession.

⁸⁷ Rev. Laws 1910, § 5198.

⁸⁸ Rev. Laws 1910, § 5199.

"Sixth. The family library and all family portraits and pictures and wearing apparel.

"Seventh. Five milch cows and their calves under six months old.

"Eighth. One yoke of work oxen with necessary yokes and chains.

"Ninth. Two horses or two mules, and one wagon, cart or dray.

"Tenth. One carriage or buggy.

"Eleventh. One gun.

"Twelfth. Ten hogs.

"Thirteenth. Twenty head of sheep.

"Fourteenth. All saddles, bridles and harness necessary for the use of the family.

"Fifteenth. All provisions and forage on hand, or growing for home consumption, and for the use of exempt stock for one year." ³⁹

Sixteenth. "Seventy-five per cent. of all current wages or earnings for personal or professional services earned during the last ninety days." ⁴⁰

"The following property shall be reserved to persons who are not heads of a family, exempt from attachment, execution and every other species of forced sale, except for liens given by the owners:

"First. A lot or lots in a cemetery held for the purpose of a sepulcher.

"Second. All wearing apparel.

"Third. All tools, apparatus and books belonging to any trade or profession.

"Fourth. One horse, bridle and saddle, or one yoke of oxen." ⁴¹

Fifth. "Seventy-five per cent. of all current wages or earnings for personal or professional services: Provided, however, that no process issued in any court to subject such wages or earnings for personal services to satisfy any judgment or obligation, shall ever include more than twenty-five per cent of such wages, or personal earnings, and any person, firm, association or corporation either

³⁹ Rev. Laws 1910, § 3342.

⁴⁰ Sess. Laws 1915, p. 385, § 1, amending sixteenth clause of Rev. Laws 1910, § 3342.

⁴¹ Rev. Laws 1910, § 3345.

personally or by agent or attorney violating any provision of this act shall forfeit the entire debt, judgment or obligation sought to be satisfied, and no court in the state of Oklahoma shall ever have jurisdiction to enforce collection of any such claim, judgment or obligation in any case in which the provisions of this act have been violated." ⁴²

Under the rule that a debtor is excused by unavoidable accident in failing to make a claim for exemptions, an "accident" is an event which is unusual and unexpected, or the happening of an event without the concurrence of the will of the person by whose agency it was caused.⁴³

§ 1607. — Homestead exemption

"The homestead of any family in this state, not within any city or town, shall consist of not more than one hundred and sixty acres of land, which may be in one or more parcels, to be selected by the owner. The homestead within any city or town, owned and occupied as a residence only, shall consist of not exceeding one acre of land, to be selected by the owner: Provided, that the same shall not exceed in value the sum of five thousand dollars, and in no event shall the homestead be reduced to less than one-quarter of an acre, without regard to value; and provided, further, that in case said homestead is used for both residence and business purposes, the homestead interests therein shall not exceed in value the sum of five thousand dollars: Provided, that nothing in the laws of the United States, or any treaties with the Indian tribes in the state, shall deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the state; and provided, further, that any temporary renting of the homestead shall not change the character of the same, when no other homestead has been acquired." ⁴⁴

"The exemption of the homestead provided for in this chapter shall not apply where the debt is due:

"First. For the purchase money of such homestead or a part of such purchase money.

"Second. For taxes or other legal assessments due thereon.

⁴² Sess. Laws 1915, p. 385, § 1, amending fifth clause of Rev. Laws 1910, § 3345.

⁴³ Hocker v. Carroll, 129 P. 56, 35 Okl. 290.

⁴⁴ Rev. Laws 1910, § 3343.

"Third. For work and material used in constructing improvements thereon." ⁴⁵

Under the statute a homestead is exempt from any form of enforced sale for the payment of debts, whether the title is in the husband or wife. ⁴⁶

§ 1608. — Exemptions not to apply, when

"The exemption herein provided for must not be construed to apply to the following persons, namely:

"First. To a non-resident.

"Second. To a debtor who is in the act of removing his family from the state; or,

"Third. Who has absconded, taking with him his family." ⁴⁷

§ 1609. — Exemption of personalty not to apply, when

"None of the personal property mentioned in this chapter shall be exempt from attachment or execution for wages of any clerk, mechanic, laborer or servant." ⁴⁸

§ 1610. — Pensions

"There shall also be exempt from levy and sale upon execution or attachment to every resident of this state who became disabled in the service of the United States as a soldier, sailor or marine, all pension money hereafter received belonging to such soldier, sailor or marine." ⁴⁹

§ 1611. — Ministers' libraries

"All libraries and office equipment of ministers of the gospel actively engaged in ministerial work in the state of Oklahoma, where said libraries and office equipment are being used by said ministers in their ministerial work, shall be deemed to be used exclusively for religious purposes and are declared to be within the meaning of the

⁴⁵ Rev. Laws 1910, § 3346.

⁴⁶ Alton Mercantile Co. v. Spindel, 140 P. 1168, 42 Okl. 210.

As used in section 303, Williams' Const., providing that the homestead shall be protected from forced sale, etc., "protect" means to insure or shield from danger, harm, damage, trespass, or the like; defend, or to preserve in safety.—Gray v. Deal, 50 Okl. 89, 151 P. 205.

⁴⁷ Rev. Laws 1910, § 3344.

⁴⁸ Rev. Laws 1910, § 3347.

⁴⁹ Rev. Laws 1910, § 3348.

'term religious purposes' as used in section 6 of article 10 of the constitution of the state of Oklahoma." ⁵⁰

§ 1612. — Motor vehicles—Claiming exemption—Damages

"Automobiles and other motor vehicles shall not be exempt from attachment, execution and other forced sale." ⁵¹

It is not the duty of an officer levying a writ to select and set apart the property exempt to the judgment debtor or his family. ⁵²

Where the wife of defendant in attachment desires to claim property as exempt to the family, she should inform the officer holding the process of the particular property claimed. ⁵³

Where personalty reserved to the family exempt from attachment or execution for payment of debts is attached and sold for the debt of the husband, and he fails to claim such property as exempt, the wife may make such claim and sue for a conversion thereof. ⁵⁴

Where a United States commissioner, after issuing an execution, absented himself from his district so that the judgment debtor could not give notice of his claim of exemption, and at the execution sale the debtor gave notice thereof, he can recover possession from the purchaser. ⁵⁵

A petition, alleging that plaintiff and defendants were residents of the state, that defendants conspired together to defraud plaintiff of his rights under the exemption laws by bringing an action in another state and garnishing his wages earned within 60 days, states a cause of action for damages against both defendants. ⁵⁶

§ 1613. — Benevolent corporations

Provision is made by law that no real estate belonging to any benevolent corporation, including chartered fraternal, grand and subordinate lodges and societies, "and no trust fund, or increment thereof, or any funds derived directly or indirectly from the mortgage, or pledge thereof, shall ever be liable, or in any manner taken for indebtedness, debts, charge, or lien of any nature whatsoever, contracted by said corporation, directly or indirectly, in, through,

⁵⁰ Sess. Laws 1915, p. 228, § 1.

⁵¹ Sess. Laws 1913, p. 9, § 1.

⁵² Sale v. Shipp, 58 Okl. 598, 160 P. 502.

⁵³ Sale v. Shipp, 58 Okl. 598, 160 P. 502.

⁵⁴ Binton v. Lyle, 114 P. 618, 28 Okl. 430.

⁵⁵ Hocker v. Carroll, 129 P. 56, 35 Okl. 290.

⁵⁶ Anderson v. Canaday, 131 P. 697, 37 Okl. 171.

by or on account of said business enterprises contemplated by * * * this act, or any transaction growing out of the same, and provided that the real estate, buildings and personal property, consisting of household goods, farming implements and domestic animals necessary for the ordinary conduct and operation¹ of the institution shall be exempt from taxation.”⁵⁷

§ 1614. Order to appear—Forms

“When an execution shall have been returned unsatisfied, the judgment creditor may file an affidavit of himself, his agent or attorney, in the office of the clerk, setting forth that he has good reasons to, and does, believe that any person or corporation, to be named, has property of the judgment debtor, or is indebted to him, and thereupon the clerk shall issue an order, requiring such person or corporation to answer, on or before a day to be named in the order, not less than ten nor more than twenty days from the date of issuing the same, all interrogatories that may be propounded by the judgment creditor, concerning such indebtedness or property.”⁵⁸

AFFIDAVIT BY JUDGMENT CREDITOR FOR GARNISHMENT WHEN EXECUTION RETURNED UNSATISFIED

(Caption.)

_____, being duly sworn, on oath says that he is _____, the judgment creditor in the above entitled action, and that execution has been issued against said defendant and returned unsatisfied, and that he has good reason to, and does, believe that _____, and within the county of _____, has property of the defendant _____ and is indebted to him. Wherefore affiant prays that said garnishee be required to appear and answer concerning same.

Subscribed and sworn to before me this _____ day of _____,
A. D. 19—.

_____, Court Clerk,
By _____, Deputy.

⁵⁷ Sess. Laws 1913, p. 125, § 2.

Exemption for legal process of benefit derived from fraternal insurance association under Rev. Laws 1910, § 3498, may be invoked by beneficiary whether a resident or nonresident of the state. *State v. Collins* (Okla.) 174 P. 568, 6 A. L. R. 603.

⁵⁸ Rev. Laws 1910, § 5211.

ORDER TO ANSWER IN GARNISHMENT

(Caption.)

The State of Oklahoma to ———:

Whereas, the above named ———, judgment creditor herein, has filed his affidavit alleging that he has good reasons to believe and does believe that you have in your possession or control, property of, or are indebted to ———, the judgment debtor above named:

Now, therefore, you are hereby ordered to appear before said court at the court house of said county in the city of ———, in said county, on the ——— day of ———, 19—, at ——— o'clock —. m., then and there to answer concerning such indebtedness or property.

Witness my hand and the seal of said court this ——— day of ———, 19—.

———, Court Clerk,

By ———, Deputy.

§ 1615. Priorities between executions

"When two or more writs of execution against the same debtor shall be sued out during the term in which judgment was rendered, or within ten days thereafter, and when two or more writs of execution against the same debtor shall be delivered to the officer on the same day, no preference shall be given to either of such writs; but if a sufficient sum of money be not made to satisfy all such executions, the amount made shall be distributed to the several creditors in proportion to the amount of their respective demands. In all other cases, the writ of execution first delivered to the officer shall be first satisfied. And it shall be the duty of the officer to endorse on every writ of execution the time when he received the same; but nothing herein contained shall be so construed as to affect any preferable lien which one or more of the judgments, on which execution issued, may have on the lands of the judgment debtor." ⁵⁹

Where two judgment creditors have not for more than a year after judgment caused executions to issue, the one of them who thereafter first issues and levies his execution has priority over the other. ⁶⁰

⁵⁹ Rev. Laws 1910, § 5155.

⁶⁰ Atchison Sav. Bank v. Wyman, 69 P. 326, 65 Kan. 314.

§ 1616. Attachments and executions—Who may levy

"It shall be unlawful for any one to levy an attachment or execution within this state who is not a bonded officer."⁶¹

§ 1617. — Void when otherwise levied

"Any attachment or execution issued to, or levied by anyone other than a bonded officer shall be void and of no effect and the court clerk or justice of the peace, or clerks of the justice of the peace issuing same, or officer levying same, as the case may be, together with their bondsmen shall be liable for any damage caused thereby."⁶²

• Provision is made by statute for punishment for the violation of the above provisions.⁶³

§ 1618. The levy

"The officer to whom a writ of execution is delivered, shall proceed immediately to levy the same upon the goods and chattels of the debtor; but if no goods and chattels can be found, the officer shall endorse on the writ of execution, "No goods," and forthwith levy the writ of execution upon the lands and tenements of the debtor, which may be liable to satisfy the judgment; and if any of the lands and tenements of the debtor which may be liable shall be incumbered by mortgage or any other lien or liens, such lands and tenements may be levied upon and appraised and sold, subject to such lien or liens, which shall be stated in the appraisal."⁶⁴

Executions can only be levied by bonded officers.⁶⁵

In levying an execution on standing corn, the officer need only take such possession as the nature of the property will admit, and it is sufficient if he go to the premises and do some unequivocal act, which as nearly as practicable amounts to seizure, and indorses the levy on the writ.⁶⁶

A sheriff, after using reasonable diligence to find chattels, may

⁶¹ Sess. Laws 1919, c. 139, § 1.

⁶² Sess. Laws 1919, c. 139, § 2.

⁶³ Sess. Laws 1919, c. 139, § 3.

⁶⁴ Rev. Laws 1910, § 5156.

⁶⁵ Sess. Laws 1919, p. 199, §§ 1-4.

⁶⁶ *National Bank of Holton v. Duff*, 94 P. 260, 77 Kan. 248, 16 L. R. A. (N. S.) 1047, 127 Am. St. Rep. 417, 15 Ann. Cas. 882.

levy on realty without making a personal demand on the debtor, or notifying him that he holds the execution, and a search for chattels may not be necessary, if the sheriff knows there are none.⁶⁷

An officer who levies an execution upon personal property acquires a special lien thereon, dependent on possession, and, if he surrenders possession of the property levied on to a senior lienholder, the lien of the execution is lost.⁶⁸

Where the execution debtor owned a field of standing corn, and the officer went to the neighborhood of the corn and found the wife, against whom the execution also ran, and read it to her, and told her he intended to take the corn, and went to the cornfield with a witness and posted a notice that the corn was taken on execution and was in his possession, it was a sufficient levy.⁶⁹

"When any writ shall issue, directing the sale of property previously taken in execution, the officer issuing said writ shall at the request of the person entitled to the benefit thereof, his agent or attorney, add thereto a command to the officer to whom such writ shall be directed, that if the property remaining in his hands not sold shall, in his opinion, be insufficient to satisfy the judgment, he shall levy the same upon lands and tenements, goods and chattels, or either, as the law shall permit, being the property of the judgment debtor, sufficient to satisfy the debt."⁷⁰

§ 1619. Advance of printer's fees

"The officer who levies upon goods and chattels, or lands and tenements, or who is charged with the duty of selling the same by virtue of any writ of execution, may refuse to publish a notice of the sale thereof by advertisement in a newspaper until the party for

⁶⁷ Collins v. Ritchie, 2 P. 623, 81 Kan. 371.

An officer seized personal property under an order of attachment, and afterwards, while the property was in his custody, an execution, based on a judgment against the same defendant, was placed in his hands, on which he indorsed the time of receiving the same. Later he returned the execution, with an indorsement that he found no property liable to satisfy the judgment. Held, that the receipt of the execution and the indorsement made thereon did not operate as a constructive levy of the execution on the property already in the custody of the officer. Bank of Santa Fé v. Haskell County Bank, 53 P. 132, 59 Kan. 354.

⁶⁸ Moore v. Calvert, 58 P. 627, 8 Okl. 358.

⁶⁹ Moore v. Calvert, 58 P. 627, 8 Okl. 358.

⁷⁰ Rev. Laws 1910, § 5160.

whose benefit such execution issued, his agent or attorney, shall advance to such officer so much money as will be sufficient to discharge the fees of the printer for publishing such notice."⁷¹

"Before any officer shall be excused from giving the notification mentioned in the last section, he shall demand of the party for whose benefit the execution was issued, his agent or attorney, provided either of them reside in the county, the fees in said section specified."⁷²

§ 1620. Appraisement and return

"If execution be levied upon lands and tenements, the officer levying such execution shall call an inquest of three disinterested householders, who shall be resident within the county where the lands taken in execution are situate, and administer to them an oath, impartially to appraise the property so levied on, upon actual view; and such householders shall forthwith return to said officer, under their hands, an estimate of the real value of said property."⁷³

"The officer receiving such return shall forthwith deposit a copy thereof with the clerk of the court from which the writ issued, and advertise and sell such property, agreeably to the provisions of this article."⁷⁴

Sale for fair value does not supply want of appraisement."⁷⁵

Where the judgment on which an execution is based is invalid, and insufficient to support a confirmation of sale, an attempted appraisement is also invalid."⁷⁶

Where execution is levied on mortgaged land, the appraisers should determine and return the value of the mortgage debtor's interest."⁷⁷

It is the duty of an officer levying on real property under an execution, in all cases where the appraisement is not waived, to deposit forthwith a copy of the return of the appraisement with the clerk of court."⁷⁸

⁷¹ Rev. Laws 1910, § 5169.

⁷² Rev. Laws 1910, § 5170.

⁷³ Rev. Laws 1910, § 5161.

⁷⁴ Rev. Laws 1910, § 5163.

⁷⁵ *Hancock v. Youree et al.*, 25 Okl. 460, 106 P. 841.

⁷⁶ *Alexander v. American Nat. Bank*, 54 Okl. 345, 153 P. 130.

⁷⁷ *Alexander v. American National Bank*, 54 Okl. 345, 153 P. 130.

⁷⁸ *Jones v. Carr*, 21 P. 258, 41 Kan. 329.

Under the statute relating to appraisalment of lands proposed to be sold under execution, the appraisalment must be made upon actual view had subsequent to the time the appraisers are called and sworn.⁷⁹

§ 1621. — Property of officer

"If the property of any clerk, sheriff, coroner, justice of the peace, constable or any collector of state, county, town or township tax, shall be levied on for, or on account of, any moneys that now are, or may hereafter be, by them collected or received in their official capacity, the property so levied on shall be sold without valuation."⁸⁰

§ 1622. Excessive levy

"If, upon such return, as aforesaid, it appear, by the inquisition, that two-thirds of the appraised value of said lands and tenements, so levied upon is sufficient to satisfy the execution, with costs, the judgment on which such execution issued shall not operate as a lien on the residue of the debtor's estate, to the prejudice of any other judgment creditor; but no such property shall be sold for less than two-thirds of the value returned in the inquest; and nothing in this section contained shall, in any wise, extend to affect the sale of lands by the State, but all lands, the property of individuals indebted to the State for any debt or taxes, or in any other manner, shall be sold without valuation, for the discharge of such debt or taxes, agreeably to the laws in such cases made and provided."⁸¹

A levy upon more property than is required to satisfy the execution, and which is not grossly excessive, will not avoid the writ. The proper remedy in such a case is to move for a release of a portion of the property seized.⁸²

§ 1623. Appraisalment waived

"If the words 'appraisalment waived,' or other words of similar import, shall be inserted in any deed, mortgage, bond, note, bill or written contract, any court rendering judgment thereon shall

⁷⁹ Alfred et al. v. Bank of Hazelton, 48 Kan. 124, 29 P. 471.

⁸⁰ Rev. Laws 1910, § 5165.

⁸¹ Rev. Laws 1910, § 5164.

⁸² Bogle v. Bloom, 13 P. 793, 36 Kan. 512.

order as a part of the judgment that the same, and any process issued thereon, shall be enforced, and that lands and tenements may be sold thereunder without appraisalment; and such judgment, and any process issued thereon, shall be enforced, and sales of land and tenements made thereunder, without any appraisalment or valuation being made of the property to be sold: Provided, that no order of sale or execution shall be issued upon such judgment until the expiration of six months from the time of the rendition of said judgment." ⁸³

§ 1624. Mortgaged chattels

The statute provides that mortgaged personal property may be taken under attachment or execution at the suit of a creditor of a mortgagor; and that before it can be so taken the officer must tender to the mortgagee the amount of the mortgage debt and interest, or deposit the amount thereof with the county treasurer. On failure of the sheriff in making a levy on mortgaged chattels to follow the provisions of the statute, the levy may be set aside, or he may be made to respond in damages to any one injured by his neglect.⁸⁴

§ 1625. Corporate stock

When any order of attachment, or execution, or order of sale shall be issued against any person being the owner of any shares of stock in any corporation or company * * * or for whom or to whose use any shares of stock in any corporation or company are held by any person other than such defendant, it shall be the duty of the president, cashier, secretary or chief clerk of such corporation or company, upon the request of the officer having such execution or order, to furnish a certificate under his hand, stating the number of rights or shares which the defendant holds or which are held in trust for such defendant, or to his use in the stock of such corporation or company."⁸⁵

"Any officer upon obtaining information in the manner provided in the last section, or otherwise, that any defendant in any order of attachment held by him or any person against whom he holds

⁸³ Rev. Laws 1910, § 5162.

⁸⁴ D. M. Osborne & Co. v. Hughey, 76 P. 146, 14 Okl. 29, Rev. Laws 1910, §§ 4040, 4041.

⁸⁵ Sess. Laws 1919, c. 89, § 2.

an execution or order of sale, owns or holds any rights or shares in the stock of any corporation or company, * * * or that such rights or shares owned or held by any other person in trust for or to the use of such defendant, may make a levy of such order or attachment, execution or order of sale, on such rights or shares by leaving a true copy of such writ with the president, secretary, cashier or chief clerk of such corporation or company, and if there be no such officer, then with some other officer of such corporation or company, with a certificate of the officer making the levy setting forth that he levies upon and takes in attachment, or upon such execution or order of sale, such rights or shares to satisfy such attachment, execution or order of sale, or if the certificates of such shares are held by any person within his' county, whether in a domestic or foreign corporation, the same may be likewise taken in attachment, execution or upon such order of sale, by leaving a true copy of such order of attachment, execution or order of sale, with the person so holding the certificates of such shares in the same manner as in the service of a summons with a certificate of the officer making the levy, setting forth that he levies upon and takes in attachment or upon such execution or order of sale, as the case may be, such rights or shares to satisfy the same." ⁸⁶

"Rights or shares in the stock of any corporation or company levied upon by virtue of any writ of attachment, shall be held subject to the judgment rendered in the action in which such writ is issued and if the plaintiff recover judgment, such rights or shares shall be sold in like manner as personal property is provided to be sold upon execution to satisfy such judgment, and if taken upon execution or order of sale, they shall be sold in like manner, and if the certificate of the shares of stock is within the jurisdiction of the court, it may compel delivery thereof by the person having custody and control thereof, by order duly served upon such person to show cause why such delivery should not be made, and if no legal cause is shown why such delivery should not be made, the delivery shall be compelled by proceedings as for contempt." ⁸⁷

⁸⁶ Sess. Laws 1919, c. 89, § 3.

⁸⁷ Sess. Laws 1919, c. 89, § 4.

§ 1626. Redelivery bond—Form

"In all cases where a sheriff or other officer shall, by virtue of an execution, levy upon any goods and chattels which shall remain upon his hands unsold, for want of bidders, for the want of time to advertise and sell, or any other reasonable cause/ the officer may, for his own security, take of the defendant an undertaking, with security, in such sum as he may deem sufficient, to the effect that the said property shall be delivered to the officer holding an execution for the sale of the same, at the time and place appointed by said officer, either by notice, given in writing, to said defendant in execution, or by advertisement published in a newspaper printed in the county, naming therein the day and place of sale. If the defendant shall fail to deliver the goods and chattels at the time and place mentioned in the notice to him given, or to pay to the officer holding the execution the full value of said goods and chattels, or the amount of said debt and costs, the undertaking, given as aforesaid, may be proceeded on as in other cases."⁸⁸

In a suit on a redelivery bond in execution, the law imports a consideration therefor, and the validity of the execution under which the levy was made need not be pleaded or proved in the first instance.⁸⁹

It is no defense that the sheriff agreed with the signers of such bond that it could be considered that he still had the constructive possession of the property levied on.⁹⁰

Plaintiffs' right to recover an agreed compensation for caring for horses levied on by a sheriff cannot be defeated by the fact that the judgment upon which the execution was issued was subsequently adjudged to be void.⁹¹

⁸⁸ Rev. Laws 1910, § 5158.

⁸⁹ Pratt v. Cook, 62 P. 438, 10 Kan. App. 144.

⁹⁰ Pratt v. Cook, 62 P. 438, 10 Kan. App. 144.

⁹¹ Burdge v. Thompson, 58 P. 484, 9 Kan. App. 146.

The sheriff, in an action against him to recover the agreed price for keeping horses levied on by him, cannot say that his levy was only colorable, and did not, during its existence which was recognized by both parties, intercept the progress of the plaintiffs' contract with the bailor of the property, and that, therefore, in furnishing the feed and care for the horses, the plaintiffs were only carrying out such prior contract. Burdge v. Thompson, 58 P. 484, 9 Kan. App. 146.

REDELIVERY BOND GIVEN TO SHERIFF BY EXECUTION DEBTOR

(Caption.)

Know all men by these presents: That we, C. D., as principal, and E. F. and G. H., as sureties, are held and firmly bound unto the above named plaintiff, A. B., and unto the sheriff of ——— county, Oklahoma, in the penal sum of ——— dollars, for the payment of which sum, well and truly to be made, we do bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally by these presents.

The condition of the above obligation is such that, whereas, by virtue of a writ of execution issued in the above entitled cause, said sheriff did on the ——— day of ———, 19—, levy upon property in the possession of C. D., principal above named, of the appraised value of ——— dollars; and whereas, said property remains in the hands of said sheriff unsold, for (state cause); and whereas, said C. D. desires to have said property delivered to him:

Now, if the said property or its appraised value in money shall be forthcoming at the time and place appointed by said sheriff, either upon notice, given in writing, to said principal, or by advertisement published in a newspaper printed in the county, naming the day and place of sale of said property by said sheriff, then this obligation to be void; otherwise to remain in full force and effect.

Witness our hands, this ——— day of ———, 19—.

C. D.

E. F.

G. H.

(Qualification of sureties.)

§ 1627. Delivery on execution

"If the execution be for the delivery of the possession of real or personal property, it shall require the officer to deliver the same, particularly describing the property, to the party entitled thereto, and may, at the same time, require the officer to satisfy any costs or damages, recovered in the same judgment, out of the goods and chattels of the party against whom it was rendered; and, for the want of such goods and chattels, then out of the lands and tene-

(1533)

ments; and in this respect it shall be deemed an execution against the property."⁹²

§ 1628. Quashing execution—Forms

The quashing of an execution rests largely in the discretion of the court.⁹³

An execution which on its face commands the officer to make the full amount of the judgment rendered when a payment has been made thereon will not for that reason be quashed where the payment made is credited on the back of the execution.⁹⁴

Where a motion is made to quash execution, on the ground that it has been released by the judgment creditor, the court may investigate whether the judgment has been assigned, and whether the release is void.⁹⁵

MOTION TO QUASH EXECUTION

(Caption.)

Now comes the defendant, C. D., and shows to the court that on the —— day of ——, 19——, an execution was issued by the court clerk in the above entitled cause, directed to the sheriff of —— county, Oklahoma, in satisfaction of the judgment rendered upon the —— day of ——, 19——, therein, against the said defendant, and in favor of the said plaintiff, and that the said sheriff has seized certain property and is threatening to sell the same in satisfaction of the said judgment.

That said execution was improvidently issued, and that the same is defective in form and substance (stating objections to same).

Wherefore defendant moves the court, by order herein, to recall the said execution and quash the levy made thereon by the said sheriff, and to hold all proceedings taken thereunder for naught.

X. Y., Attorney for Defendant.

ORDER QUASHING EXECUTION

(Caption.)

Now on this —— day of ——, 19——, comes on for hearing the motion of the defendant filed herein on the —— day of ——,

⁹² Rev. Laws 1910, § 5214.

⁹³ Barnett v. Bohannon, 112 P. 987, 27 Okl. 368.

⁹⁴ St. Louis & S. F. Ry. Co. v. Rierson, 16 P. 443, 38 Kan. 359.

⁹⁵ Bogle v. Bloom, 13 P. 793, 36 Kan. 512.

19—, for an order quashing the levy of execution made by the sheriff and ordering the recall of said execution; plaintiff appearing by G. H., his attorney, and defendant appearing by X. Y., his attorney.

Thereupon, upon argument of counsel, and being fully advised in the premises, said motion is by the court sustained, to which plaintiff excepts.

And it is further ordered that the sheriff of ——— county do forthwith release any and all property levied upon by him under said writ of execution issued in this cause and take no further steps toward satisfying the same, and that he return the said writ into the office of the clerk of this court with the return that he has not executed the same by order of the court, to which plaintiff excepts.

———, Judge.

§ 1629. Injunction

Equity will not enjoin the issuance of an execution on a judgment not void, but voidable only,⁹⁶ but may enjoin the service of an execution on a void judgment.⁹⁷

An injunction will lie to prevent the sale of property in custodia legis when seized,⁹⁸ of realty not owned by the judgment debtor,⁹⁹

⁹⁶ *Ellis v. Akers*, 121 P. 258, 32 Okl. 96.

⁹⁷ A court of equity, in certain cases, may prevent, by injunction, the service of an execution on a void judgment. An irregular or void execution, or one issued on a void judgment, is open to direct attack on affidavit of illegality or motion to discharge the property, or to quash or set aside. *Harris v. Smiley*, 128 P. 276, 36 Okl. 89.

A petition for injunction against service of an execution on a void judgment held insufficient to warrant issuance of the writ. *Harris v. Smiley*, 128 P. 276, 36 Okl. 89.

⁹⁸ A temporary injunction may be granted to restrain the sale of personal property, when it appears that such property is in custodia legis, and is not subject to the satisfaction of the judgment under which the execution issued, and a sale of the same would confer no title in the purchaser. *Ryan v. Paris*, 30 P. 172, 48 Kan. 765.

⁹⁹ An owner of realty may enjoin its sale under an execution issued on a judgment against another person in an action to which the owner was not a party. *Yount v. Hoover*, 149 P. 408, 95 Kan. 752, L. R. A. 1915F, 1120, Ann. Cas. 1918C, 148.

An owner of an undivided one-fourth interest in land, one-eighth interest being subject to payment of a judgment against his grantor, and the other eighth not, may enjoin the sale of more than an undivided one-eighth interest under execution issued on such judgment. *Leslie v. Harrison Nat. Bank*, 154 P. 209, 97 Kan. 22.

and of incumbered property attempted to be sold without reference to the liens,¹ unless an adequate remedy at law exists.²

A party claiming an interest in property levied on under an execution has an adequate remedy at law by way of motion to have the property released from the levy, under the statute providing that the party, seeking to vacate a judgment because the summons was fraudulently issued, may obtain an order suspending proceedings upon a showing that it is probable that he is entitled to have such judgment or order vacated.³

Where property is wrongfully levied on, a party interested must proceed in the court from which the execution issues, and cannot obtain relief by injunction in a separate action.⁴

Where, in a suit to enjoin enforcement of a judgment, it appears that, though the return is incomplete, the service was good, the return may be considered as amended and relief denied.⁵

Where a temporary injunction was issued to restrain a sale of personalty under execution pending further order of the court, and the property was returned to plaintiff, who sold it and disposed of the proceeds, the temporary injunction was properly dissolved.⁶

¹ The holder of a mechanic's lien purchased the land, and assumed several mortgages thereon, and paid a part of them. A judgment was subsequently rendered in favor of a third person against the original owner of the land at a term of court commenced before the conveyance was made, and in an action pending at the beginning of the term. Held that, though the judgment creditor was entitled to have the land sold on execution subject to the rights of the purchaser of the land, founded on the mechanic's lien and the mortgage liens, yet, where the judgment creditor has the land levied on, appraised, and advertised for sale, without reference to such liens, injunction against the judgment creditor and the sheriff is the proper remedy to protect said purchaser's rights. *Bowling v. Garrett*, 31 P. 135, 49 Kan. 504, 33 Am. St. Rep. 377.

² Injunction will not issue against the execution of a judgment pending the preparation of a petition in error to obtain a review of the judgment, since defendant has a remedy by applying to the court which rendered the judgment for a stay. *Treat v. Wilson*, 46 P. 322, 4 Kan. App. 586.

A petition for a temporary injunction restraining the sale of real estate upon execution until the judgment supporting the execution could be opened, under Code, § 77, providing for the opening of a judgment where service of summons is obtained by publication only, is demurrable, since the relief sought by injunction is obtainable by opening the judgment. *Linville v. Brown*, 60 P. 476, 9 Kan. App. 747.

³ *Crist v. Cosby*, 69 P. 885, 11 Okl. 635.

⁴ *Crist v. Cosby*, 69 P. 885, 11 Okl. 635.

⁵ *M. Rumely Co. v. Bledsoe*, 56 Okl. 180, 155 P. 872.

⁶ *Logan v. Yoes*, 30 Okl. 65, 118 P. 353.

Injunction will lie to enjoin an execution on a dormant judgment.⁷

Where real property is levied on under an execution against another, the owner's privilege to move in the case in which the execution was issued to release the property from such levy is not an adequate remedy at law, so as to cut off the right he would otherwise have to enjoin the sale of the property.⁸

The judgment creditor is not a necessary party to an action to enjoin a sheriff from selling a third person's property under execution.⁹

Where a judgment debtor sues to restrain the sale of lands seized in execution on the ground that it is not liable, his co-judgment debtors are not necessary parties to the action.¹⁰

In an action to enjoin the execution of a money judgment which is void for want of any service, the plaintiff need not plead and prove a meritorious defense to the action in which the judgment was rendered, but it is sufficient if he shows that he is not simply delaying justice by compelling the adverse party to resort to regular procedure.¹¹

The fact that a sheriff in a notice of sale of real estate on execution fails to describe with sufficient definiteness the property to be sold is no ground for an action by the judgment defendant to enjoin the sale.¹²

Injunction will not lie to prevent the levy of an execution on personality, where the judgment on which execution is issued is admitted to be valid and enforceable.¹³

A motion to quash an execution was cumulative, and did not oust a court of equity of its jurisdiction, in an action to restrain the exe-

⁷ Updegraff v. Lucas, 93 P. 630, 76 Kan. 456, 13 Ann. Cas. 860, rehearing denied 94 P. 121, 76 Kan. 456, 13 Ann. Cas. 860.

In a suit to enjoin execution, evidence held to show that a prior execution had been issued within five years from the judgment, so as to prevent its becoming dormant. Sparks v. Martin, 150 P. 532, 96 Kan. 282, Ann. Cas. 1918C, 324.

⁸ Gale Mfg. Co. v. Sleeper, 79 P. 648, 70 Kan. 806.

⁹ Yount v. Hoover, 149 P. 408, 95 Kan. 752, L. R. A. 1915F, 1120, Ann. Cas. 1918C, 148.

¹⁰ McGill v. Sutton, 72 P. 853, 67 Kan. 234.

¹¹ O'Neill v. Eppler, 133 P. 705, 90 Kan. 314.

¹² Cameron v. Griesa, 87 P. 679, 74 Kan. 560.

¹³ Payne v. Ramsey, 30 Okl. 356, 120 P. 595.

cution of the judgment, on the ground that it created no lien on the land levied on.¹⁴

§ 1630. Creation of lien

The issuance and levy of an execution upon property fixes a lien thereon in favor of a judgment creditor only to the extent of the judgment debtor's actual as distinguished from apparent, interest in the property.¹⁵

The lien of a judgment does not attach to the mere legal title to the land existing in the judgment debtor, when the equitable and beneficial title is in another.¹⁶

Where a judgment from the justice or county court has been filed in the district court, "such judgment shall be a lien upon the real estate of the judgment debtor, from the day of filing the abstract or transcript, in the same manner and to the same extent as if the judgment had been rendered in the district court."¹⁷

§ 1631. — Dependent on levy

"All real estate not bound by the lien of the judgment, as well as goods and chattels of the debtor, shall be bound from the time they shall be seized in execution."¹⁸

§ 1632. Liens prior to execution

A lien upon personal property, not reduced to possession or recorded, is void as to execution creditors.¹⁹

Before the lien of an execution can attach to mortgaged chattels, the officer must pay off or tender the amount of any existing mortgage liens, or deposit the amount of the mortgage debt with the county treasurer, for the use of the holder of the mortgage.²⁰

A mortgagee of chattels, who has taken possession of the mortgaged property for the purpose of foreclosure, cannot waive the right to have the mortgage debt paid or deposited with the county

¹⁴ Rader v. Gvozdanovic, 130 P. 159, 35 Okl. 421.

¹⁵ Hamilton v. Brown, 31 Okl. 213, 120 P. 950. This rule applies where the judgment debtor, although having the legal title to the lands, holds it subject to a resulting trust in favor of another. *Id.* See, also, Black on Judgments, par. 421; 23 Cyc. 1371.

¹⁶ J. I. Case Threshing Machine Co. v. Walton Trust Co., 39 Okl. 748, 136 P. 769.

¹⁷ Rev. Laws 1910, § 5218.

¹⁸ Rev. Laws 1910, § 5152.

¹⁹ Sedgwick City Bank v. Pollard, 54 P. 14, 8 Kan. App. 34.

²⁰ Moore v. Calvert, 58 P. 627, 8 Okl. 358.

treasurer, so as to make effective the levy of an execution, without delivering possession of the property to the officer, and waiving the lien of his mortgage.²¹

Where one wrongfully obtains possession of personal property which has been levied on under execution, and sells the same, the vendee does not take a title free from the lien of the execution.²²

Where a mortgage, purporting to be a lien on land of a judgment debtor, is alleged to be without consideration and in fraud of a judgment creditor, he can have its validity determined before the land is sold on execution, in order to ascertain the actual interest of the debtor in the land.²³

§ 1633. Duration of lien on realty

"No judgment heretofore rendered, or which hereafter may be rendered, on which execution shall not have been taken out and levied before the expiration of one year next after its rendition, shall operate as a lien on the estate of any debtor, to the prejudice of any other judgment creditor. But in all cases where judgment has been or may be rendered in the Supreme Court, and a special mandate awarded to the district court to carry the same into execution, the lien of the judgment creditor shall continue for one year after the first day of the term of the district court to which such mandate may be directed. Nothing in this section contained shall be construed to defeat the lien of any judgment creditor who shall fail to take out execution and cause a levy to be made, as herein provided, when such failure shall be occasioned by appeal, proceedings in error, injunction, or by vacancy in the office of sheriff, or the disability of such officer, until one year after such disability shall be removed. In all cases where real estate has been or may hereafter be taken on execution and appraised and twice advertised and offered for sale, and shall remain unsold for the want of bidders it shall be the duty of the court from which such execution issued, on motion of the plaintiff, to set aside such appraisal and order a new one to be made, or to set aside such levy and appraisal and award a new execution to issue, as the case may require."²⁴

²¹ Moore v. Calvert, 58 P. 627, 8 Okl. 358.

²² Ross v. Richolson, 45 P. 97, 3 Kan. App. 239.

²³ Taylor v. Dunlap Stone & Lime Co., 16 P. 751, 38 Kan. 547.

²⁴ Rev. Laws 1910, § 5177.

Where real estate has been sold on execution prior to the death of one of the judgment debtors, it is unnecessary to revive the action before the confirmation of the sale or the execution of the deed.²⁵

§ 1634. Claims of third persons—Bond—Form

"If the officer, by virtue of an execution issued from any court of record in this state, shall levy the same on any goods and chattels claimed by any person other than the defendant, or be requested by the plaintiff to levy on any such goods and chattels, the officer may require the plaintiff to give him an undertaking, with good and sufficient securities to pay all costs and damages that he may sustain by reason of the detention or sale of such property; and until such undertaking shall be given, the officer may refuse to proceed as against such property."²⁶

The terms of a bond executed by third persons claiming cattle seized on execution do not estop them from claiming title to the cattle in a suit on the bond by the execution creditor, where the terms disclosed that it was not given on behalf of the execution debtors and contained an express declaration of ownership in the third persons.²⁷

Where property is wrongfully replevied from a sheriff, and during the time of its possession by the plaintiff it depreciates in value, the sheriff is entitled to damages for the amount of depreciation, although his term of office had expired before judgment rendered.²⁸

In an action to recover personalty, taken under execution by defendant as constable, it is not error to refuse to strike an allegation that the execution creditor had knowledge of the mortgage, since notice to him is binding on the officer, who is only an agent.²⁹

Where corn in the possession of plaintiff was levied on by defendant as the property of a third person, and sold, the defendant cannot defeat an action for restitution by showing that the property did not belong to plaintiff, but it must appear that it belonged to the judgment debtor.³⁰

²⁵ *Johnson Loan & Trust Co. v. Ball*, 53 P. 878, 7 Kan. App. 667.

²⁶ Rev. Laws 1910, § 5157.

²⁷ *Bowles Live Stock Commission Co. v. Tate*, 138 P. 602, 91 Kan. 538.

²⁸ *Bowersock v. Adams*, 54 P. 1064, 59 Kan. 779.

²⁹ *Starr v. Cox*, 57 P. 247, 9 Kan. App. 882.

³⁰ *Buckhalter v. Nuzum*, 61 P. 810, 9 Kan. App. 885.

In replevin for property seized under execution, where the defendant officer admitted the levy, and alleged that a redelivery bond was given and approved, he could not, by withdrawing his answer be permitted to deny his possession.⁸¹

When an interplea, averring interpleader's ownership of property in controversy, and praying a return thereof, showed that the property had been seized under execution nearly three years prior to the filing of the interplea, a general demurrer to such interplea raised the question of statutory limitation.⁸²

INDEMNITY BOND GIVEN BY EXECUTION CREDITOR TO SHERIFF

(Caption.)

Know all men by these presents: That we, A. B., as principal, and E. F. and G. H., as sureties, are held and firmly bound unto J. K., sheriff of ——— county, state of Oklahoma, in the penal sum of ——— dollars, for the payment of which, well and truly to be made, we do hereby jointly and severally bind ourselves, our heirs, executors, administrators and assigns.

The condition of the above obligation is such that, whereas, on the ——— day of ———, 19—, a writ of execution was issued out of the district court of ——— county, state of Oklahoma, against C. D., at the suit of A. B., directed and delivered to said sheriff; and whereas, the said sheriff has, by virtue of said writ, seized upon, taken, and levied upon (or, has been directed by said A. B. to seize upon, take, and levy upon) the following described property, to wit: (Describe property.)

Now, therefore, we hereby undertake to pay all costs and damages that said sheriff may sustain by reason of the taking, detention, or sale of such property.

Witness our hands this ——— day of ———, 19—.

A. B.
E. F.
G. H.

(Qualification of sureties.)

Signed in my presence and approved this ——— day of ———, 19—.

J. K., Sheriff of ——— County, Oklahoma.

⁸¹ Carr v. Huffman, 41 P. 982, 1 Kan. App. 713.

⁸² Gardner v. Quick, 54 P. 1034, 8 Kan. App. 559.

· ARTICLE V

SALE AND REDEMPTION

Sections

- 1635. Duty of officer.
- 1636. Place of sale—Who may purchase.
- 1637. Alias execution.
- 1638. Time of sale.
- 1639. Notice of sale.
- 1640. Confirmation of sale.
- 1641. Setting aside sale—Form of motion and order.
- 1642. Waiver and estoppel.
- 1643. Collateral attack.
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- 1645. Recovery of amount bid.
- 1646. Title of purchaser and interest acquired.
- 1647. Sheriff's deed—Form.
- 1648. Possession.
- 1649. Corporate stock.
- 1650. Corporate franchise—Form of certificate of purchase.
- 1651. Redemption of franchise.
- 1652. Irregularities.
- 1653. Reversal of judgment.

§ 1635. Duty of officer

In case of a sale under a general execution, the sheriff does not act as the court's agent, and has no guidance but the law and takes his chance of finding and levying on property which is not exempt, as the court has not specified the property or adjudicated the lien, and has not otherwise been concerned with the sheriff's course.³³

§ 1636. Place of sale—Who may purchase

"All sales of lands or tenements under execution shall be held at the court-house in the county in which such lands or tenements are situated. No sheriff or other officer making the sale of property, either personal or real, nor any appraiser of such property, shall, either directly or indirectly, purchase the same; and every purchase so made shall be considered fraudulent and void."³⁴

³³ Brewer v. Warner, 105 Kan. 168, 182 P. 411, 5 A. L. R. 383.

³⁴ Rev. Laws 1910, § 517L.

§ 1637. Alias execution

"If lands or tenements, levied on as aforesaid, are not sold upon one execution, other executions may be issued to sell the property so levied upon."³⁵

§ 1638. Time of sale

A sheriff, who has levied an execution on personal property, which on the return day remains in his hands unsold for want of bidders, or want of time to advertise, or any other reasonable cause, may sell the property after the return day.³⁶

§ 1639. Notice of sale

"The officer who levies upon goods and chattels, by virtue of an execution issued by a court of record, before he proceeds to sell the same shall cause public notice to be given of the time and place of sale, for at least ten days before the day of sale. The notice shall be given by advertisement, published in same newspaper printed in the county, or, in case no newspaper be printed therein, by setting up advertisements in five public places in the county. Two advertisements shall be put up in the township where the sale is to be held; and where goods and chattels levied upon cannot be sold for want of bidders, the officer making such return shall annex to the execution a true and perfect inventory of such goods and chattels, and the plaintiff in such execution may thereupon sue out another writ of execution, directing the sale of the property levied upon as aforesaid; but such goods and chattels shall not be sold, unless the time and place of sale be advertised, as hereinbefore provided."³⁷

"Lands and tenements taken on execution shall not be sold until the officer cause public notice of the time and place of sale to be given."

³⁵ Rev. Laws 1910, § 5172.

An execution was levied on land, which was then appraised and advertised for sale by the sheriff. Further proceedings under the writ were enjoined by the judgment debtor, and return of the process made by the officer, reciting the facts. The defendant in execution died, and the injunction suit was dismissed. Immediately, and without revivor, an alias execution was issued, reciting the steps taken under the first one, and the land advertised and sold thereunder. Held that the alias execution performed the office of a venditioni exponas at common law, and that a sale made under it was valid. *Rain v. Young*, 59 P. 1068, 61 Kan. 428, 78 Am. St. Rep. 325.

³⁶ *Ireland v. Linn County Bank*, 103 Kan. 618, 176 P. 103, 2 A. L. R. 184.

³⁷ Rev. Laws 1910, § 5159.

en, for at least thirty days before the day of sale, by advertisement in some newspaper printed in the county, or in case no newspaper be printed in the county, in some newspaper in general circulation therein, and by putting up an advertisement upon the court-house door, and in five other public places in the county, two of which shall be in the township where such lands and tenements lie. All sales made without such advertisement shall be set aside, on motion, by the court to which the execution is returnable."³⁸

In sales of real estate upon execution, a notice of the sale as published in the newspaper should be given for at least thirty days before the day of sale, and should be continued in each successive issue of the newspaper up to and including the day of sale, if that is the regular day of issue of such newspaper.³⁹

A notice of sale under execution, published once a week for six weeks in a daily edition, was insufficient,⁴⁰ before the enactment of a statute in 1919, providing that it shall be sufficient to publish notices in a daily newspaper published on Thursday of each week during the required period of publication.⁴¹

Under a statute providing that lands taken on execution shall not be sold without a certain statutory notice, where the return of an officer does not show when or how long he caused such notice to be published, the sale is voidable, and will be set aside on motion.⁴²

³⁸ Rev. Laws 1910, § 5166.

³⁹ *Watkins v. Williams*, 5 P. 771, 33 Kan. 149.

Where notice of a sheriff's sale was published, as required, 30 days before the sale, but not in every issue of the newspaper up to the day of the sale, the sale was voidable. *Rounsaville v. Hazen*, 33 Kan. 71, 5 Pac. 422; *Watkins v. Williams*, 5 Pac. 771, 33 Kan. 149.

⁴⁰ *Cherry v. City Nat. Bank*, 61 Okl. 236, 160 P. 896.

⁴¹ Sess. Laws 1919, p. 131, c. 81.

⁴² *Hazen v. Webb*, 74 P. 1111, 68 Kan. 308. But where the notice of a sheriff's sale of real estate is published in a weekly newspaper for more than thirty days prior to the sale, but is not published in every issue of the paper up to the day of sale, the omission to publish in all the issues of the paper does not render the sale void to the extent that it may be treated as void in a collateral proceeding or on a collateral attack. *Rounsaville v. Hazen*, 5 P. 422, 33 Kan. 71.

Where the sale was to take place, and did take place, at 2 o'clock in the afternoon of the regular day for the issue of the newspaper in which the notice was published, and the notice was not published in that issue, and the court, on proper motion, and before confirmation, set aside the sale for that reason, held that, as all presumptions are in favor of the correctness of the decision of the court it will be presumed that the newspaper of the date of the sale

A sheriff holding an order for the sale of real estate cannot be required, by a writ of mandamus, to publish the notice of sale in a newspaper selected by the plaintiff, though the latter may have paid the newspaper in advance for the publication.⁴³

In sales of real estate on execution, notice by posting on the courthouse door and in five other places is necessary only where there is no newspaper printed in the county.⁴⁴

§ 1640. Confirmation of sale

"If the court, upon the return of any writ of execution, for the satisfaction of which any lands or tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has, in all respects, been made in conformity to the provisions of this article, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed for such lands and tenements; and the officer, on making such sale, may retain the purchase money in his hands until the court shall have examined his proceedings as aforesaid, when he shall pay the same to the person entitled thereto, agreeably to the order of the court."⁴⁵

The sale should be confirmed, where it appears that the proceedings are regular, and no equitable grounds for setting aside the sale are shown.⁴⁶

It is no part of the official duty of a sheriff to notify the execution plaintiff when a sale will be had, and the fact that he has agreed to notify him so that he may bid, and fails to do so, affords no ground for a refusal to confirm the sale at the request of the purchaser.⁴⁷

Mere irregularities are cured by the order of the court confirming the sale; but matters which are not mere irregularities, or

was published prior to the time of the sale, and therefore that the sale was properly set aside. *Watkins v. Williams*, 5 P. 771, 33 Kan. 149.

⁴³ *Winton v. Wilson*, 24 P. 91, 44 Kan. 146.

⁴⁴ *McLaughlin v. Houston-Hudson Lumber Co.*, 31 Okl. 182, 120 P. 659, 38 L. R. A. (N. S.) 248.

⁴⁵ Rev. Laws 1910, § 5167.

⁴⁶ *Robinson v. Kennedy*, 144 P. 1002, 93 Kan. 514; *Collins v. Ritchie*, 2 P. 623, 31 Kan. 371; *Cowdin v. Cowdin*, 3 P. 369, 31 Kan. 528.

⁴⁷ *Keene Five-Cent Sav. Bank v. Marsh*, 3 P. 511, 31 Kan. 771.

which form no part of the proceedings connected with the sale, as, for instance, fraudulent combinations which might prevent a fair and equitable sale, and matters relating to the ownership of the property sold, are not cured, nor finally or conclusively determined, by the order confirming the sale.⁴⁸

An order denying confirmation will be reversed, where no reason appears from the record or is suggested by counsel why such sale should not be confirmed.⁴⁹

The purchaser or assignee of the purchaser of real estate acquires such an interest in the property as to entitle him to file a motion for the confirmation of the sale, with or without the consent of the sheriff.⁵⁰ The confirmation relates back to the date of sale.⁵¹

An execution sale of mortgaged land at two-thirds or more of the appraised value of the debtor's interest is valid.⁵²

§ 1641. Setting aside sale—Form of motion and order

Where land has been sold on execution, any person claiming to be the owner thereof and interested in defeating the sale may, though not a party to the suit, move to set aside such sale.⁵³

Neither the manner of service of summons, nor the want of the defendant's actual knowledge of the rendition of the judgment, nor the fact that the purchaser was not an entire stranger to all the proceedings in the case, nor the fact that the property was sold for much less than its value, nor the fact that the property at the time of the confirmation was worth much more than the amount of the judgment, nor all together, will authorize the sale to be set aside.⁵⁴

An execution sale without notice to the creditors, at which the property was bid in by one of the judgment debtors at a grossly inadequate price, will be set aside.⁵⁵

⁴⁸ *Capital Bank of Topeka v. Huntoon*, 11 P. 369, 35 Kan. 577.

⁴⁹ *McDonald v. Citizens' Nat. Bank*, 51 P. 289, 58 Kan. 818.

⁵⁰ *Payne v. Long-Bell Lumber Co.*, 60 P. 235, 9 Okl. 683.

⁵¹ *Christy v. Springs*, 69 P. 864, 11 Okl. 710.

⁵² *Alexander v. American Nat. Bank*, 54 Okl. 345, 153 P. 130.

⁵³ *Sparks v. City Nat. Bank of Lawton*, 97 P. 575, 21 Okl. 827.

⁵⁴ *McGeorge v. Sease*, 4 P. 846, 32 Kan. 387.

⁵⁵ *Weir v. Travelers' Ins. Co.*, 4 P. 267, 32 Kan. 325.

Where a sale is confirmed on motion of the judgment debtor, and it is afterwards shown by the sheriff that the debtor's wife before the sale claimed the property as her homestead, and that he has received no part of the purchase money from the purchaser, it is not error as against the judgment debtor to

Where the notice of a sheriff's sale is not published for at least 30 days before the day of sale, the sale may be set aside on motion at any time before confirmation.⁵⁶

Where a sheriff's sale was made to satisfy the judgments of several creditors, one of which had been previously paid, but no entry of satisfaction made nor notice given to the other creditors, the fact that such payment was made did not invalidate the sale.⁵⁷

In an attachment action against a nonresident, after service by publication and without any appearance, judgment was rendered against defendant, and a writ issued, which, instead of being simply an order of sale, was a command to satisfy the judgment out of any goods and chattels of defendant, and, for want of them, out of the specific real estate attached. On such writ, a portion of said real estate was sold. It was decided that this irregularity was not sufficient to avoid the writ or the sale.⁵⁸

Where lands are sold at sheriff's sale for a price so grossly inadequate as to be little more than a nominal consideration, a very slight additional circumstance indicative of bad faith on the part of the purchaser, or of a combination among bidders, will be sufficient ground for setting aside the sale.⁵⁹

When a sheriff, who has levied on real estate, sells the land, he must, except where appraisement has been waived, sell the same for not less than two-thirds of its appraised value and, if he sells the same for less, the sale is void.⁶⁰

set aside the confirmation and sale, no costs being taxed to said judgment debtor. *Adams v. Devalley*, 20 P. 239, 40 Kan. 486.

⁵⁶ *Watkins v. Williams*, 5 P. 771, 33 Kan. 149.

⁵⁷ *Capital Bank of Topeka v. Huntoon*, 11 P. 369, 35 Kan. 577.

⁵⁸ *Merwin v. Hawker*, 1 P. 640, 31 Kan. 222.

⁵⁹ *Iona Sav. Bank v. Blair*, 43 P. 686, 56 Kan. 430.

Where land is sold at sheriff's sale a few minutes prior to the time at which the sale was advertised to take place, and at a grossly inadequate price, the sale may be set aside on motion of the defendant. *Pickett v. Pickett*, 3 P. 549, 31 Kan. 727.

Mere inadequacy of price is not sufficient to set aside a sheriff's sale, but it may be considered with other grounds, and where the inadequacy is palpable the purchaser can only retain his advantage by showing that the proceedings are free from fault and irregularity. *Jones v. Carr*, 21 P. 258, 41 Kan. 329; *Capital Bank of Topeka v. Huntoon*, 11 P. 369, 35 Kan. 577.

⁶⁰ *Capital Bank of Topeka v. Huntoon*, 11 P. 369, 35 Kan. 577; *De Jarnette v. Verner*, 19 P. 686, 40 Kan. 224.

Where two-thirds of the appraised value of real estate sold at sheriff's sale

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On a motion to set aside a sheriff's sale, the court may allow or disallow evidence to be introduced.⁶¹

The decision is not conclusive as to the ultimate rights of either of the parties.⁶²

A person who has filed exceptions to the confirmation of an execution sale, which exceptions have been overruled, cannot thereafter sue to have the confirmation set aside on other grounds, without alleging that he had no information as to such grounds when he filed his exceptions, and without showing that his substantial rights were affected by the confirmation.⁶³

A sale of real estate on execution cannot be set aside on a motion of defendant, two years after confirmation, showing no reason for such delay, and presenting only such matters as were necessarily involved in the order of confirmation.⁶⁴

Where the judgment creditors after a sheriff's sale paid a large amount of taxes due on the property sold, the sale should be set aside only on condition that such taxes be paid by the judgment debtor, or out of the proceeds of another sale.⁶⁵

MOTION TO SET ASIDE EXECUTION SALE

(Caption.)

Comes now the above named defendant, C. D., and objects to the confirmation of the sale purported to have been had on the execu-

was \$901, and there was a supposed mortgage on the property of \$800, and the sheriff sold the property for the sum of only \$101, but subject to such mortgage, he sold the property for less than two-thirds of its appraised value, within the meaning of Civ. Code, § 455. *De Jarnette v. Verner*, 19 P. 666, 40 Kan. 224.

⁶¹ *C. Aultman & Co. v. Humphrey*, 53 P. 789, 8 Kan. App. 2.

⁶² *C. Aultman & Co. v. Humphrey*, 53 P. 789, 8 Kan. App. 2.

Irregularities affecting a sheriff's sale may be examined in the district court, on motion to confirm the same, or to set aside the sale. Some of such irregularities may also be re-examined in the district court by proceedings under Civ. Code, §§ 568-580; and all such irregularities, so far as they are shown by the record, may be re-examined on petition in error in the supreme court; and in cases of fraud parties may have an action in the district court in the nature of a suit in equity to set aside the sale, and for such other and further relief as justice and equity may authorize. *Capital Bank of Topeka v. Huntoon*, 11 P. 369, 35 Kan. 577.

⁶³ *Walton v. Kennamer*, 139 P. 984, 41 Okl. 675.

⁶⁴ *Hill v. Gatiliff*, 76 P. 428, 69 Kan. 179.

⁶⁵ *Capital Bank of Topeka v. Huntoon*, 11 P. 369, 35 Kan. 577.

tion herein, and to set aside and hold for naught said sale, for the following reasons, to wit:

1. That the property levied on under said writ of execution and sold herein was appraised far below its actual value, and so far below its value as to show fraud, collusion, partiality, or incompetency on the part of the appraisers, as is shown by the affidavits of ——— and ——— hereto attached and made a part hereof.

2. That said property was sold at a grossly inadequate price, and that the same was worth at the time of said sale the sum of \$———, and that the same was sold for less than two-thirds of the appraised value thereof.

3. That said sale was not advertised as required by law, in this, to wit: (Setting forth irregularities of advertisement.)

4. That said sale was not held on the date on which the same was advertised to be held, to wit, on the ——— day of ———, 19——, but that the same was actually held on the ——— day of ———, 19——.
(Other reasons.)

X. Y., Attorney for Defendant.

ORDER SETTING ASIDE EXECUTION SALE

(Caption.)

Now on this ——— day of ———, 19——, comes on for hearing the motion of the defendant herein, C. D., to set aside the sale of the property taken on execution herein, plaintiff appearing by G. H., his attorney, and defendant appearing by X. Y., his attorney, and it appearing to the court that said motion should be sustained for the reason that (setting forth findings).

It is therefore ordered that said sale be and the same is hereby set aside, vacated, and held for naught, and that said property be reappraised, readvertised, and resold according to law.

———, Judge.

§ 1642. Waiver and estoppel

Where an execution has been levied upon real estate, and appraisement thereof been made, and, without having such appraisement set aside, an alias execution is levied, and a second appraisement is had of the same property, it is too late, after a sale, confirmation, and the execution of a sheriff's deed, to challenge the sale

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or other proceedings on account of any irregularities in the appraisalment.⁶⁶

§ 1643. Collateral attack

Where, under execution, certain land was sold, and on the return of the sheriff the sale was confirmed, and no appeal was taken, the execution and judgment confirming the proceedings and sale are valid against collateral attack.⁶⁷

An attack by strangers on a sheriff's deed on execution sale in an action separate from that in which it was issued on the ground that out of proceeds of sale current taxes were not paid is collateral, and cannot be maintained.⁶⁸

An execution, issued on a valid judgment, from a justice's court, erroneously directed a levy on certain specified property, instead of a general levy, is such that its validity cannot be attacked collaterally.⁶⁹

In a collateral action a party cannot challenge an execution lev-

⁶⁶ *Dickens v. Crane*, 6 P. 630, 33 Kan. 344.

Where a sheriff's sale is void for the reason that he sold the land for less than two-thirds of its appraised value, as required by Civ. Code, § 455, and only to the injury of the judgment debtor, the judgment debtor may, if he waive the invalidity of the sale, treat the sale as valid, and makes it valid by suing the sheriff for any damages which he may have sustained by reason of such irregular sale. *De Jarnette v. Verner*, 19 P. 666, 40 Kan. 224.

Wheat in the stack, alleged to have been wrongfully seized by the sheriff, was sold at sheriff's sale, and a portion of it purchased by the brother of the alleged owner. Held, that the latter, by purchasing from the brother a part of the wheat after it had been threshed, did not estop himself from asserting the invalidity of the sale. *First Nat. Bank v. Knoll*, 52 P. 619, 7 Kan. App. 352.

Where plaintiff's real property was sold under an execution from a court having no jurisdiction to issue it, and by an officer having no authority to sell, but the purchaser acted in good faith, and paid the officer, at the time of the sale, all that the property was worth, and plaintiff, who was present at the sale, made no protest, but gave the purchaser possession, received the proceeds, and permitted the purchaser and his grantees, for 12 years, to occupy the land, and make valuable improvements thereon, without objection, though living within two miles thereof, plaintiff is estopped from denying the purchaser's title, and from recovering the land, though at the time of the sale he did not know that the proceedings were void. *Hazel v. Lyden*, 32 P. 898, 51 Kan. 233, 37 Am. St. Rep. 273.

⁶⁷ *Dixon v. Peacock*, 141 P. 429, 43 Okl. 87.

⁶⁸ *Clark v. Tandy*, 101 Kan. 328, 167 P. 1039.

⁶⁹ *Pracht v. Pister*, 1 P. 638, 30 Kan. 568.

ied upon real estate upon the ground that it misdescribes the amount of the judgment upon which it is based after confirmation and sale.⁷⁰

That the holder of a sheriff's deed brings an action to quiet his title does not expose the deed to collateral attack for irregularities in the proceedings on which it is based.⁷¹

Where the undivided interest of the widow was sold under execution, and the purchaser brought proceedings to partition the land, irregularities in the execution and sale could not be attacked in such collateral proceedings.⁷²

A sheriff's sale is not, after confirmation and the issuance of a sheriff's deed, void and subject to collateral attack because the owner of the judgment wrote a letter to the sheriff directing a return of the order of sale, which letter was not received until after the sale had been made.⁷³

§ 1644. Presumption of validity

Where it was alleged that the property in suit was seized by a sheriff under an execution issued out of a certain court, and directed to the officer as sheriff, and the only averment from which irregularity could be inferred was that the execution was referred to as a "supposed execution," it will be presumed that the execution was valid.⁷⁴

The sale of a crop of corn passes good title as against the grantee in a sheriff's deed to the land, if, at expiration of the period for redemption, the corn is ripe in the sense that it has ceased to draw sustenance from the soil, though not fit to husk or market.⁷⁵

§ 1645. Recovery of amount bid

A sheriff may maintain an action to recover the amount bid at an execution sale, the purchaser refusing to pay, and it is immaterial that the execution has been returned, or that the notice of

⁷⁰ *Dickens v. Crane*, 6 P. 630, 33 Kan. 344.

⁷¹ *Beeler v. Elwell*, 141 P. 551, 92 Kan. 536.

The judgment and execution being valid, the sheriff's deed cannot be attacked collaterally. *Stetson v. Freeman*, 11 P. 431, 35 Kan. 523.

⁷² *Trowbridge v. Cunningham*, 66 P. 1015, 63 Kan. 847.

⁷³ *Caldwell v. Bigger*, 90 P. 1095, 76 Kan. 49.

⁷⁴ *Bowersock v. Adams*, 41 P. 971, 55 Kan. 681.

⁷⁵ *Myers v. Steele*, 158 P. 660, 98 Kan. 577, L. R. A. 1917C, 4.

the sale was defective, the execution debtor and creditor having approved the sale.⁷⁶

§ 1646. Title of purchaser and interest acquired

The grantee in a sheriff's deed obtains as good a title to land conveyed as was held by person against whom execution was issued.⁷⁷

A purchaser of land bound by a judgment lien, of which he knew at the time of the purchase, is not entitled to the value of improvements made by him, against a purchaser at a judicial sale.⁷⁸

Where a leasehold interest in land is sold at judicial sale, the purchaser acquires no greater right than the tenant held, and, like the tenant, he will not be permitted to dispute the title of the landlord under whom he holds.⁷⁹

A purchaser at a sheriff's sale acquires such an interest, and becomes so far a party, that he may make a motion to confirm the sale, or maintain proceedings in error to reverse an order overruling it, and setting aside the sale.⁸⁰

Where title to real estate is evidenced by quitclaim deed, and the adverse claimant claims under a sheriff's deed upon a judgment and execution against a debtor who is not shown to have ever had title to the land, the title conveyed by the quitclaim deed is paramount.⁸¹

Only the interest which an execution debtor has in the property is levied upon and sold, and the purchaser at such sale takes the property subject to any valid and subsisting lien which may exist against it; and the sheriff is not warranted in accepting from the purchaser less than the amount of the bid, or in crediting the purchaser upon the bid with any mortgage debt which he may claim against the property sold.⁸²

⁷⁶ *Walker v. Braden*, 9 P. 613, 34 Kan. 660.

Such action is founded on the contract arising from the bid and its acceptance, and not on the judgment and execution on which the sale was made, and therefore it is unnecessary that the judgment and execution should be set out at length in the petition. *Walker v. Braden*, 9 P. 613, 34 Kan. 660.

⁷⁷ *Clark v. Tandy*, 101 Kan. 328, 167 P. 1039.

⁷⁸ *Rounsaville v. Hazen*, 18 P. 689, 39 Kan. 610.

⁷⁹ *Hentig v. Pipher*, 51 P. 229, 58 Kan. 788.

⁸⁰ *Cowdin v. Cowdin*, 3 P. 369, 31 Kan. 528.

⁸¹ *Mosier v. Momsen*, 74 P. 905, 13 Okl. 41.

⁸² *Walker v. Braden*, 9 P. 613, 34 Kan. 660.

Real estate incumbered by a mortgage was levied on by a judgment credi-

One purchasing real property sold under attachment is not a bona fide purchaser for value, but takes only the interest of defendant in attachment in the property.⁸³

One who, being no party to the judgment, purchases at sheriff's sale real estate which, by the record, apparently belongs to defendant, is protected against unrecorded deeds and mortgages and outstanding equities as fully as one who takes a voluntary conveyance from such defendant.⁸⁴

A sale of real estate by a sheriff, upon a second offer of sale under an appraisement four years old, is not, for this reason alone, void, nor is it voidable, in an action to set it aside, brought several months after confirmation, and after a portion of the property had passed into the hands of innocent purchasers.⁸⁵

The judgment creditor buying at the execution sale is not an innocent purchaser as against a deed of the judgment debtor executed before rendition of the judgment, but not recorded till after the execution sale.⁸⁶

§ 1647. Sheriff's deed—Form

"The sheriff or other officer who, upon such writ or writs of execution, shall sell the said lands and tenements, or any part thereof, shall make to the purchaser as good and sufficient deed of conveyance of the land sold as the person or persons against whom such writ or writs of execution were issued could have made of the same, at or any time after they became liable to the judgment. The deed shall be sufficient evidence of the legality of such sale, and the proceedings therein, until the contrary be proved, and shall vest in the purchaser as good and as perfect an estate in the premises therein mentioned, as was vested in the party at, or after, the time when such lands and tenements became liable to the satisfac-

tor. The land was appraised, advertised, and sold subject to the mortgage, and bid in by the plaintiff in execution for a nominal sum. Held, that the lien of the mortgage was not impaired by a contract between the mortgagor and mortgagee that the latter should look solely to the incumbered premises for the satisfaction of his debt, but that the purchaser took the same charged with the lien of the incumbrance. *Myers v. Jones*, 61 Kan. 191, 59 Pac. 275.

⁸³ *Markley v. Carbondale Inv. Co.*, 73 P. 96, 67 Kan. 535.

⁸⁴ *Lee v. Birmingham*, 1 P. 73, 30 Kan. 312.

⁸⁵ *Capital Bank of Topeka v. Huntoon*, 11 P. 369, 35 Kan. 577.

⁸⁶ *McCalla v. Knight Inv. Co.*, 94 P. 126, 77 Kan. 770, 14 L. R. A. (N. S.) 1258.

tion of the judgment; and such deed of conveyance, to be made by the sheriff or other officer, shall recite the execution or executions, or the substance thereof, and the names of the parties, the amount and date of rendition of each judgment, by virtue whereof the said lands and tenements were sold as aforesaid, and shall be executed, acknowledged and recorded as is or may be provided by law, to perfect the conveyance of real estate in other cases."⁸⁷

"If the term of service of the sheriff or other officer who has made, or shall hereafter make sale of any lands and tenements, shall expire, or if the sheriff or other officer shall be absent, or be rendered unable by death or otherwise, to make a deed of conveyance of the same, any succeeding sheriff or other officer, on receiving a certificate from the court from which the execution issued for the sale of said lands and tenements, signed by the clerk, by order of said court, setting forth that sufficient proof has been made to the court that said sale was fairly and legally made, and on tender of the purchase money, or if the same or any part thereof be paid, then on proof of such payment and tender of the balance, if any, may execute to the said purchaser or purchasers, or his or their legal representatives, a deed of conveyance of said lands and tenements so sold. Such deed shall be as good and valid in law and have the same effect as if the sheriff or other officer who made the sale had executed the same."⁸⁸

Where a sale of real estate on execution is made subject to the right of redemption, the issuance of a certificate of purchase is not a prerequisite to the execution of a sheriff's deed to the property."⁸⁹

A sheriff's deed, defective by reason of omissions, may nevertheless, by the admissions of the adverse party, be treated as complete."⁹⁰

⁸⁷ Rev. Laws 1910, § 5168.

⁸⁸ Rev. Laws 1910, § 5174.

Where real estate is sold under execution subject to the right of redemption, the proper officer to make the deed, under Gen. St. 1901, § 4946, is the sheriff who is in office when the right to the deed accrues. *Armstead v. Jones*, 80 P. 56, 71 Kan. 142.

⁸⁹ *Armstead v. Jones*, 80 P. 56, 71 Kan. 142.

⁹⁰ *Towne v. Milner*, 1 P. 613, 31 Kan. 207.

A sheriff's deed on alias execution recited the issuing of a first execution, levy, appraisalment, no sale for want of bidders, and a return of the execution, then the filing of an amended abstract, the issuing of an alias execu-

In ejectment, where it is shown that plaintiff is entitled to a sheriff's deed to the property in controversy, based on an execution sale, and has received a deed from the proper officer, misrecitals in such deed will not enable the execution defendant to defeat a recovery.⁹¹

A sheriff's deed relates back to the day of sale, and vests the title as of that date; hence, in ejectment by the purchaser, commenced after sale and confirmation, it is no objection to the sheriff's deed as evidence that it bears date and was in fact executed, since suit began.⁹²

SHERIFF'S DEED

This indenture, made this _____ day of _____, 19—, by and between A. B., as sheriff of the county of _____, state of Oklahoma, party of the first part, and C. D., party of the second part, witnesseth that—

Whereas, by virtue of a writ of execution issued out of and under the seal of the district court of _____ county, state of Oklahoma, on the _____ day of _____, 19—, upon a judgment for the sum of \$_____, and \$_____ costs, recovered in said court on the _____ day of _____, 19—, by E. F. against G. H., in case No. _____; said writ being directed and delivered to the sheriff of said county, commanding him that of the goods and chattels of the said G. H. he should cause to be made certain moneys specified in said writ, and for want of goods and chattels he should cause the amount of said judgment, with costs, to be made of the lands and tenements of said G. H., not exempt from execution; and

Whereas, sufficient goods and chattels of said G. H. could not be found, whereof he, the said sheriff, could cause the money specified to be made, therefore he, the said sheriff did, in obedience to said command, levy on, take, and seize all the right, title, and interest

tion, levy, appraisement, and sale. Held, that the deed did not set forth different judgments, and was not void on its face. *Dickens v. Crane*, 6 P. 630, 33 Kan. 344.

⁹¹ *Armstead v. Jones*, 80 P. 56, 71 Kan. 142.

Where a sheriff's deed recites the return of an execution, the proceedings and sale thereunder, and that the court confirmed the sale and ordered the deed made to the purchaser, it will be presumed, in the absence of a contrary showing, that the sale was confirmed as stated in the deed. *Christy v. Springs*, 69 P. 864, 11 Okl. 710.

⁹² *Farlin v. Sook*, 1 P. 123, 30 Kan. 401, 46 Am. Rep. 100.

which the said G. H. had in and to the lands, tenements, real estate, and premises hereinafter particularly set forth and described, with the appurtenances thereunto belonging, said levy being made on the — day of —, 19—; and thereupon the said sheriff did call an inquest of three disinterested householders resident with the county of —, where said lands are situated, and administered to them an oath, impartially to appraise the property so levied on, upon actual view; and said householders having as directed forthwith returned to said sheriff, under their hands, an estimate of the real value of said property, which they fixed at the sum of \$—, and the said sheriff having forthwith deposited a copy of said appraisal with the court clerk of said county of —; and

Whereas, said sheriff did thereupon advertise said lands so levied on for sale by causing public notice of the time and place of sale to be given, for at least thirty days before the day of sale, by advertisement in the —, a newspaper printed and of general circulation in said county of —, and by posting an advertisement upon the courthouse door, and in five other public places in said county, two of which were in the township where such lands and tenements lie; and

Whereas, on the said — day of —, 19—, pursuant to said notice of sale, said sheriff did offer the said lands and tenements for sale at public auction at the front door of the court house in the city of —, in the county of —, state of Oklahoma, at the hour of — o'clock, — m., at which sale the said property was sold and struck off to the said C. D., he being the highest bidder, and that being the highest and best sum bid, and the whole price paid for same, and being more than two-thirds of the appraised value thereof; and

Whereas, on the — day of —, 19—, said sheriff returned said writ of execution into said court, showing all his proceedings thereunder, and the court, after having carefully examined such proceedings, being satisfied that said sale has, in all respects, been made in conformity with the provisions of law, made an order that said sheriff make to said purchaser a deed for such lands and tenements:

Now, therefore, A. B., as sheriff of the county of —, aforesaid, party of the first part, by virtue of said writ and order, and in

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pursuance of the statutes in such case made and provided, for and in consideration of the said sum of ——— dollars, to him in hand paid by C. D., party of the second part, receipt of which is hereby acknowledged, hath granted, bargained, sold, conveyed, and confirmed, and by these presents doth grant, bargain, sell, convey, and confirm, unto the said party of the second part, his heirs and assigns, all the estate, right, title, and interest which the said G. H. had, on the ——— day of ———, 19—, or at any time thereafter, or now has, of, in, and to the following described real estate and premises, situated in the county of ———, and state of Oklahoma, to wit: (Describing same), together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining.

To have and to hold the said premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, forever, as fully and absolutely as he, the sheriff aforesaid, can, may, or ought to by virtue of the said writ, and of the statutes in such cases made and provided, grant, bargain, sell, release, convey, and confirm the same.

In witness whereof, said party of the first part, as sheriff of ——— county, aforesaid, has hereunto set his hand and seal the day and year first above written.

———, Sheriff of ——— County,
State of Oklahoma.

State of Oklahoma, }
County of ———. } ss.:

Before me, ——— in and for said county and state, on this ——— day of ———, 19—, personally appeared A. B., sheriff of ——— county, state of Oklahoma, to me known to be the identical person described in and who executed the within and foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed as such sheriff, for the uses and purposes therein set forth.

In witness whereof I have hereunto set my hand and official seal the day and year last above written.

———, ———.

(If by notary public:)

My commission expires ———, 19—.

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§ 1648. Possession

The purchaser at a sheriff's sale is not ordinarily entitled to the possession of the premises, as a matter of right, until the deed is executed in conformity with the order of confirmation.⁹³

A writ of assistance should not be issued to put in possession a purchaser at an ordinary execution sale under a general judgment.⁹⁴

§ 1649. Corporate stock

"Every purchaser of rights or shares of stock in any corporation or company at any sale thereof made by any officer upon receiving a certificate of such sale as provided in the last section, shall be deemed and held to be the legal and equitable owner of such rights or shares of stock and he shall be and become entitled to all dividends thereon and to the same rights and privileges, as a member of such corporation or company, as the defendant in such attachment, execution or order of sale was theretofore entitled to, notwithstanding such rights and shares of stock may not have been transferred upon the books of such company."⁹⁵

"It shall be the duty of every officer who shall sell any rights or shares of stock in any corporation or company" which has been levied upon and sold by virtue of a writ of attachment, execution or order of sale, "to execute to the purchaser thereof, a certificate in writing reciting the sale and payment of the consideration and conveying to the purchaser such rights and shares; and such officer shall also leave with the president, secretary, cashier or chief clerk, or if there be none, with any other officer of such corporation or company, a true copy of such certificate; and thereupon it shall be the duty of the officer, clerk or other person having charge of the books of such corporation or company to make such entries in the books of such company as may be necessary to vest the legal and equitable title to such rights or shares of stock in the purchaser of same, and to transfer such shares on the books of the company to the purchaser thereof."⁹⁶

⁹³ Robinson v. Hall, 5 P. 763, 33 Kan. 139.

⁹⁴ Lundstrom v. Branson, 139 P. 1172, 92 Kan. 78, 52 L. R. A. (N. S.) 607.

⁹⁵ Sess. Laws 1919, c. 89, § 6.

⁹⁶ Sess. Laws 1919, c. 89, § 5.

§ 1650. Corporate franchise—Form of certificate of purchase

"The sale of any franchise under execution must be made in the county in which the corporation has its principal place of business, or in which the property or some portion thereof, upon which the taxes are paid, is situated." ⁹⁷

"The purchaser at the sale must receive a certificate of purchase of the franchise, and be immediately let into the possession of all property necessary for the exercise of the powers and the receipt of the proceeds thereof, and must thereafter conduct the business of such corporation, with all its powers and privileges, and subject to all its liabilities, until the redemption of the same as hereinafter provided." ⁹⁸

"The purchaser or his assignee is entitled to recover any penalties imposed by law and recoverable by the corporation for an injury to the franchise or property thereof, or for any damages or other cause, occurring during the time he holds the same, and may use the name of the corporation for the purpose of any action necessary to recover the same. A recovery for damages or any penalties thus had is a bar to any subsequent action by or on behalf of the corporation for the same." ⁹⁹

"The corporation whose franchise is sold as in this article provided, in all other respects retains the same powers, is bound to the discharge of the same duties, and is liable to the same penalties and forfeitures as before such sale." ¹

CERTIFICATE OF PURCHASE OF CORPORATE FRANCHISE AT EXECUTION SALE

Whereas, by virtue of a writ of execution issued out of and under the seal of the district court of ——— county, state of Oklahoma, on the ——— day of ———, 19—, upon a judgment for the sum of \$——, and \$—— costs, recovered in said court on the ——— day of ———, 19—, by A. B. against the C. D. Street Railway Company, in case No. ———; said writ being directed and delivered to the sheriff of said county, commanding him that of the personal property of the said judgment debtor in his county, he should cause to be made certain moneys in the said writ specified,

⁹⁷ Rev. Laws 1910, § 1358.

⁹⁸ Rev. Laws 1910, § 1354.

⁹⁹ Rev. Laws 1910, § 1355.

¹ Rev. Laws 1910, § 1356.

and if sufficient personal property of the said judgment debtor, C. D. Street Railway Company, could not be found, then he should cause the amount of said judgment, with costs, to be made of the real property in said county belonging to said judgment debtor, not exempt from execution;

And whereas, the said sheriff did, on the — day of —, 19—, in obedience to said command, levy on, take, and seize all the right, title, and interest which the said judgment debtor so had, in and to the franchise and rights and privileges thereof hereinafter particularly set forth and described;

And whereas, said sheriff thereupon advertised said property for sale by giving due and legal notice of the time and place of sale, and the property to be sold, by advertising the same in the —, a newspaper of general circulation, printed and published in said county once a week for at least thirty days prior to the day of sale, which was the — day of —, 19—, and by posting an advertisement of said sale at the courthouse door, and at five other public places in the county, two of which were in the township where said property is situated:

Now, therefore, I hereby certify that on the said — day of —, 19—, pursuant to said notice of sale, I did offer the franchise of the said C. D. Street Railway Company granted to it by the city of — (fully describing same), together with all the rights and privileges thereof; including the right of possession of all property necessary for the exercise of the powers of said franchise, and the right to conduct the business of such corporation, with all its powers and privileges, unless and until redemption thereof is made as required by law, for sale at public auction, at the front door of the courthouse in the city of — in said county of — at the hour of —, at which sale, the said property was sold and struck off to X. Y., for the sum of \$—, the said X. Y. being the highest bidder, and that being the highest sum bid, and the whole price paid for the same.

Dated this — day of —, 19—.

—, Sheriff of — County.

(Copy of certificate of sale should be attached to the return of the execution.)

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§ 1651. — Redemption of franchise

"The corporation may at any time within one year after such sale redeem the franchise by paying or tendering to the purchaser thereof the sum paid therefor, with twelve per cent. interest thereon, but without any allowance for the roll which he may in the meantime have received; and upon such payment or tender the franchise and all the rights and privileges thereof revert and belong to the corporation, as if no such sale had been made."²

§ 1652. Irregularities

Mere irregularities in conduct of sheriff's sale of realty, such as omission to cause appraisement, if required, or to name hour in notice of sale, afford no basis for an attack on deed after decree of confirmation not appealed from.³

A sheriff's deed of realty made under a valid order of sale, and a void execution is not a nullity, and after decree of confirmation has become final, the purchaser's title cannot be attacked because of invalidity of execution.⁴

Mere irregularities in the method of appraisement, and other steps preliminary to an execution sale, do not render the sale void.⁵

A sale of personal property on execution issued on a void judgment confers no title on the purchaser.⁶

A sheriff's sale under authority of an execution issued out of the district court to the sheriff of another county on a transcript of a judgment of the county court, prior to the adoption of Rev. Laws of 1910, was a nullity, and merely clouded the title without conveying same.⁷

The purchaser at an execution sale cannot be heard to complain that the notice of such sale was defective.⁸

The sale of attached property under an order of sale issued after final judgment in attachment proceedings, without any appraisement having been made under said order of sale, but for more than two-thirds of the actual value thereof, and for more than two-thirds

² Rev. Laws 1910, § 1357.

³ Catlin v. William Deering & Co., 102 Kan. 256, 170 P. 396.

⁴ Catlin v. William Deering & Co., 102 Kan. 256, 170 P. 396.

⁵ Trowbridge v. Cunningham, 66 P. 1015, 63 Kan. 847.

⁶ Schott v. Linscott, 103 P. 997, 80 Kan. 536.

⁷ Garnett v. Goldman, 39 Okl. 516, 135 P. 410.

⁸ Walker v. Braden, 9 P. 612, 34 Kan. 660.

of its appraised value under the order of attachment, is not absolutely void, but voidable.⁹

A sale on an execution out of a court without jurisdiction to make an order of sale is void.¹⁰

§ 1653. Reversal of judgment

"If any judgment or judgments, in satisfaction of which any lands or tenements are sold, shall at any time thereafter be reversed, such reversal shall not defeat or affect the title of the purchaser or purchasers; but in such cases, restitution shall be made, by the judgment creditors, of the money, for which such lands or tenements are sold, with lawful interest from the day of sale."¹¹

Where a sheriff's sale of real estate is made under a special execution, based on two judgments rendered in the same action, brought to foreclose first and second mortgages on such real estate, the fact that the judgment on the inferior mortgage is afterwards reversed does not affect the validity of the sale, even where the judgment plaintiff is the purchaser.¹²

ARTICLE VI

PROCEEDS, AMERCEMENT, AND RETURN

Sections

- 1654. Clerk.
- 1655. Amercement—Forms.
- 1656. Execution mailed.
- 1657. Distribution among execution creditors.
- 1658. Surplus.
- 1659. Return—Form.
- 1660. Neglect of officer.
- 1661. Payment.

§ 1654. Clerk

"If any clerk of a court shall neglect or refuse, on demand made by the person entitled thereto, his agent or attorney of record, to pay over all money by him received in his official capacity, for the use of such persons, every such clerk may be amerced, and the

⁹ Shaffer v. Knox, 53 P. 785, 7 Kan. App. 182.

¹⁰ Robertson v. Eldridge, 15 Okl. 599, 87 P. 659, 15 Okl. 599.

¹¹ Rev. Laws 1910, § 5176.

¹² Falk v. Ferd, Heim Brewing Co., 72 P. 531, 67 Kan. 131.

proceedings against him and his sureties shall be the same as provided for in the foregoing section against sheriffs and their sureties." ¹³

§ 1655. Amercement—Forms

"When the cause of amercement is for refusing to pay over money collected as aforesaid, the said sheriff or other officer shall not be amerced in a greater sum than the amount so withheld, with ten per cent. thereon." ¹⁴

"No sheriff shall forward by mail any money made on any such execution, unless he shall be especially instructed to do it by the plaintiff, his agent or attorney of record. In all cases of a motion to amerce a sheriff, or other officer of any county other than that from which the execution issued, notice by writing shall be given to such officer, as hereinbefore required, by leaving it with him, or at his office, at least fifteen days before the day on which such motion shall be made. All amercements so procured shall be entered on the record of the court, and shall have the same force and effect as a judgment." ¹⁵

"Every surety of any sheriff or other officer may be made party to the judgment rendered as aforesaid, against the sheriff or other officer, by action, to be commenced and prosecuted as in other cases; but the goods and chattels, lands and tenements of any such surety shall not be liable to be taken on execution, when sufficient goods and chattels, lands and tenements of the sheriff or other officer against whom execution may be issued, can be found to satisfy the same. Nothing herein contained shall prevent either party from proceeding against such sheriff or other officer, by attachment, at his election." ¹⁶

"In cases where a sheriff or other officer may be amerced, and shall not have collected the amount of the original judgment, he shall be permitted to sue out an execution and collect the amount of said judgment, in the name of the original plaintiff, for his use." ¹⁷

¹³ Rev. Laws 1910, § 5181.

¹⁴ Rev. Laws 1910, § 5182.

¹⁵ Rev. Laws 1910, § 5185.

¹⁶ Rev. Laws 1910, § 5186.

¹⁷ Rev. Laws 1910, § 5187.

MOTION FOR AMERCEMENT AGAINST A SHERIFF

(Caption.)

Comes now the above named plaintiff, A. B., and moves the court for an order of amercement against G. H., sheriff of _____ county, state of Oklahoma, in the above entitled action, for the reason that the execution heretofore issued in said action in said sheriff's hands was not returned by him within the time and manner provided by law, and the sheriff neglected and refused to levy the same upon property of the said defendant, C. D., when requested so to do by said plaintiff (or, that he neglected and refused to return a just and perfect inventory of all and singular the goods and chattels by him taken under said execution, and has not returned that he has levied and made the amount of said judgment and costs), (or, for the reason that said sheriff has refused and neglected, on demand, to pay over to X. Y., attorney for said plaintiff, all moneys by him collected or received for the use of said plaintiff after collecting and receiving the same, including the sum of \$_____ retained by the said sheriff out of the proceeds of the sale of _____ [describing property sold], sold by said sheriff on execution in this action, and the sale of which property so made was by this court duly confirmed and approved), (or, state other grounds or reasons).

The amount of amercement demanded is the sum of \$_____, being the amount and interest due upon said judgment and execution.

X. Y., Attorney for Plaintiff.

ORDER OF AMERCEMENT AGAINST A SHERIFF

(Caption.)

Now, on this _____ day of _____, 19____, this cause coming on for hearing on the motion of the plaintiff, A. B., for an order of amercement against G. H., sheriff of _____ county, state of Oklahoma, the plaintiff appearing by his attorney, X. Y., and the said G. H., sheriff, appearing in person and by his attorney, K. M., and the court, having heard the evidence and the arguments of counsel made, and being fully advised in the premises, finds that the execution heretofore issued in this action in the hands of said G. H. sheriff, was not returned by him within the time and manner provided by law, and that said G. H. neglected and refused to levy the

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same upon property of the said defendant, C. D., when requested so to do by said plaintiff (state other findings).

It is therefore by the court ordered, adjudged, and decreed that said G. H. be and he is hereby amerced, and that the plaintiff, A. B., have judgment against said G. H. in the amount of \$——, and \$—— costs, and the further sum of ten per cent. thereon, amounting to \$——.

——, Judge.

§ 1656. Execution mailed

"When execution shall be issued in any county in this state and directed to the sheriff of another county, it shall be lawful for such sheriff having the execution, after having discharged all the duties required of him by law to inclose such execution, by mail, to the clerk of the court who issued the same. On proof being made by such sheriff that the execution was mailed soon enough to have reached the office where it was issued within the time prescribed by law, the sheriff shall not be liable for any amercement or penalty if it do not reach the office in due time."¹⁸

§ 1657. Distribution among execution creditors

"In all cases where two or more executions shall be put into the hands of any sheriff or other officer, and it shall be necessary to levy on real estate to satisfy same, and either of the judgment creditors, in whose favor one or more of said executions are issued, shall require the sheriff or other officer to levy said executions, or so many thereof as may be required, on separate parcels of the real property of the judgment debtor or debtors, giving to the officer making the levy on behalf of the creditors, whose execution may, by the provisions of this article, be entitled to a preference, the choice of such part of the real property of the judgment debtor or debtors, as will be sufficient, at two-thirds of the appraised value, to satisfy the same; and in all cases where two or more executions, which are entitled to no preference over each other, are put in the hands of the same officer, it shall be the duty of the officer, when required, to levy the same on separate parcels of the real property of the judgment debtor or debtors, when, in the opinion of the appraisers, the same may be divided without material injury; and if the real property of said debtors will not be sufficient, at

¹⁸ Rev. Laws 1910, § 5184.

two-thirds of its appraised value, to satisfy all the executions chargeable thereon, such part of the same shall be levied on to satisfy each execution, as will bear the same proportion in value to the whole, as the amount due to the execution bears to the amount of all the executions chargeable thereon, as near as may be, according to the appraised value of each separate parcel of said real property."¹⁹

Money collected by a sheriff on execution and remaining in his hands, before such execution is returned or returnable, cannot be applied by him on other writs in his hands against the execution plaintiff.²⁰

§ 1658. Surplus

"If, on any sale made as aforesaid, there shall be in the hands of the sheriff or other officer more money than is sufficient to satisfy the writ or writs of execution, with interest and costs, the sheriff or other officer shall, on demand, pay the balance to the defendant in execution."²¹

Where personal property sold under execution is bid in by a mortgagee thereof, and it appears that his mortgage and the execution are the only liens on such property, he is entitled to the surplus of the purchase money, after satisfaction of the execution, though the officer making the sale has accepted orders of the defendant in execution to pay such surplus to others of his creditors.²²

¹⁹ Rev. Laws 1910, § 5173.

Where a sale was made to satisfy the judgments of several creditors, one of which had been previously paid, but no entry of satisfaction made, nor notice given to the other creditors, and the amount for which the property was sold was not enough to satisfy the other judgments, the judgment creditor whose judgment had been paid was not entitled to receive any portion of the proceeds of the sale. *Capital Bank of Topeka v. Huntton*, 11 P. 369, 35 Kan. 577.

Where two or more suits are commenced under Gen. St. 1889, par. 1204, against the stockholders of a corporation that has been dissolved leaving debts unpaid, and judgments are obtained against the stockholders in such suits at the same term, and executions are issued thereon during the term, or within 10 days thereafter, the fund raised thereon, or upon any one of such executions, must be distributed pro rata among all such execution creditors, as required by paragraph 4544. *Clevenger v. Hansen*, 24 P. 61, 44 Kan. 182.

²⁰ *Eaton v. McElhone*, 49 P. 695, 6 Kan. App. 225.

²¹ Rev. Laws 1910, § 5175.

²² *Walker v. Braden*, 25 P. 195, 44 Kan. 707.

It is error on proceedings for a confirmation of an execution sale to order that the surplus be paid to the purchaser, though it be shown that since the execution sale he has become the assignee of an outstanding equitable mortgage on the premises.²³

Where land is sold by a sheriff under execution, and more money is paid than necessary to satisfy the execution, the excess belongs to whoever owns the land, and, when it is paid into court as a part of the proceedings in an action to which the then owner is not a party, an order of the court disposing of such money without notice to and without the knowledge or consent of the then owner of the land is without jurisdiction, and void.²⁴

§ 1659. Return—Form

"The sheriff or other officer to whom any writ of execution shall be directed, shall return such writ to the court to which the same is returnable, within sixty days from the date thereof."²⁵

If no property is found, the execution may be returned immediately.²⁶

Where a sheriff's return on a sale of property under execution fails to show the exact truth relating to such sale, through omission or mistake, an amendment should be allowed to make the record speak the truth.²⁷

The individual liability of a stockholder arises after a judgment has been rendered against the corporation, and when an execution thereon has been returned nulla bona; and, in the absence of fraud

²³ *Tucker v. McCrie*, 55 P. 493, 8 Kan. App. 228.

²⁴ *Poole v. French*, 83 Kan. 281, 111 P. 488.

²⁵ Rev. Laws 1910, § 5178.

The statute requiring a sheriff to return an execution in 60 days from its date, has been held to have no application to an execution in a special case provided for another statute. *Price v. Citizens' State Bank of Mediapolis*, 102 P. 800, 23 Okl. 723.

A statute providing that a sheriff shall return a writ of execution within 60 days from its date, does not apply to executions in special cases mentioned in another statute defining executions, and providing for special executions conforming to the judgment or order of the court. *Norton v. Reardon*, 72 P. 861, 67 Kan. 302, 100 Am. St. Rep. 459.

²⁶ *Buist v. Citizens' Sav. Bank of Concordia*, 46 P. 718, 4 Kan. App. 700.

The following return: "Finding no property whereon to levy to make the amount of this execution, I now return this writ"—held not to be a return nulla bona. *Beers v. Bunker*, 50 P. 505, 6 Kan. App. 697.

²⁷ *Payne v. Long-Bell Lumber Co.*, 60 P. 235, 9 Okl. 683; *Stetson v. Freeman*, 11 P. 431, 35 Kan. 523.

on the part of the officers, such return is conclusive, as against the stockholder, that the corporation property has been exhausted.²⁸

RETURN OF EXECUTION

(General Form—Levy on Personal Property)

Sheriff's Office, _____ County, State of Oklahoma.

Received the within writ _____, 19____, at _____ o'clock _____ m., and on the _____ day of _____, 19____, levied on the goods and chattels of the within named _____, described in the annexed schedule.

_____, 19____, sold the following goods and chattels at the prices set opposite the same, respectively:

_____, \$_____.

_____, \$_____.

The following goods remain unsold for _____.

Dated this _____ day of _____, 19____.

W. G., Sheriff of _____ County,

By _____, Undersheriff.

Sheriff's fees:

(Itemize same.)

(When Money is Paid on the Execution)

Sheriff's Office, _____ County, State of Oklahoma.

Received this writ _____, 19____, at _____ o'clock _____ m.

_____, 19____, received of the within C. D. _____ dollars in full satisfaction of the same.

W. G., Sheriff of _____ County,

By _____, Undersheriff.

Sheriff's fees:

(Itemize.)

(No Personal Property Found—Levy on Real Property)

Sheriff's Office, _____ County, State of Oklahoma.

Received this writ this _____ day of _____, A. D., 19____, at _____ o'clock _____ m. According to the command of the within

²⁸ Steffins v. Gurney, 59 P. 725, 61 Kan. 292; Thompson v. Pfeiffer, 56 P. 763, 60 Kan. 409.

writ, finding no goods or chattels belonging to the within named defendant whereon to levy on the _____ day of _____, A. D., 19—, I did forthwith levy said writ upon the following described _____ of said debtor, situated in _____ county, and state of Oklahoma, to wit: _____, which were liable to satisfy said judgment, and did cause the same to be appraised by _____, _____, and _____, three disinterested householders residing within said county wherein said lands are situated, and administer to them an oath impartially to appraise said property levied upon, upon actual view. And said householders did forthwith return to me, under three disinterested householders residing within said county wherein said lands are situated and administer to them an oath with the clerk of said district court from whence the execution issued, and did cause public notice of the time and place of sale of said _____ to be given over _____ days before the day of sale thereof, by advertisement in the _____, a newspaper printed in and of general circulation in _____ county, state of Oklahoma, a copy of said notice with the printer's affidavit is hereto attached and made part of this return.

On the _____ day of _____, A. D. 19—, at _____ o'clock _____ m. of said day, I offered the said _____ for sale at _____, in _____ county, state of Oklahoma, the time and place stated in said notice, at public auction, to the highest and best bidder for cash in hand.

Sold the following _____, to wit: _____, for cash in hand to _____ for the sum of \$_____, he being the highest and best bidder for said property and that being the highest and best price bid for the same. Said purchase money I _____.

Dated this _____ day of _____, 19—.

_____, Sheriff of _____ County,
By _____, Undersheriff.

Sheriff's fees:

(Itemize.)

(No Property Found)

_____, 19—. I can find no property of the within C. D. in my county (or, the within C. D. has no property in my county subject to execution).

W. G., Sheriff of _____ County,
By _____, Undersheriff.

§ 1660. Neglect of officer

"If any sheriff or other officer shall refuse or neglect to execute any writ of execution to him directed, which has come to his hands, or shall neglect or refuse to sell any goods and chattels, lands and tenements; or shall neglect to call an inquest and return a copy thereof forthwith to the clerk's office, or shall neglect to return any writ of execution to the proper court on or before the return day thereof; or shall neglect to return a just and perfect inventory of all and singular the goods and chattels by him taken in execution, unless the said sheriff or other officer shall return that he has levied and made the amount of the debt, damages and costs; or shall refuse or neglect, on demand, to pay over to the plaintiff, his agent or attorney of record, all moneys by him collected or received for the use of said party at any time after collecting or receiving the same, except as provided in section 5167; or shall neglect or refuse, on demand made by the defendant, his agent or attorney of record, to pay over all moneys by him received for any sale made, beyond what is sufficient to satisfy the writ or writs of execution, with interest and legal costs, such sheriff or other officer shall, on motion in court, and two days' notice thereof in writing, be amerced in the amount of said debt, damages and costs, with ten per cent. thereon to and for the use of said plaintiff or defendant, as the case may be." ²⁹

§ 1661. Payment

"After the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt shall be a sufficient discharge for the amount so paid, or directed to be credited by the judgment creditor on the execution." ³⁰

²⁹ Rev. Laws 1910, § 5180.

³⁰ Rev. Laws 1910, § 5194.

ARTICLE VII

SUPPLEMENTAL PROCEEDINGS

Sections

- 1662. In general.
- 1662a. Examination of debtor and others—Arrest—Contempt.
- 1663. Reference—Form.
- 1664. Receivers—Order of appointment—Form.
- 1665. Continuance.
- 1666. Lien on funds.
- 1667. Fees and costs.
- 1668. Contempt.
- 1669. Orders.
- 1670. Judgment enforced after death.

§ 1662. In general

The statutory remedy commonly known as "proceedings in aid of execution," for the ascertaining and taking of equitable interests in real estate, are not the only provisions for that purpose, but are merely cumulative or alternative.³¹

An abstract of a judgment of a justice of the peace, duly filed in the district court, is a sufficient basis for a proceeding in aid of execution.³²

§ 1662a. Examination of debtor and others—Arrest—Contempt

"When an execution against a judgment debtor, or one of the several debtors in the same judgment, issued to the sheriff of the county where he resides, or, if he does not reside in the state, to the sheriff of the county where judgment was rendered, or a transcript of a justice's judgment has been filed, is returned unsatisfied, in whole or in part, the judgment creditor is entitled to an order of the county judge, or judge of the district or superior court of the county to which the execution was issued, requiring such debtor to appear and answer concerning his property, before such judge, or a referee appointed by such judge, at a time and place specified in such order, within the county to which the execution was issued."³³

³¹ Poole v. French, 80 P. 997, 71 Kan. 391.

³² Honce v. Schram, 85 P. 535, 73 Kan. 368.

³³ Rev. Laws 1910, § 5190.

Kansas cases.—In proceedings in aid of execution, instituted under Code, § 482, the judgment debtor cannot be required by an order of the judge of the

"After the issuing of an execution against property, and upon the affidavit of the judgment creditor, his agent or attorney, that the judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, the county judge or judge of the district or superior court of the county in which the order may be served, may, by order, require the judgment debtor to appear, at a time and place in said county to answer concerning the same; and such proceedings may thereupon be had, for the application of the property of the judgment debtor toward the satisfaction of the judgment, as hereinafter prescribed."³⁴

"Instead of the order requiring the attendance of the judgment debtor, as provided in the last two sections, the judge may, upon proof to his satisfaction, by affidavit of the party or otherwise, that there is danger of the debtor leaving the state, or concealing himself, to avoid the examination herein mentioned, issue a warrant

district court to appear and answer concerning his property outside of the county to which the execution against him was issued; but, where an order is made requiring him to appear within a proper county, and, by consent of all the parties and with the approval of the judge, the judgment debtor voluntarily appears in another county in the same judicial district, submits to the examination, and the consideration of the case is adjourned to the county in which the execution was issued, and the judgment debtor there proceeds with a hearing without objection, he waives the irregularity of an examination in a county other than the one to which the execution was issued. *State v. Burrows*, 5 P. 449, 33 Kan. 10.

After proceedings have been regularly instituted before a probate judge in aid of execution, and a receiver appointed, the jurisdiction of such judge continues until all orders concerning the property of the judgment debtor are fully obeyed. *In re Morris*, 18 P. 171, 39 Kan. 28, 7 Am. St. Rep. 512.

An execution defendant, after the return of the execution, was ordered by the judge of the district court to appear and answer concerning her property. After appearing by attorney, but before submitting to any examination, she left the county, and went to another county, where she was arrested under an order issued by the district judge, and brought back to the county where the proceeding was pending. On the hearing, she was discharged from arrest. By consent, the examination with reference to her property was continued; and afterwards, on a hearing, an order was made appointing a receiver, and directing application of certain property to the payment of the judgment. Held that, whether the arrest was legal or not, it did not deprive the court of the jurisdiction before acquired to examine the defendant with reference to her property, and make an order for its application to the payment of the judgment. *Teats v. Bank of Herrington*, 51 P. 219, 58 Kan. 721.

³⁴ Rev. Laws 1910, § 5191.

requiring the sheriff to arrest him and bring him before such judge, within the county in which the debtor may be arrested. Such a warrant can be issued only by a county judge, or the judge of the district or superior court, of the county in which such debtor resides or may be arrested. Upon being brought before the judge, he shall be examined on oath, and other witnesses may be examined on either side; and if, on such examination, it appear that there is danger of the debtor leaving the state, and that he has property which he unjustly refuses to apply to such judgment he may be ordered to enter into an undertaking, in such sum as the judge may prescribe, with one or more sureties, that he will, from time to time, attend for examination before the judge or referee, as shall be directed. In default of entering into such an undertaking, he may be committed to the jail of the county, by warrant of the judge, as for contempt."²⁵ But "imprisonment for debt is prohibited, except for the nonpayment of fines and penalties imposed for the violation of law."²⁶

"No person shall, on examination pursuant to this article, be excused from answering any question on the ground that his examination will tend to convict him of a fraud; but his answer shall not be used as evidence against him in a prosecution for such fraud."²⁷

"Witnesses may be required, upon the order of the judge, to appear and testify upon any proceedings under this article, in the same manner as upon the trial of an issue."²⁸

"The party or witness may be required to attend before the judge, or before a referee appointed by the court or judge. All examinations and answers before a judge or a referee, under this article, must be on oath, and reduced to writing; but when a corporation answers, the answer must be on oath of an officer thereof."²⁹

The failure of the judgment debtor to appear in supplementary proceedings and testify does not preclude the examination of other witnesses, nor prevent the judge from making such an order as the testimony produced will warrant. While the rights of third parties

²⁵ Rev. Laws 1910, § 5192.

²⁶ Const. Okl. art. 2, § 13.

²⁷ Rev. Laws 1910, § 5193.

²⁸ Rev. Laws 1910, § 5196.

²⁹ Rev. Laws 1910, § 5197.

as to the ownership of assets sought to be subjected to the payment of a judgment cannot be finally determined in summary proceedings, the fact that the property is in the hands of others than the judgment debtor, or that a colorable dispute as to the ownership arises, does not deprive the judge of power to proceed.⁴⁰

§ 1663. Reference—Form

"The judge may, in his discretion, order a reference to a referee, agreed upon or appointed by him, to report the evidence or the facts."⁴¹

ORDER FOR A REFEREE TO REPORT EVIDENCE OR FACTS

(Caption.)

It appearing to the judge of this court that on the — day of —, 19—, the plaintiff herein, A. B., recovered a judgment against the defendant, C. D., for the sum of \$—, and that execution was issued thereon on the — day of —, 19—, and returned unsatisfied, and it further appearing from the affidavit of said plaintiff that said defendant has property which he unjustly refuses to apply toward the satisfaction of said judgment—

It is ordered that the issue of facts raised by said affidavit are hereby referred to G. H., as referee, to hear the evidence and report the facts upon the same on the — day of —, 19—; and it is further ordered that said defendant, C. D., appear before said referee on said date at (state place) and answer concerning his property.

Dated this — day of —, 19—. —, Judge.

§ 1664. Receivers—Order of appointment—Form

"The judge may also, by order, appoint the sheriff of the proper county, or other suitable person, a receiver of the property of the judgment debtor, in the same manner and with like authority as if the appointment was made by the court. The judge may also, by order, forbid a transfer or other disposition of the property of the judgment debtor, not exempt by law, and any interference therewith."⁴²

⁴⁰ Honce v. Schram, 85 P. 535, 73 Kan. 368; Honce v. Schram, 85 P. 535, 73 Kan. 368.

⁴¹ Rev. Laws 1910, § 5206.

⁴² Rev. Laws 1910, § 5200.

"If the sheriff shall be appointed receiver, he and his sureties shall be liable on his official bond for the faithful discharge of his duties as receiver, and no additional oath shall be required of him; if any other person shall be appointed receiver, he shall give a written undertaking, in such sum as shall be prescribed by the judge, with one or more sureties, to the effect that he will faithfully discharge the duties of receiver, and he shall also take an oath to the same effect before acting as such receiver. The undertaking mentioned in this section shall be to the state of Oklahoma, and actions may be prosecuted for a breach thereof, by any person interested, in the same manner as upon a sheriff's official bond."⁴³

"The receiver shall be vested with the property and effects and rights in action of the judgment debtor, not exempt by law, or such part thereof as the court or judge may order, and may sue for, collect, and recover, and dispose of the same, and apply the proceeds according to the order of the court or judge, and generally may do such acts concerning the property as the court or judge may authorize."⁴⁴

A sheriff, appointed receiver of the property of a judgment debtor, has the same authority that any other person so appointed would have, and difficulties he is likely to encounter in gaining possession of the debtor's property furnish no grounds for reversal of the order of appointment.⁴⁵

"The court or judge may order the delivery, to the receiver, by the judgment debtor, or any other person in whose possession the same may be, of any notes, bills, accounts, contracts, books or other evidence of indebtedness or right in action, of the judgment debtor, and may enforce such order by attachment, as for a contempt."⁴⁶

ORDER APPOINTING RECEIVER FOR JUDGMENT DEBTOR

(Caption.)

Now, on this ——— day of ———, 19—, this cause coming on to be heard on the application of the plaintiff for the appointment of a receiver to take charge of all the property and effects and rights in action of the said defendant, C. D., and it appearing that due

⁴³ Rev. Laws 1910, § 5202.

⁴⁴ Rev. Laws 1910, § 5203.

⁴⁵ Teats v. Bank of Herrington, 51 P. 219, 58 Kan. 721.

⁴⁶ Rev. Laws 1910, § 5204.

notice of said hearing has been given to said defendant, and it appearing to the judge of this court that the plaintiff, on the _____ day of _____, 19—, recovered a judgment against said defendant for the sum of \$_____, and that there was issued on said judgment an execution which was duly returned on the _____ day of _____, 19—, showing that said defendant has not personal or real property, subject to levy on execution, sufficient to satisfy the judgment, and it further appearing that said defendant is the owner of certain equitable interests in real estate, stock, notes, and other rights of action subject to the payment of such judgment:

It is therefore ordered and adjudged by the court that G. H., of _____ county, state of Oklahoma, be and he is hereby appointed as receiver of said defendant, and is hereby ordered to immediately take into his possession and under his control all of the property and effects and rights in action of the said defendant, C. D., not exempt by law, and to sue for, collect, and recover, and dispose of the same, and apply the proceeds according to the order of this court.

It is further ordered that said defendant, C. D., be, and he is hereby enjoined from transferring or otherwise disposing of his property, and all other persons are enjoined from interfering therewith, pending the further order of this court.

It is further ordered that any person or persons, in whose possession any notes, bills, accounts, contracts, books, or other evidence of indebtedness or rights in action of the said defendant, C. D., may be, deliver the same to said receiver.

It is further ordered that said receiver make due report of his proceedings hereunder within _____ days from the date hereof.

It is further ordered that said receiver, before entering upon the discharge of his duties hereunder, enter into a bond in the sum of \$_____, with sureties, to be approved by the court clerk of this court, conditioned as required by law, and that he also take and file herein his oath that he will faithfully discharge his duties as such receiver.

_____, Judge of the District Court.

§ 1665. Continuance

"The judge or referee, acting under the provisions of this article, shall have power to continue his proceedings, from time to time, until they shall be completed."⁴⁷

⁴⁷ Rev. Laws 1910, § 5205.

§ 1666. Lien on funds

Service on a judgment defendant of a notice to appear in supplementary proceedings, no order being made forbidding the transfer of his property, does not give plaintiff a lien on the funds held by the defendant, nor prevent the defendant from withdrawing such funds from the reach of his creditors by investing them in a homestead.⁴⁸

§ 1667. Fees and costs

"The judge shall allow to clerks, sheriffs, referees, receivers and witnesses such compensation as is allowed for like services in other cases, to be taxed as costs in the case, and shall enforce, by order, the collection thereof, from such party or parties as ought to pay the same."⁴⁹

"The clerk shall be allowed such fees for services under this head as are allowed for similar services in other cases."⁵⁰

§ 1668. Contempt

"If any person, party or witness disobey an order of the judge or referee, duly served, such person, party or witness may be punished by the judge, as for a contempt."⁵¹

A judgment debtor may be committed for contempt for willfully disobeying an order in proceedings in aid of execution requiring him to apply property in his possession not exempt to the satisfaction of the judgment.⁵²

⁴⁸ *McConnell v. Wolcott*, 78 P. 848, 70 Kan. 375, 3 L. R. A. (N. S.) 122, 109 Am. St. Rep. 454.

⁴⁹ Rev. Laws 1910, § 5209.

⁵⁰ Rev. Laws 1910, § 5210.

⁵¹ Rev. Laws 1910, § 5207.

⁵² *State v. Burrows*, 5 P. 449, 33 Kan. 10; *In re Burrows*, 7 P. 148, 33 Kan. 675.

In contempt proceedings against a judgment debtor, who was shown to have money under his actual control not exempt by law, and which he refused to apply to the satisfaction of the judgment, the judge may commit him to the county jail until the judgment and the cost of the contempt proceedings are satisfied. *In re Burrows*, 7 P. 148, 33 Kan. 675.

A person cited for contempt for failure to pay money found by the district court on examination in supplementary proceedings, to belong to the judgment debtor, cannot excuse a disobedience of the order by asserting that the money withheld does not belong to such debtor. Such showing should have been made at the original examination. *In re Lewis*, 72 P. 788, 67 Kan. 340.

In proceedings in aid of execution the court made a general finding that the

§ 1669. Orders

"The orders mentioned in the foregoing sections shall be in writing, and signed by the judge making the same, and shall be served as a summons in other cases. The judge shall reduce all his orders to writing, which, together with a minute of his proceedings, signed by himself, shall be filed with the clerk of the court of the county in which the judgment is rendered, or the transcript of the justice filed, and the clerk shall enter on his execution docket the time of filing the same."⁵³

A third person subpœnaed as a witness in supplementary proceedings, who gives testimony, but is not made a party and did not intervene to claim the property, is not bound by the order of the judge, and may in an appropriate action litigate his rights to such property.⁵⁴

In proceedings supplemental to execution, the court is not authorized to direct a judgment debtor to apply to the payment of a judgment property the title to which is in a third party, but only property which the debtor has power to deliver.⁵⁵

§ 1670. Judgment enforced after death

"When any judgment has been rendered for or against the testator or intestate in his lifetime, no execution shall issue thereon after his death, except:

"First. In case of the death of the judgment creditor, upon the application of his executor or administrator, or successor in interests.

"Second. In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon.

"A judgment against the decedent for the recovery of money, judgment debtor had money and property in his possession and under his control which he unjustly refused to apply to the payment of his debts, and ordered his imprisonment until he make full satisfaction of the judgment. Held, on habeas corpus, that it was necessary that the order state the amount of money and describe the property under his control, otherwise it would not appear that he had wherewith to satisfy the judgment, and that the order should first direct payment, and only after refusal should the commitment be made. In re O'Connell, 30 P. 456, 49 Kan. 415.

⁵³ Rev. Laws 1910, § 5208.

⁵⁴ Honce v. Schram, 85 P. 535, 73 Kan. 368.

⁵⁵ Ryland v. Arkansas City Milling Co., 92 P. 160, 19 Okl. 435.

must be presented to the executor or administrator, like any other claim. If the execution is actually levied upon any property of the decedent before his death, the same may be sold for the satisfaction thereof, and the officer making the sale must account to the executor or administrator for any surplus in his hands."⁵⁶

ARTICLE VIII

WRONGFUL EXECUTION

Sections

1671. Conversion—Damages.

§ 1671. Conversion—Damages

Where goods belonging to the plaintiff are taken and sold under a void judgment and writ of attachment, the purchaser at the sale is liable in conversion, especially where the purchaser is the plaintiff in the attachment proceedings.⁵⁷

Where a party causes an execution to be issued on a void judgment and causes the officer to whom it is delivered to seize the property of one not a party to the suit in which the judgment is rendered, the officer thereby becomes the agent of such party, and the party is liable for compensatory damages to the person injured thereby.⁵⁸

In an action against a judgment creditor to recover damages for land sold under a judgment obtained by publication, where the judgment is afterwards vacated, the measure of damages is the value of the land when the bona fide purchaser acquires a sheriff's deed.⁵⁹

⁵⁶ Rev. Laws 1910, § 6351.

⁵⁷ Bilby v. Jones, 138 P. 414, 39 Okl. 613.

⁵⁸ Duff & Repp Furniture Co. v. Read, 88 P. 263, 74 Kan. 730.

⁵⁹ Erath v. Glenn, 129 P. 830, 89 Kan. 55.

CHAPTER XXII

JUDICIAL SALES

Sections

- 1672. Judgment or order—Forms.
- 1673. Appraisement.
- 1674. Authority to sell.
- 1675. Notice.
- 1676. Return, confirmation, and objections.
- 1677. Foreclosure.
- 1678. Opening or vacating sale—Forms.
- 1679. Resale—Form of order.
- 1680. Collateral attack.
- 1681. Title and rights of purchaser.
- 1682. Taxes.
- 1683. Wrongful sale.
- 1684. Validity.
- 1685. Foreclosure sale.
- 1686. Without appraisement.
- 1687. Right of redemption.
- 1688. Tax sales.
- 1689. Estray sales.

§ 1672. Judgment or order—Forms

In the case of a "judicial sale," as distinguished from a sale by virtue of a general execution, the court actually or presumptively adjudicates every matter essential to the propriety and validity of the sale decree.¹

The order must run in the name of the state and be under the seal of the court.²

¹ *Brewer v. Warner*, 105 Kan. 168, 182 P. 411, 5 A. L. R. 385.

² Order of sale on decree of foreclosure not running in the name of the state to the sheriff is void. *Martin v. Hostetter*, 59 Okl. 246, 158 P. 1174. Order of sale under decree of foreclosure not running in name of state of Oklahoma to the sheriff cannot be amended after sale to cure defect. *Id.*

The provision of Const. art. 3, § 1, that "all courts of record shall have a seal to be used in the authentication of all process," is mandatory; and an order of sale issued without the seal of the court is void, and the court has no power, after a sale made thereunder, to allow the process to be amended by attaching the seal. *Gordon v. Bodwell*, 51 P. 906, 59 Kan. 51, 68 Am. St. Rep. 341.

(1580)

ORDER FOR JUDICIAL SALE

(Caption.)

The State of Oklahoma, to the Sheriff of _____ County—Greeting:

Whereas, _____ on the _____ day of _____, 19____, obtained a judgment in the district court of _____ county, state of Oklahoma, against _____ for the sum of _____ dollars, together with interest thereon, at the rate of _____ per centum per annum, from the _____ day of _____ 19____, and the sum of _____ dollars, costs, and _____ dollars accrued costs, and clerk's costs accruing in the sum of _____ dollars; and whereas, there has been paid on said judgment the sum of _____ dollars, and there remains unpaid the sum of _____ dollars, with interest on the sum of _____ dollars, from the _____, day of _____, 19____, at said rate aforesaid, and said costs and accruing costs; and whereas, by the judgment of said court the following described property was charged with the payment of said judgment, to wit: _____:

Now, therefore, you are hereby commanded to cause the said property above described to be advertised and sold without appraisalment according to law. And make return of this order of sale, showing the manner in which you have executed the same, within sixty days from the date hereof.

In witness whereof I have hereunto set my hand and affixed the seal of said court at _____, in said county, this _____ day of _____, 19____.

_____, District Clerk.

By _____, Deputy.

SHERIFF'S RETURN

Received the within writ on the _____ day of _____, 19____, at _____ o'clock _____m., and executed same on the _____ day of _____, 19____, at _____ o'clock _____m., by _____.

Dated this _____ day of _____, 19____.

_____, Sheriff of _____ County,

By _____, Under-Sheriff (Deputy).

§ 1673. Appraisalment

Where a mortgage contains the provision "and waive the appraisalment," a provision in the order of sale "according to the provisions of law relating to the sale of real estate under execution" means that the premises shall be sold "without appraisalment."^a

^a Owens v. Culbertson (Okla.) 164 P. 975.

Where lands sold at judicial sale are required to be appraised, the appraisement must be upon such actual view as will enable the appraisers to judge fairly of the value of the land and improvements upon it, the mere entry on one corner of a tract of 240 acres at a distance of a half mile from the house and outbuildings not being a sufficient view.⁴

§ 1674. Authority to sell

A sheriff or other officer of the court, in making a judicial sale, ordinarily acts under the direction of the court out of which the order of sale issues.⁵

§ 1675. Notice

The notice of sale must be published for thirty days, and the first publication should be at least thirty days before the sale.⁶

Under the statute directing notice to be given of the time and place of execution sales by advertisement, stating the name of plaintiff defectively will not vitiate the sale, since the officer is not required to include in his notice of sale the name of either the plaintiff or the defendant.⁷

§ 1676. Return, confirmation, and objections

Confirmation or vacation of a judicial sale is within the trial court's sound discretion.⁸

⁴ *Miller v. Loving*, 53 P. 476, 59 Kan. 485.

⁵ *State v. Hoover*, 142 P. 1110, 43 Okl. 299.

⁶ A printer's affidavit showing daily publication of sale notice from January 22d to February 23d, inclusive, sufficiently showed publication for 30 days before day of sale, as required by Gen. St. 1909, § 6048 (Code Civ. Proc. § 453). *First Nat. Bank of Parsons v. Kennedy*, 157 P. 417, 98 Kan. 51, rehearing denied 157 P. 1199, 98 Kan. 477.

Where decree foreclosing realty mortgage ordered a sale "according to law," and order of sale provided that premises "be advertised and sold according to law," the publication required was that provided in Rev. Laws 1910, § 5166. *Johnson v. Taylor* (Okl.) 173 P. 1039. In foreclosure sale made on order of sale requiring publication under Rev. Laws 1910, § 5166, the notice of sale must be first published at least 30 days before day of sale, and continued in successive issues to day of sale. *Id.*

Under Rev. Laws 1910, § 5166, a publication notice for foreclosure sale first made on the 15th day of November and on each day thereafter including the 15th day of December, the sale being had on the 16th, is sufficient. *Richmond v. Robertson*, 50 Okl. 635, 151 P. 203.

⁷ *McLain Land & Investment Co. v. Kelly*, 66 P. 282, 11 Okl. 26.

⁸ *In re Standwaitie's Estate* (Okl.) 175 P. 542.

A sheriff's return that property was sold by him at public auction implies that it was disposed of to the highest bidder.⁹

An order confirming a judicial sale does not conclude the parties as to the question of title under the sheriff's deed based thereon.¹⁰

Third persons whose rights are not affected cannot complain that an attorney purchases his client's realty at a judicial sale.¹¹

The rule of caveat emptor applies to a purchaser at a judicial sale.¹²

§ 1677. — Foreclosure

Objections to confirmation of a foreclosure sale, raising no jurisdictional question, but going merely to certain trial irregularities, are concluded by the judgment rendered, and on defendant's failure to except thereto and appeal such irregularities cannot be considered.¹³

Confirmation ordinarily concludes objections to irregularities, but not objections based on gross errors¹⁴ or fraud in the proceedings.¹⁵

Where a judgment creditor has made an equitable assignment of his bid at a sheriff's sale under decree of foreclosure, and the assignee has paid the purchase price, the judgment creditor has no right to defeat confirmation of the sale by dismissing the confirmation proceedings.¹⁶

⁹ *Fraser v. Seeley*, 79 P. 1081, 71 Kan. 160.

¹⁰ *Havens v. Pope*, 62 P. 538, 10 Kan. App. 299.

¹¹ *Hayes v. Waggener*, 161 P. 584, 98 Kan. 740.

¹² *In re Standwaitie's Estate* (Okla.) 175 P. 542.

¹³ *McCornack v. Fleming* (Okla.) 172 P. 952.

¹⁴ A decree was entered in a foreclosure suit, and the sheriff sold the premises under an execution within 60 days from its issuance, but did not return the writ until the sixty-second day after its date. The sale was confirmed. Held that, it being within the power of the court to order the premises sold under special execution at the time of sale, the confirmation removed any objection on account of such irregularity, being an approval of that which the court, as to the time the return was made, had the power to order in the first instance. *Price v. Citizens' State Bank of Mediapolis*, 102 P. 800, 23 Okla. 723. An order of confirmation of a real estate mortgage foreclosure sale was erroneous where directing the sheriff to make a deed to the purchaser before the purchase money was paid to the sheriff. *Id.*

¹⁵ Objection to confirmation of sale under foreclosure held to show no such gross inadequacy of price or circumstances raising presumption of fraud as to require sale to be set aside. *Wheeler & Motter Mercantile Co. v. Wright*, 64 Okla. 97, 166 P. 184.

¹⁶ *Payne v. Long-Bell Lumber Co.*, 60 P. 235, 9 Okla. 683.

Where, at a term subsequent to the term at which an order of confirmation is made, it is moved to set aside the order, the motion must state facts showing that movant is entitled to the relief sought.¹⁷

§ 1678. Opening or vacating sale—Forms

Mere inadequacy of price is not ground for setting aside a judicial sale;¹⁸ but a sale may be set aside for gross inadequacy of price under circumstances showing unfair conduct of the successful bidder or raising presumption of fraud.¹⁹

Where interested parties attack the title of property offered at a judicial sale, in such a way as to deter bidders and depress values, and where the price paid for the property is greatly inadequate, the sale should be set aside.²⁰

The purchaser is a necessary party to a motion to set aside a judicial sale.²¹

The court has no authority to set aside a sale on foreclosure, where the parties alleged to be affected made no effort before the sale to relieve themselves from their own negligence.²²

Without fraud, or unfairness, or gross inadequacy of price, one acquiring mortgagor's interest is not entitled to have a foreclosure sale, made conformably to statute, set aside because he did not receive other than statutory notice of the time of sale, and hence was not present, especially where such failure was not attributable to the purchaser.²³

¹⁷ Hall v. Holloway, 62 Okl. 192, 162 P. 186.

¹⁸ Cowles v. Phoenix Mut. Life Ins. Co., 65 P. 217, 63 Kan. 883.

¹⁹ Wheeler & Motter Mercantile Co. v. Wright, 64 Okl. 97, 166 P. 184.

If unaccompanied by unfairness of successful bidder, or circumstances sufficient to raise a presumption of fraud, a judicial sale will not be set aside for mere inadequacy of price, unless it is so great as to shock conscience. Wheeler & Motter Mercantile Co. v. Miller (Okl.) 175 P. 224.

A sale will be set aside where there was a defect in the sheriff's return, and there is evidence that the price was inadequate. Evans v. Bushnell, 52 P. 419, 59 Kan. 160.

²⁰ Wood v. Drury, 43 P. 763, 56 Kan. 409.

²¹ Hall v. Holloway, 62 Okl. 192, 162 P. 186.

²² McLain Land & Investment Co. v. Swofford Bros. Dry Goods Co., 68 P. 502, 11 Okl. 429.

²³ Wheeler & Motter Mercantile Co. v. Miller (Okl.) 175 P. 224.

MOTION TO OPEN OR VACATE A JUDICIAL SALE

(Caption.)

Comes now the defendant (or plaintiff), C. D., and moves the court to set aside and vacate the sale made by the sheriff in this action of the following described property, to wit: (Description of property), for the following reasons, to wit:

1. That said sale was not had on the day on which the same was advertised to be had.

2. That notice of said sale was not given by advertisement as required by law.

3. (Other grounds of objection.)

———, Attorney for Defendant.

ORDER OPENING OR VACATING A JUDICIAL SALE

(Caption.)

Now, on this —— day of ——, 19—, this cause coming on to be heard on the motion of C. D., defendant, to set aside and vacate the sale made by the sheriff in this action of the following described property, to wit: (Description of property), the plaintiff being present by his attorney, X. Y., and the defendant by his attorney, J. K.; and the court, having examined the proceedings of said sheriff under said order of sale and being fully advised in the premises, finds that said sale was not had on the day on which the same was advertised to be had; that notice of said sale was not given by advertisement as required by law (state other grounds).

It is therefore by the court ordered, adjudged, and decreed that said sale be and the same is hereby set aside, vacated, and held for naught.

———, Judge.

§ 1679. Resale—Form of order

A court of equity has discretion as to ordering or refusing a resale of property sold at judicial sale.²⁴

Where a party, at whose instance a sale of real estate has been set aside, fully complies with the terms imposed by the court as conditions to setting aside the sale, it is error to enjoin a resale of

²⁴ *Wheeler & Motter Mercantile Co. v. Wright*, 64 Okl. 97, 166 P. 184.

the property under the judgment, merely because the officer to whom the purchaser paid the amount of his bid has made an unauthorized application of a portion of the money to the payment of taxes and costs, and refuses, for that reason, to pay to the purchaser the whole sum bid on demand.²⁵

ORDER OF COURT OF EQUITY DIRECTING RESALE OF PROPERTY SOLD AT
A JUDICIAL SALE

(Caption.)

The State of Oklahoma to the Sheriff of _____ County—Greeting:

Now on this _____ day of _____, 19—, this cause comes on to be heard on the motion of the defendant, C. D., to set aside the sale made by the sheriff herein on the _____ day of _____, 19—, under an order of sale herein dated the _____ day of _____, 19—, of the following described property, to wit: (Description of property), and to order a resale thereof, and the court having carefully examined the proceedings of said officer, and it appearing to the court that said sale is void for the reason that said property was sold for less than two-thirds of the appraised value thereof and at a grossly inadequate price (state other reasons).

It is therefore by the court ordered, adjudged, and decreed that said sale be and the same is hereby set aside, vacated, and held for naught.

It is further ordered that the sheriff of _____ county, state of Oklahoma, cause the said property above described to be readvertised and resold according to law, and that due return of this order of sale be made, showing the manner in which the same has been executed, within sixty days from the date hereof.

_____, Judge.

(Sheriff's return.)

§ 1680. Collateral attack

When a purchaser at a master's sale under a decree is himself a party to the suit in which the decree was entered, he cannot in a collateral proceeding raise a question as to the irregularity of the decree, but if the decree is irregular so that the purchaser will not

²⁵ Chapin v. Pyle, 50 P. 499, 58 Kan. 566.

(1586)

get a good title to the premises purchased by him, his remedy is to apply to the court directly to set aside the decree on that ground.²⁶

§ 1681. Title and rights of purchaser

A final judgment sustaining an attachment and ordering the property sold, followed by a sale, confirmation, and sheriff's deed to the property, are sufficient to divest the title of the debtor, and are not open to attack for irregularity by one who had obtained no lien on the property until after the confirmation of the sale.²⁷

The rule that the purchaser of real estate at sheriff's sale acquires no right of possession until a deed is executed, is not affected by the fact that there was an unexplained failure to make a timely record of the confirmation that a motion for nunc pro tunc entry was resisted by the occupant, and that there was considerable delay in procuring the sheriff's deed.²⁸

The judgment creditor may not, as purchaser, obtain the same rights as a third person.²⁹

Where an attempt is made in good faith to redeem land from a judicial sale, but by mistake the clerk accepts a less sum than is due, the court may permit the redemption to be completed after expiration of the statutory period.³⁰

§ 1682. Taxes

The court may order taxes paid and this includes all taxes which have not been merged into tax titles.³¹

§ 1683. Wrongful sale

Where personalty is sold under an order based on an erroneous judgment which is not superseded and which afterwards is reversed

²⁶ *Threadgill v. Colcord*, 85 P. 703, 16 Okl. 447.

²⁷ *Harrison v. Shaffer*, 55 P. 881, 60 Kan. 176.

²⁸ *Haish v. Pollock*, 101 P. 3, 79 Kan. 624.

²⁹ Rev. Laws 1910, § 5176, applies only to bona fide purchasers at the sheriff's sale, not to the judgment creditor who purchases at such sale. *Arnold v. Joines*, 50 Okl. 4, 150 P. 130.

³⁰ *Loomis v. National Supply Co. of Kansas*, 161 P. 627, 99 Kan. 279.

³¹ Gen. St. 1889, par. 6902, providing that, "where any real estate shall be sold at judicial sale, or by administrators, executors, guardians, or trustees, the court shall order all taxes and penalties thereon against such to be discharged out of the proceeds of such sale," includes all unpaid taxes which have not merged into tax titles on the day of sale. *Kerr v. Hoskinson*, 47 P. 172, 5 Kan. App. 193.

on appeal, an action for conversion will not lie against the plaintiff in the order of sale. A judgment, though erroneous, is the act of the court, and unless superseded it constitutes, until reversal, sufficient justification for all acts done in its enforcement.³²

§ 1684. Validity

"A void judgment may be vacated at any time, on motion of a party, or any person affected thereby."³³

A sale set for a holiday may not be held on the following day. It must be held on the day specified in the notice.³⁴

§ 1685. Foreclosure sale

A foreclosure sale, which has been in all respects regular, will not be set aside for gross inadequacy of the price, unless the person who has suffered thereby at the time of the sale was under some restraint which prevented him from attending it, or unless fraud is shown.³⁵

The purchaser at a foreclosure sale takes subject to a prior mortgage, and cannot deduct the amount thereof from his bid, or apply on such prior mortgage any surplus remaining after satisfaction of the judgment and costs.³⁶

A purchaser at a senior mortgage foreclosure will be presumed to have bid and purchased with reference to a junior mortgage, if it has been recorded, and with knowledge of the junior mortgagee's right to redeem.³⁷

³² State Nat. Bank v. Ladd (Okl.) 162 P. 684, L. R. A. 1917C, 1176.

³³ Rev. Laws 1910, § 5274.

Under Rev. Laws, 1910, § 5274, the order and confirmation of judicial sale and the sheriff's deed based on a void judgment are absolutely void. Arnold v. Joines, 50 Okl. 4, 150 P. 130.

³⁴ A sale of land by a sheriff on a day not named in the notice of sale is illegal and should be set aside, though the day named fell on Labor Day and the sale was held the day following, though under Comp. Laws 1909, § 4065, such day is a legal holiday, and under section 2957 an act appointed by law to be performed on a holiday may be performed on the next business day. McLaughlin v. Houston-Hudson Lumber Co., 31 Okl. 182, 120 P. 659, 38 L. R. A. (N. S.) 248.

³⁵ McLain Land & Investment Co. v. Swofford Bros. Dry Goods Co., 68 P. 502, 11 Okl. 429.

³⁶ Streeter v. Ponca State Bank, 49 Okl. 609, 153 P. 632.

³⁷ Horr v. Herrington, 98 P. 443, 22 Okl. 590, 20 L. R. A. (N. S.) 47, 132 Am. St. Rep. 648.

A junior mortgagee has no claim, by virtue of his mortgage, upon the (1588)

Where a mortgagee enters under a void judgment or a void foreclosure sale, he is merely a mortgagee in possession, having rights not adverse to the rights of the mortgagor or his grantor, but this possession will not be disturbed while the mortgage debt remains unpaid.³⁸

An equity court having called the interested parties before it and decreed a sale of mortgaged property, may put the purchaser, in possession as against a party to the suit.³⁹

The purchaser is entitled to all the crops which at time of sale were not severed from the soil, as against all parties whose rights have been foreclosed, whether matured or not.⁴⁰

A decree of mortgage foreclosure merges the interests of the parties to the suit in the decree, and transfers and vests them in the purchaser at the sale.⁴¹

Where a person holding all of a series of notes secured by mortgage assigns one, the assignee is preferred to the assignor in the distribution of the proceeds of the mortgaged property.⁴²

The rule requiring the sale of disconnected pieces of land to be made separately on foreclosure is not an arbitrary one, but is

surplus money arising from a sale under a senior mortgage foreclosure to which he is not made a party. *Horr v. Herrington*, 98 P. 443, 22 Okl. 590, 20 L. R. A. (N. S.) 47, 132 Am. St. Rep. 648.

Where premises are sold under a prior mortgage, and bought by mortgagee, who resells to mortgagor, rights of assignee of the junior mortgagee, not a party, are not thereby impaired, but such resale operates as a payment of the prior mortgage. *Core v. Smith*, 102 P. 114, 23 Okl. 909.

³⁸ *Page v. Turk*, 143 P. 1047, 43 Okl. 667.

A mortgagee who enters into possession peaceably as purchaser under foreclosure cannot be dispossessed so long as the mortgage remains unsatisfied. *Gillett v. Romig*, 87 P. 325, 17 Okl. 324.

Where a mortgagee enters into possession peaceably as purchaser under foreclosure proceedings, his grantee stands in the shoes of the mortgagee, and must be treated as the mortgagee in possession, and must account for the rents and profits derived from the land from the time he was put in possession. *Gillett v. Romig*, 87 P. 325, 17 Okl. 324.

³⁹ *Richmond v. Robertson*, 50 Okl. 635, 151 P. 203.

⁴⁰ *Dixon v. Pugh* (Okl.) 178 P. 880.

⁴¹ *Horr v. Herrington*, 98 P. 443, 22 Okl. 590, 20 L. R. A. (N. S.) 47, 132 Am. St. Rep. 648.

⁴² *Lawson v. Warren*, 124 P. 46, 34 Okl. 94, 42 L. R. A. (N. S.) 183, Ann. Cas. 1914C, 139,

enforced, when necessary, to protect the rights of the debtor and secure the best prices.⁴³

§ 1686. — Without appraisalment

Where, on foreclosure, the real estate is ordered sold, and the sale made without appraisalment, as required by statute, it is void, and it is proper to set aside the confirmation thereof and cancel the sheriff's deed.⁴⁴

Where a judgment directing sale of the mortgaged premises does not recite that same be sold without appraisalment and the order of sale directs a sale with appraisalment, a sale for less than two-thirds of the appraised value is a nullity.⁴⁵

§ 1687. Right of redemption

The statutory right of redemption from a mortgage foreclosure or execution sale is a rule of property, and cannot be impaired by subsequent legislation.⁴⁶

§ 1688. Tax sales

A tax sale of land made at a time other than that provided by law is void.⁴⁷

The notice must be published for three weeks prior to the sale.⁴⁸

The sale must be held at the place specified in the statute.⁴⁹

⁴³ *Miller v. Trudgeon*, 86 P. 523, 16 Okl. 337, 8 Ann. Cas. 739.

⁴⁴ *Hancock v. Youree*, 106 P. 841, 25 Okl. 460.

⁴⁵ *Page v. Turk*, 143 P. 1047, 43 Okl. 667.

⁴⁶ *Turk v. Mayberry*, 121 P. 665, 32 Okl. 66.

⁴⁷ *Holt v. Spicer* (Okl.) 162 P. 686.

A sale of land for delinquent taxes at a time not authorized by statute, is void. *Perry v. Snyder*, 75 Okl. 24, 181 P. 147.

A tax deed, based on a sale of land for delinquent taxes at a time not authorized by Rev. Laws 1910, § 7398, is a nullity. *Perry v. Snyder*, 75 Okl. 24, 181 P. 147.

⁴⁸ Publication of delinquent tax sale notice October 24th, 31st, and November 7th preceding the sale on November 16th held a sufficient compliance with the statute, requiring publication for three consecutive weeks. *Buhler v. Hysell*, 132 P. 140, 37 Okl. 392.

⁴⁹ Under Sess. Laws 1909, c. 38, § 8, held, that a delinquent tax sale was void where the land was offered for sale at the front door of the courthouse, instead of at the office of the county treasurer. *Davenport v. Wolf*, 59 Okl. 92, 158 P. 382.

§ 1689. Estray sales

In sales of animals under the estray laws, all provisions of same must be strictly followed; otherwise the buyer acquires no title.⁵⁰ Such sale is void, where the animals are not correctly described in the notices of sale.⁵¹

The law does not look with favor on purchases by a public official.⁵²

⁵⁰ Gibson v. Linthicum, 50 Okl. 441, 150 P. 908.

⁵¹ Gibson v. Linthicum, 50 Okl. 441, 150 P. 908.

⁵² Gibson v. Linthicum, 50 Okl. 441, 150 P. 908.

(1591)

CHAPTER XXIII

REPLEVIN

Sections

- 1690-1703. Article I.—Rights and defenses.
 1704-1707. Article II.—Jurisdiction and parties.
 1708-1721. Article III.—Proceedings for taking and redelivery of property.
 1722-1731. Article IV.—Pleadings and evidence.
 1732-1733. Article V.—Damages.
 1734-1752. Article VI.—Trial, judgment, enforcement of judgment, and review.
 1753-1756. Article VII.—Liabilities on bonds and undertakings.

ARTICLE I

RIGHTS AND DEFENSES

Sections

1690. Remedy—Nature.
 1691. Property subject.
 1692. Scope—Equity.
 1693. Liens on animals.
 1694. Property seized under prohibitory law.
 1695. Rent—Crop.
 1696. Purchaser with notice liable.
 1697. Plaintiff's right to possession.
 1698. Detention by defendant.
 1699. Defendant's possession.
 1700. Conditions precedent.
 1701. Demand for return.
 1702. Defenses.
 1703. Estoppel.

§ 1690. Remedy—Nature

The gist of replevin is the right to possession of chattels in controversy.¹

At common law, as now, a replevin action tested only the right of possession at the commencement of the action.²

Replevin is distinguished from trover, which is an action to recover damages sufficient to cover the value of personal property wrongfully held by another, while replevin or detinue is primarily

¹ Robinson & Co. v. Stiner, 109 P. 238, 26 Okl. 272.

² Humphrey v. Baker (Okl.) 176 P. 896.

an action to recover the property, and a judgment is given only in the absence of ability to secure the specific articles claimed.³

§ 1691. Property subject

Replevin will lie to recover property seized in judicial proceedings,⁴ provided the property is not properly in the custody of the law as against the claimant.⁵

Replevin will not lie for an undivided interest in personalty not divisible into aliquot parts.⁶

³ *Leeper Graves & Co. v. First Nat. Bank of Hobart*, 26 Okl. 707, 110 P. 655, 29 L. R. A. (N. S.) 747, Ann. Cas. 1912B, 302.

⁴ Replevin lies against an officer for personalty held by virtue of an order of delivery issued in an action to which plaintiff is not a party. *Relley v. Haynes*, 16 P. 440, 38 Kan. 259, 5 Am. St. Rep. 737.

Under Rev. Laws 1910, § 4799, replevin will lie against a sheriff wrongfully holding under execution property exempt under section 3342. *Taylor v. Smith*, 44 Okl. 408, 144 P. 1028.

One claiming to be the owner of property held by an individual under a bond given in judicial proceedings for redelivery of it, other than the person against whom the writ runs, may assert his rights in it by replevin. *Alexander v. Alexander* (Okl.) 164 P. 114, L. R. A. 1917D, 984.

⁵ Where final judgment of justice of peace for defendant on merits dissolves an attachment, the attachment lien was discharged and property released, and, on constable's refusal to surrender it upon demand, defendant's remedy was by action against constable to recover it or its value. *Thompson v. Grove* (Okl.) 180 P. 553.

The owner of personalty which has been taken from him by a city marshal with a warrant in an action commenced under a void ordinance against such owner cannot maintain replevin against the marshal for the recovery of the property. *Karr v. Stahl*, 89 P. 669, 75 Kan. 387.

Where intoxicating liquors and other property are seized under Gen. St. 1901, § 2494, and are held by the officer who served the warrant pending a hearing under section 2495, the owner cannot maintain replevin to recover possession; the property being in the custody of the law until final action on the complaint. *Greentree v. Wallace*, 93 P. 598, 77 Kan. 149.

Property held under bond in replevin conditioned for its redelivery is to be considered in custodia legis the same as if in the actual possession of the officer, and, being in custodia legis, a sale under the mortgage was void, and the proceeds thereof cannot be applied as a credit upon the mortgage debt for the satisfaction of which the same was replevied until such action has been finally determined. *Farmers' State Bank of Arkansas City, v. Stephenson*, 102 P. 992, 23 Okl. 695.

Replevin may be maintained against an officer who seized the property under an order of sale issued on a judgment of foreclosure of a chattel mortgage, though plaintiff was a defendant in the foreclosure suit, where the order of sale did not direct the seizure of property of plaintiff, and was not issued against him. *Scott v. Wagner*, 42 P. 741, 2 Kan. App. 386.

⁶ *Thomas v. Armstrong*, 51 Okl. 203, 151 P. 689, L. R. A. 1916B, 1182; *McDonald v. Bailey*, 107 P. 523, 25 Okl. 849, 37 L. R. A. (N. S.) 267.

§ 1692. Scope—Equity

While legal and equitable rights may be determined in replevin, the equities to be settled must relate to the property or the rights arising out of the contract, and not to the rescission thereof.⁷

It is not proper to make a replevin action the means of litigating and determining the title to real property as between the original owner and the tax-title claimant in adverse possession of the premises under a tax deed valid on its face.⁸

§ 1693. Liens on animals

All proceedings under the article giving a lien for feeding, grazing, herding, and breeding,⁹ where it is not otherwise therein specifically provided, are governed by the general laws concerning replevin.¹⁰

"For the purpose of enforcing such lien upon default in the payment of the sum secured, the lienor may proceed by replevin in any court of competent jurisdiction, and possess himself of the incumbered property, and hold the same subject to such judgment as he shall recover."¹¹

§ 1694. Property seized under prohibitory law

"No liquors, vessels, fixtures, furniture or other property seized by virtue of any warrant issued under the provisions of" the statutes relative to prohibition enforcement, "shall be taken from the possession of the officer seizing the same under any replevin or other process."¹²

⁷ *Kansas City Hay Press Co. v. Williams*, 51 Okl. 6, 151 P. 570.

Replevin is not a chancery proceeding which can be invoked for the cancellation of a contract. *Penton v. Hansen*, 73 P. 843, 13 Okl. 450.

⁸ *Rees v. Higgins*, 61 P. 500, 9 Kan. App. 832.

⁹ Rev. Laws 1910, §§ 175-184.

¹⁰ Rev. Laws 1910, § 185.

¹¹ Rev. Laws 1910, § 183.

¹² Rev. Laws 1910, § 3614.

Replevin will not lie to recover beer from an officer holding it under a search and seizure warrant under Comp. Laws 1909, § 4184, nor from a common carrier who has received it from the officer to carry it to a superior officer; the delivery by the inferior officer to the carrier being a delivery to the superior officer, and the provisions of section 4186 being applicable to all officers charged with the duty of handling the liquor. *Stiller v. Atchison, T. & S. F. Ry. Co.*, 124 P. 595, 34 Okl. 45.

§ 1695. Rent—Crop

"When any such rent is payable in a share or certain proportion of the crop, the lessor shall be deemed the owner of such share or proportion, and may, if the tenant refuse to deliver him such share or proportion enter upon the land and take possession of the same, or obtain possession thereof by action of replevin."¹³

Replevin is a proper remedy to recover crops of a subtenant seized by a constable under an attachment to enforce a landlord's lien for rent against the tenant in chief when such crops were not subject to such lien when the attachment issued.¹⁴

§ 1696. Purchaser with notice liable

"The person entitled to rent may recover from the purchaser of the crop, or any part thereof, with notice of the lien, the value of the crop purchased, to the extent of the rent due and damages."¹⁵

§ 1697. Plaintiff's right to possession

The gist of the action of replevin is plaintiff's right to immediate possession of the personal property in controversy at commencement of action by reason of his being the owner or having a special interest therein.¹⁶

Plaintiff must recover on the strength of his own title or right of possession, and defendant can defeat the action by showing title in a third person.¹⁷

¹³ Rev. Laws 1910, § 3807.

The assignee of a note given in payment of rents is without authority to distrain for rent unless he is also assignee of the reversion. *Fuller v. Ripple*, 62 Okl. 129, 163 P. 127.

The common-law right to distrain for rent is violative of the condition and wants of the people of Oklahoma, and is repugnant to the genius and spirit of its institutions, and is not in force there. *Smith v. Wheeler*, 44 P. 203, 4 Okl. 138.

¹⁴ *McFall v. Elmore*, 94 P. 545, 20 Okl. 443.

¹⁵ Rev. Laws 1910, § 3808.

¹⁶ *First Nat. Bank of Wellston v. Kreuzberg*, 75 Okl. 97, 181 P. 717.

¹⁷ *Robb v. Dobrinski*, 78 P. 101, 14 Okl. 563, 1 Ann. Cas. 981; *Bank of Buffalo v. Crouch* (Okl.) 174 P. 764; *Tulsa Rig, Reel & Mfg. Co. v. Arnold*, 64 Okl. 160, 166 P. 135.

Where, in replevin, plaintiff fails to show completed sale to him or any other right to possession, he cannot recover. *Singer Mfg. Co. v. Godding*, 131 P. 572, 89 Kan. 396.

Right to possession.—Plaintiff bank, which acquired title to wheat by paying draft attached to bill of lading, and which, after purchaser refused to

The maker of notes is not the owner nor entitled to the immediate possession thereof unless the same have been paid or canceled by a decree of court, or for other reasons have become absolutely void and invalid as obligations in the hands of the payees or of third parties; and an action of replevin by the maker for the recovery of the possession thereof will not lie.¹⁸

One who holds the full legal title to personal property, the beneficial ownership of which he shares with another, may in his own name maintain replevin to recover possession from a stranger.¹⁹

§ 1698. Detention by defendant

Replevin lies only in the case of a wrongful detention existing when the suit is commenced.²⁰

pay, took reassignment from its transferee, after wheat had been attached by third party, and thereafter sold it, was not entitled to recover possession in replevin against attaching officer. *Oklahoma State Bank v. Hicklin*, 164 P. 257, 100 Kan. 301.

In replevin it is immaterial whether right of possession is claimed by mortgagee under his chattel mortgage or under his purchase of property at sale under conditions of mortgage. *Emerson-Brantingham Implement Co. v. Willhite*, 102 Kan. 56, 169 P. 549; *Sehrt-Patterson Milling Co. v. Levan*, 58 P. 275, 9 Kan. App. 523.

Where plaintiff sold to defendant six head of cattle, to be kept for three years, for which he was to receive one-half of the increase, though defendant unlawfully sold part of the cattle, replevin could not be maintained to recover the possession of those remaining in the possession of defendant before the end of the three years. *Penton v. Hansen*, 73 P. 843, 13 Okl. 450.

Instructions examined, and held to substantially state the law applicable to the case, where the question was as to the right of a mortgagee to take possession of the property when he deems himself insecure. *Wertz v. Barnard*, 122 P. 649, 32 Okl. 426.

¹⁸ *Olson v. Thompson*, 48 P. 184, 6 Okl. 74; *Id.*, 52 P. 388, 6 Okl. 576

¹⁹ *McDonald v. Daniels*, 92 P. 51, 76 Kan. 388.

After sale by a mortgagee of mortgaged personalty out of possession, the mortgagee or the purchaser could recover possession by appropriate action. *Continental Gin Co. v. Pannell*, 61 Okl. 102, 160 P. 598.

²⁰ *Redinger v. Jones*, 75 P. 997, 68 Kan. 627.

The defendant, in his answer, admitted the detention, and justified the same by levy of execution thereon; and, when plaintiff rested, he demurred to the evidence, on the sole ground that, by the receipt of the plaintiff, it appeared he did not detain the property, and the demurrer was sustained upon that contention. It was error to render a judgment in his favor for a return of the property or its value. *Hursh v. Starr*, 49 P. 618, 6 Kan. App. 8.

In replevin against a levying officer, where the evidence of the plaintiff proves prima facie that he is the owner of the property, that he demanded possession of the property from the defendant before bringing the suit, but it is incidentally developed by cross-examination that, at the time the levy

§ 1699. Defendant's possession

Replevin cannot be maintained against one not in the actual or constructive possession of the property at the commencement of the action;²¹ but the owner may replevin chattels levied on by an officer not in possession, if the officer could take possession as against a wrongful taker.²²

Where defendant in replevin had confederated with others to detain the property from plaintiff, the owner, and deprive him of possession, a judgment against defendant was not erroneous, though the property, at the commencement of the action, was in the actual possession of a confederate, from whom defendant could have obtained it.²³

§ 1700. Conditions precedent

Where a borrowing bank after insolvency turned over additional assets to a lender as security, it was not a condition precedent to the right to maintain replevin that the borrower tender back the securities surrendered by the lender when the additional securities were turned over.²⁴

§ 1701. Demand for return

Where, in replevin, defendant contests the action, the writ is a sufficient demand, and defending the suit a refusal.²⁵

was made, the plaintiff gave a receipt to the defendant, by which he undertook to safely keep the property for the defendant, it is error to sustain a demurrer thereto, on the ground that the defendant did not, at the commencement of the suit, have or detain the property from the plaintiff. *Hursh v. Starr*, 49 P. 618, 6 Kan. App. 8.

²¹ *Robb v. Dobrinski*, 78 P. 101, 14 Okl. 563, 1 Ann. Cas. 981.

Replevin cannot ordinarily be maintained against one not in possession at commencement of suit. *Carpenter v. Mead*, 60 Okl. 127, 153 P. 658.

Replevin will not lie against a person who has sold the property sought to be recovered, and parted with the possession before the commencement of the action. *Davis v. Van De Mark*, 25 P. 589, 45 Kan. 130.

²² *Francis v. Guaranty State Bank of Texola*, 44 Okl. 446, 145 P. 324.

²³ *Meixell v. Kirkpatrick*, 6 P. 241, 33 Kan. 282.

²⁴ *Citizens' State Bank of Chautauqua v. First Nat. Bank of Sedan*, 157 P. 392, 98 Kan. 109, L. R. A. 1917A, 696.

²⁵ *Maddox v. Dowdy*, 31 Okl. 169, 120 P. 651; *Hutchings v. Cobble*, 30 Okl. 158, 120 P. 1013.

When an officer levies an execution on the property of one not named in the writ, a demand is not necessary by the owner before bringing replevin. *Burchett v. Purdy*, 37 P. 1053, 2 Okl. 391.

Where defendant in replevin asserts title to the property in himself in op-

A claim by a person in possession of property, that he is the owner, made on its seizure under execution as the property of a third person, is not equivalent to a demand for a return of the property, so as to enable him to maintain replevin in a case where demand is

position to that claimed by plaintiff, or where he alleges such title in his answer, no proof of demand and refusal is necessary. *Fuller v. Torson*, 56 P. 512, 8 Kan. App. 652.

To maintain replevin, even where the original taking was not wrongful, a demand for possession is not a condition precedent. *Citizens' State Bank of Lawton v. Chattanooga State Bank*, 101 P. 1118, 23 Okl. 767. Where defendant in lawful possession does not tender the property but contests the action, the writ will be a sufficient demand, and defending the suit a refusal. *Id.*

Kansas cases.—When defendant, in replevin, bases his defense on title and right of possession in himself, and does not rely on want of demand, and it appears that a demand would have been unavailing, proof of demand is not required. *State Bank of St. John v. Norduff*, 43 P. 312, 2 Kan. App. 55.

Where property in possession of its owner is levied on as the property of another, the owner need not, before bringing replevin, make a demand therefor. *Burgwald v. Donelson*, 43 P. 100, 2 Kan. App. 301.

Where, shortly before the action was commenced, defendant took the property without plaintiff's consent claiming it as his own, a demand was unnecessary. *Jordan v. Johnson*, 42 P. 415, 1 Kan. App. 656.

In an action to recover personal property, the possession of which it is claimed was obtained by false and fraudulent representations, a demand is not necessary before commencing the action. *Salisbury v. Barton*, 66 P. 618, 63 Kan. 552.

Where defendant has never conceded the right of plaintiff to the possession of the property, but has denied the claim and right of plaintiff thereto, and has otherwise shown that a demand would be unavailing, proof of demand and refusal is unnecessary. *Barton v. Mulvane*, 52 P. 883, 59 Kan. 313.

Where the defense in replevin is founded on title in a defendant, and the right of possession incident thereto, it is not necessary to prove demand and refusal. *Greenawalt v. Wilson*, 34 P. 403, 52 Kan. 109.

Where defendant in replevin asserts title to the property in himself in opposition to that claimed by plaintiff, or where he alleges such title in his answer, no proof of demand and refusal is necessary. *Chapin v. Jenkins*, 31 P. 1084, 50 Kan. 385.

When the petition in an action of replevin against a sheriff was filed, and the summons and order of delivery were issued, the sheriff had the actual possession of the goods. The order of delivery was set aside on account of irregularities, and an alias order issued, under which the goods were ordered by the court to be turned over to defendant. He did not file any disclaimer, but attempted to show title and right of possession in himself, under an execution. Held, that no proof of demand and refusal was required, and it was not material that defendant did not have the goods in his possession when the last order of delivery was issued and served. *Bliss v. Couch*, 26 P. 706, 46 Kan. 400.

A defendant, wrongfully in the possession of property, which he has shifted to another defendant, and attempted to defeat those entitled to the posses-

necessary;²⁶ that is, want of prior demand will not defeat a right to immediate possession of personalty, but only affects the question of costs in replevin where defendant's original taking is not wrongful and he does not resist the right.²⁷

A demand for the return of the property before bringing replevin is not necessary, where the property was exempt and sold under execution.²⁸

§ 1702. Defenses

In an action to replevin property taken forcibly and without the owner's consent, it is no defense that the owner was indebted to defendant.²⁹

Where attaching creditors dismiss their attachment as to the mortgagee of the property after the latter has replevied the same, they cannot assert that replevin was not maintainable by him, because begun before the attachment proceedings were determined.³⁰

A defendant wrongfully in the possession of property, which he had shifted to another defendant, and attempted to defeat those entitled to the possession, and whose defense is based on grounds inconsistent with the right of possession in the plaintiff, is not in a position to insist that he did not unlawfully detain the property, because he had not actual manual possession when the action was begun.³¹

Defenses must ordinarily be pertinent to the property involved.

sion, and whose defense is based on grounds inconsistent with the right of possession in the plaintiff, is not in a position to insist that a demand has not been made of him. *Schmidt v. Bender*, 18 P. 491, 39 Kan. 437.

A demand of personal property is not a prerequisite to the right to maintain an action for the recovery thereof, when the defendant bases his defense on title in himself, and the right of possession incident thereto, and does not rely on want of demand, and it appears that a demand would have been unavailing. *Raper v. Harrison*, 15 P. 219, 37 Kan. 243.

²⁶ *Chandler v. Colcord*, 32 P. 330, 1 Okl. 260.

²⁷ *Wall v. Rouse*, 49 Okl. 544, 153 P. 1112.

²⁸ *Byers v. Ingraham*, 51 Okl. 440, 151 P. 1061.

²⁹ *Ray v. Navarre*, 47 Okl. 438, 147 P. 1019.

A person who wrongfully takes and detains personal property of another cannot plead a set-off as a defense in replevin by the owner. *Kennett v. Fickel*, 21 P. 93, 41 Kan. 211.

³⁰ *Hasie v. Connor*, 37 P. 128, 53 Kan. 713.

³¹ *Schmidt v. Bender*, 18 P. 491, 39 Kan. 437.

It is no defense that a defendant in possession is acting for a third party.³³

In replevin by a claimant to recover property from an officer taken on attachment against such claimant, a showing that the attachment is issued at the suit of a bona fide creditor, and that the attachment process is valid, is sufficient to entitle the officer to hold possession until a better right is shown.³⁴

In replevin against an officer who justifies under a writ of attachment against the property of a third person on account of the fraudulent transfer by him to plaintiff to defeat his creditors, it is a material element of the defense that the relation of debtor and creditor exists between the attachment plaintiffs and the fraudulent grantor, and the question as to whether such transfer was fraudulent is immaterial until the officer has shown that he represents creditors.³⁵

Where defendant in replevin claims to hold the property under a levy made by virtue of an order of attachment, and no copy of the order appears in the record, and no statement that one was issued appears in the transcripts of the justices of the peace, and nothing appears to show the possession of defendant legal, it was not error to instruct for plaintiff.³⁶

§ 1703. Estoppel

By executing a redelivery bond, and procuring a return of the property thereunder, defendant is estopped from denying his pos-

³³In an action of replevin to recover the immediate possession of certain stacks of oats, the plaintiff offered evidence tending to prove that she had sown and harvested the oats on land of which she had been in possession several years. Held that, in such an action, the defendants had no right to show that the plaintiff had made a settlement and entry of the land for the benefit of her father, and therefore that her possession was fraudulent as against the government. *Barnhart v. Ford*, 15 P. 542, 37 Kan. 520. Three persons, acting together, wrongfully took the possession of and deprived the owner of several stacks of oats, and, in an action of replevin brought for the immediate possession of the property, all the defendants filed an answer containing a general denial. Held, that it is no defense for two of the parties that they acted merely as employes in the transaction for the benefit of the third. *Id.*

³⁴*Bruce v. Squires*, 74 P. 1102, 68 Kan. 199.

³⁵*Marrinan v. Knight*, 54 P. 656, 7 Okl. 419; *Dunn v. Overton*, 83 P. 715, 15 Okl. 670.

³⁶*Goodwin v. Suthelmer*, 55 P. 486, 8 Kan. App. 212.

session at the commencement of the action.³⁶ That personal property is in possession of and used by another does not estop the owner from asserting title.³⁷

ARTICLE II

JURISDICTION AND PARTIES

Sections

1704. Waiver of jurisdiction.

1705. Plaintiff.

1706. Defendant.

1707. Intervention and substitution.

§ 1704. Waiver of jurisdiction

Irregularities and defects in the affidavit in an action in replevin, sufficient to give ground for dismissal of an action, if timely objections had been made, will be waived, and the court will obtain jurisdiction to try the case, if the defendant answer to the merits without raising objection thereto.³⁸

An action of replevin to recover chattels levied on by a sheriff as the property of another, is not an action against an officer for misconduct in office, and the probate court has jurisdiction of such action where the value of the property does not exceed \$1,000.³⁹

§ 1705. Plaintiff

An agent authorized to exchange a chattel for realty who delivered it to one with whom he contracted for conveyance of land to his principal is not the real party in interest, and so not entitled, in his own name, to replevin the chattel.⁴⁰

One in actual possession of automobile owned by adult daughter and having right to use it at will is a real party in interest to maintain replevin against one claiming possession and ownership through trade with him.⁴¹

³⁶ *Jordan v. Johnson*, 42 P. 415, 1 Kan. App. 656.

³⁷ *Alexander v. Busch* (Okl.) 168 P. 900, L. R. A. 1918E, 125.

The surety of a defendant's redelivery bond is not estopped from claiming an interest in the property by virtue of a chattel mortgage executed to him by the defendant. *Rathbone v. Boyd*, 2 P. 664, 30 Kan. 485.

³⁸ *Hutchings v. Cobble*, 30 Okl. 158, 120 P. 1013.

³⁹ *Walters v. Ratliff*, 61 P. 1070, 10 Okl. 262.

⁴⁰ *Essex v. Fife* (Okl.) 159 P. 1009.

⁴¹ *Essex v. Fife* (Okl.) 168 P. 814.

§ 1706. Defendant

Where property belonging to one person is seized under a writ running against another, the owner may maintain replevin against the officer in his individual name or against him in his official capacity.⁴²

§ 1707. Intervention and substitution

One having an interest in property replevined in an action between others may be made a party and take steps to protect his interest;⁴³ but intervener's right to recover property must exist when he intervenes.⁴⁴

One who neither demanded the property nor gave a bond could not be substituted for a plaintiff in replevin, who had made a demand and given bond, and who was in possession of the property.⁴⁵

Where replevin is brought against a sheriff to recover chattels held by such officer under attachment, it is not error to permit the attachment plaintiff to be substituted as defendant, and to dismiss said cause as to such sheriff.⁴⁶

Where the holder of a second mortgage replevins the chattels from the mortgagor, the holder of the first mortgage may be made a party to the replevin suit, though he styles his pleading an intervention.⁴⁷

⁴² Mann v. Ridenhour, 46 Okl. 565, 149 P. 124; Irwin v. Walling, 44 P. 219, 4 Okl. 128; Burchett v. Purdy, 37 P. 1053, 2 Okl. 391.

⁴³ Ely v. Holloway, 147 P. 1128, 95 Kan. 8.

Where creditors cause the personal property of the debtor to be seized upon orders of attachment for the satisfaction of their debts, they acquire thereby an attachment lien upon the property; and in an action of replevin brought by a mortgagee or pledgee, against the officer holding the property by virtue of the orders of attachment, the creditors should be permitted to be made parties defendant, so that they may establish any facts that will defeat the claimant's title to the property seized by attachment. Wafer v. Harvey Co. Bank, 36 Kan. 292, 13 P. 209.

⁴⁴ Essex v. Fife (Okl.) 168 P. 814.

⁴⁵ Pierce v. Batten, 42 P. 924, 3 Kan. App. 396.

⁴⁶ Moore v. Calvert, 58 P. 627, 8 Okl. 358.

Civ. Code, § 45, allows the court in actions against officers for the recovery of property seized under execution to substitute the execution plaintiff upon application as defendant in such officer's stead. Held, that such substitution was discretionary with the court. Wafer v. Harvey Co. Bank, 13 P. 209, 36 Kan. 292.

⁴⁷ First State Bank of Ardmore v. King & McCants, 133 P. 30, 37 Okl. 744, 47 L. R. A. (N. S.) 668; Comp. Laws 1909, § 5574 (Rev. Laws 1910, § 4697).

ARTICLE III

PROCEEDINGS FOR TAKING AND REDELIVERY OF PROPERTY

Sections

- 1708. In general.
- 1709. Affidavit—Form.
- 1710. Replevin undertaking—Form.
- 1711. Order of replevin—Form.
- 1712. To different counties.
- 1713. Execution of order.
- 1714. Officer may forcibly enter buildings.
- 1715. Custody of property.
- 1716. Statutory provisions for delivery by attachment.
- 1717. Redelivery to defendant—Undertaking—Form.
- 1718. Plaintiffs' objection to sureties—Form.
- 1719. Effect of redelivery.
- 1720. Quashing writ—Forms.
- 1721. Return.

§ 1708. In general

"The plaintiff, in an action to recover the possession of specific personal property, may, at the commencement of the suit, or at any time before answer, claim the immediate delivery of such property, as provided herein."⁴⁸

Though a plaintiff seeking immediate possession of personalty must make the statutory affidavit and bond and procure an order of delivery, the right to maintain the action and to a trial of the main issue is not dependent upon such proceeding.⁴⁹

In an action to recover specific personal property the plaintiff may claim its immediate delivery by filing the affidavit required by law, and the action of replevin may proceed as an action for damages, though the affidavit required is not filed.⁵⁰

§ 1709. Affidavit—Form

"An order for the delivery of property to the plaintiff shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing:

"First. A description of the property claimed.

⁴⁸ Rev. Laws 1910, § 4798.

⁴⁹ Scott v. Smith, 129 P. 49, 36 Okl. 313.

⁵⁰ Lamont v. Williams, 23 P. 592, 43 Kan. 553.

"Second. That the plaintiff is the owner of the property, or has a special ownership or interest therein, stating the facts in relation thereto, and that he is entitled to the immediate possession of the property.

"Third. That the property is wrongfully detained by the defendant.

"Fourth. That it was not taken in execution on any order or judgment against said plaintiff, or for the payment of any tax, fine or amercement assessed against him, or by virtue of an order of delivery issued under this article, or any other mesne or final process issued against said plaintiff; or,

"Fifth. If taken in execution, or on any order or judgment against the plaintiff, that it is exempt by law from being so taken.

"Sixth. The actual value of the property. When several articles are claimed, the value of each shall be stated as nearly as practicable."⁵¹

The office of an affidavit in replevin is to authorize the issuance of the writ, and although the affidavit is omitted, or is defective, the court may hear and determine the action, although the possession of the property may not be had without the affidavit, unless the same has been waived.⁵²

AFFIDAVIT FOR REPLEVIN

(Caption.)

State of Oklahoma, }
County of _____, } ss.:

_____, being duly sworn, says that he is (or, they are) the owner (or, the owners) and entitled to the immediate possession of the following described property of the actual value, as follows, to wit:

Description of Property	Actual Value Each Article.	
.....
.....
.....
Total value	\$.....

⁵¹ Rev. Laws 1910, § 4799.

⁵² Hutchings v. Cobble, 30 Okl. 158, 120 P. 1013.

The statute requiring an averment in an affidavit in replevin that "the property had not been seized by virtue of an order of delivery issued under

All of the aggregate and actual value of ——— dollars, and that said property was not taken in execution on any order of judgment against said plaintiff, or for the payment of any tax, fine, amercement, or assessed against him (or, them), or by virtue of any order or delivery issued in replevin or any other mesne or final process issued against him (or, them); that said property was taken in execution on a ——— rendered in favor of ——— against said plaintiff, and that the same is exempt by law from being so taken; that said property was not taken for the payment of any tax, fine or amercement assessed against him (or, them), or by virtue of an order of delivery issued in replevin, or any other mesne or final process against him (or, them).

Subscribed and sworn to before me this ——— day of ———, 19—.

———, Court Clerk,

By ———, Deputy.

§ 1710. Replevin undertaking—Form

"The order shall not be issued by the clerk until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the clerk, an undertaking in not less than double the value of the property, as stated in the affidavit to the effect that the plaintiff shall duly prosecute the action, and pay all costs and damages which may be awarded against him, and if the property be delivered to him, that he will return the same to the defendant if a return be adjudged."⁵³

Where a statutory bond is given in a replevin action, the provisions of the statute enter into and become a part of the bond.⁵⁴

An action lies to recover specific personal property, and damages for the withholding thereof, without securing its immediate delivery by giving a bond.⁵⁵

The obligors on a replevin bond given by plaintiff, who has received and retained the property, are estopped from questioning its validity for formal technical defects.⁵⁶

this article," is sufficiently complied with by an averment in the affidavit that the property had not been taken under execution "by an order of the court." *Scott v. Jones*, 54 P. 308, 7 Okl. 42.

⁵³ Rev. Laws 1910, § 4800.

⁵⁴ *Mulhall v. McVay*, 37 P. 604, 2 Okl. 534.

⁵⁵ *Goodwin v. Sutheimer*, 55 P. 486, 8 Kan. App. 212.

⁵⁶ *Leeper, Graves & Co. v. First Nat. Bank*, 110 P. 655, 26 Okl. 707, 29 L. R. A. (N. S.) 747, Ann. Cas. 1912B, 302.

Under the statute, providing that in an action of replevin, upon the filing of a bond and affidavit by the plaintiff, as therein specified, it shall be the duty of the clerk to issue an order for the delivery of the property to plaintiff, the duty of the clerk is purely ministerial, and he is not excused from issuing such order upon compliance with the requirements of said sections by the fact that the property is intoxicating liquor, and that the action is against the sheriff, who has seized it under criminal process.⁵⁷

REPLEVIN BOND

(Caption.)

Whereas, ——— has commenced an action against ——— for the recovery of the possession of certain personal property belonging to said plaintiff:

Now, we the undersigned, residents of said county and state, bind ourselves to said defendant, in the sum of ——— dollars, that said plaintiff shall duly prosecute the above action and pay all costs and damages that may be awarded against him, and, if a return of the property therein delivered to him be adjudged, that he will deliver the same to said defendant. _____.

Approved by me this ——— day of ———, 19—.

———, Court Clerk,

By ———, Deputy.

(Qualification of sureties.)

§ 1711. Order of replevin—Form

"The order for the delivery of the property to the plaintiffs shall be addressed and delivered to the sheriff. It shall state the names of the parties, the court in which the action is brought, and command the sheriff to take the property, describing it, and deliver it to the plaintiff, and to make return of the order on a day to be named therein."⁵⁸

An action to recover specific personal property may be maintained in the county or district courts of state, although no order is issued for delivery of such property before judgment.⁵⁹

⁵⁷ Easter v. Traylor, 21 P. 606, 41 Kan. 493.

⁵⁸ Rev. Laws 1910, § 4801.

⁵⁹ Thompson v. Grove (Okl.) 180 P. 553.

The right to maintain replevin does not depend on the taking out of an

An order for the delivery of the property cannot issue until a summons has been issued;⁶⁰ but an order of delivery, granted by the district court, cannot be set aside and vacated after answer for any informality or irregularity in its issue, or because no præcipe was filed by the party desiring it.⁶¹

ORDER OF REPLEVIN

(Caption.)

The State of Oklahoma to the Sheriff of ——— County—Greeting:

Whereas, ——— ha— commenced in the district court of the state of Oklahoma, within and for the county of ——— against ———, a civil action for the recovery of the following specific personal property, to wit:

List of Articles	Value	
.....
.....
.....
.....
Total value	\$.....

and has filed his affidavit and undertaking, as required by law, in the clerk's office of said court, to obtain an order for the immediate delivery of said goods and chattels:

This, therefore, is to command you as such sheriff, to take such goods and chattels above described, and deliver the same to the said ———, plaintiff in said action, and of this order and your proceedings thereon make due return on or before the ——— day of ———, 19—.

In witness whereof, I have hereunto set my hand and the seal of said court in the city of ——— this ——— day of ———, A. D. 19—.

———, Court Clerk,

By ———, Deputy.

order of delivery at or after the commencement of the action. *Varner v. Bowling*, 38 P. 481, 54 Kan. 380; *Hutchings v. Cobble*, 30 Okl. 158, 120 P. 1013.

⁶⁰ *Pelham v. Edwards*, 26 P. 41, 45 Kan. 547.

⁶¹ *Carr v. Huffman*, 27 P. 827, 47 Kan. 188.

SHERIFF'S RETURN

Received this writ on the ——— day of ———, 19—, at ——— o'clock ——— m.

On the ——— day of ———, 19—, at ——— o'clock ——— m., I executed the same by taking possession of the property therein, and, after holding the same twenty-four hours, delivered the same to said plaintiff, and the defendant, within twenty-four hours after the service of said writ, having given an undertaking as required by law, I returned said property to said defendant.

Dated ———, 19—.

———, Sheriff,
By ———.

§ 1712. ——— To different counties

"An order may be directed to any other county than the one in which the action is brought, for the delivery of the property claimed. Several orders may issue at the same time, or successively, at the option of the plaintiff; but only one of them shall be taxed in the costs, unless otherwise ordered by the court."⁶²

§ 1713. Execution of order

"The sheriff shall execute the order by taking the property therein mentioned. He shall also deliver a copy of the order to the person charged with the unlawful detainer of the property, or leave such copy at his usual place of residence."⁶³

Where an officer seizes property under a warrant charging the defendant with maintaining a liquor nuisance, and a claimant brings replevin for the property against the officer in another court, the officer is liable to commitment as for contempt for refusing to deliver the property in obedience to the writ of replevin.⁶⁴

⁶² Rev. Laws 1910, § 4808.

⁶³ Rev. Laws 1910, § 4803.

⁶⁴ In re Massey, 42 P. 865, 56 Kan. 120.

A writ of replevin to which a sheriff was defendant was served by the coroner, who made the following return: "Deputy Sheriff Rothrock accepts service, and then and there gave a redelivery bond for the within goods and chattels in the replevin of said goods. Service accepted by Deputy Sheriff R. and a redelivery bond filed this day and approved by me." Held, that the service was not irregular, owing to the writs having been served on the deputy sheriff, or on account of the acceptance of service by the deputy sheriff. Nipp v. Bower, 61 P. 448, 9 Kan. App. 854.

If an action in replevin is properly brought in the county where the property is wrongfully held by an agent, who is made a party defendant and is summoned, the summons may be issued and service may be had in another county on the agent's principal, who claims the right to the possession as against the plaintiff."⁶⁵

§ 1714. Officer may forcibly enter buildings

"The sheriff or other officer, in the execution of the order of delivery, may break open any building or inclosure in which the property claimed, or any part thereof, is concealed, but not until he has been refused an entrance into said building or inclosure and the delivery of the property, after having demanded the same."⁶⁶

§ 1715. Custody of property

Replevined property held under a redelivery bond is in custodia legis the same as if in the officer's actual possession."⁶⁷

§ 1716. Statutory provisions for delivery by attachment

"In an action to recover the possession of specific personal property, the court, or judge in vacation, may, for good cause shown, before or after judgment, compel the delivery of the property to the officer or party entitled thereto by attachment, and may examine either party as to the possession or control of the property. Such authority shall only be exercised in aid of the foregoing provisions of this article."⁶⁸

"Any order for the delivery of property, issued under this article, without the affidavit and undertaking required, shall be set aside at the cost of the clerk issuing the same, and such clerk, as well as the plaintiff, shall also be liable, in damages, to the party injured."⁶⁹

⁶⁵ Central Nat. Bank of Topeka v. Brooke, 81 P. 498, 71 Kan. 767.

⁶⁶ Rev. Laws 1910, § 4809.

⁶⁷ Noble Bros. v. Ballew, 59 Okl. 90, 158 P. 906; Bohannon v. Jennings, 121 P. 195, 31 Okl. 254.

Since property taken in replevin is in custodia legis, a sale thereof by plaintiff, a chattel mortgagee, pending the suit, and an application of the proceeds to the mortgage debt, is invalid. Fidelity Trust Co. v. Pumroy, 45 Okl. 66, 144 P. 1052.

⁶⁸ Rev. Laws 1910, § 4810.

⁶⁹ Rev. Laws 1910, § 4811.

§ 1717. Redelivery to defendant—Undertaking—Form

"If, within twenty-four hours after service of the copy of the order, there is executed by one or more sufficient sureties of the defendant, to be approved by the sheriff, an undertaking to the plaintiff, in not less than double the amount of the value of the property as stated in the affidavit of the plaintiff, to the effect that the defendant will deliver the property to the plaintiff, if such delivery be adjudged, and will pay all costs and damages that may be awarded against him, the sheriff shall return the property to the defendant. If such undertaking be not given within twenty-four hours after service of the order, the sheriff shall deliver the property to the plaintiff."⁷⁰

A redelivery bond is a remedy given defendant to secure speedy relief where property is wrongfully seized in replevin.⁷¹

Where the plaintiff's bond is signed by himself alone without sureties, and the case is tried and judgment rendered without objection to the sufficiency of the undertaking a redelivery bond executed by the defendant on which the property was returned to him will, in the absence of objections to the validity of the plaintiff's bond, be held a valid undertaking, and binding on the parties, including the defendant.⁷²

In replevin before a justice of the peace, the redelivery bond must be taken by the officer levying the writ of replevin.⁷³

REDELIVERY BOND IN REPLEVIN

(Caption.)

Know all men by these presents: That we, ——, as principal, and —— and ——, as sureties, are held and firmly bound into the above named plaintiff in the penal sum of —— dollars, for the payment of which we hereby bind ourselves, our heirs, executors, administrators and assigns, jointly and severally by these presents.

The condition of the above obligation is such, that whereas, the above named plaintiff has caused to be issued out of the above entitled court in the above entitled cause a writ in replevin, under

⁷⁰ Rev. Laws 1910, § 4804.

⁷¹ *Perryman v. Brown*, 105 P. 680, 25 Okl. 138.

⁷² *Wood v. Colby*, 30 Okl. 106, 118 P. 584.

⁷³ *Burton v. Doyle* (Okl.) 165 P. 169.

and by authority of which the property of the defendant described therein has been taken by — as sheriff of said county: Now, if the defendant above named shall deliver said property to said plaintiff, if such delivery be adjudged, and shall pay all costs and damages that may be awarded against —, then this obligation to be void; otherwise, to remain in full force and effect.

Witness our hands, this — day of —, 19—.

(Qualification of sureties.)

§ 1718. Plaintiffs' objection to sureties—Form

"The plaintiff may, within twenty-four hours from the time the undertaking referred to in the preceding section is given by the defendant, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fail to do so, he must be deemed to have waived all objections to them. When the plaintiff excepts, the sureties must justify, upon notice, as bail in criminal cases."⁷⁴

OBJECTION TO SURETIES ON REDELIVERY BOND IN REPLEVIN

(Caption.)

To —, Sheriff of — County, Oklahoma:

You are hereby notified that the above named plaintiff, A. B., objects and excepts to the sufficiency of the sureties on the redelivery bond taken by you from the defendant, C. D., in said action on the — day of —, 19—, and you will therefore govern yourself accordingly.

Dated this — day of —, 19—.

X. Y., Attorney for Plaintiff.

§ 1719. Effect of redelivery

By executing a redelivery bond, and procuring a return of the property thereunder, defendant is estopped from denying his possession of the property at the commencement of the action.⁷⁵

⁷⁴ Rev. Laws 1910, § 4805.

⁷⁵ Nye v. Weiss, 53 P. 152, 7 Kan. App. 627.

Defendant in replevin who executes a redelivery bond and regains possession of the property is estopped from denying that he was in possession at the time the action was brought, but not from proving that the title is in a

Property held under a redelivery bond in replevin is in custodia legis, the same as if in the officer's actual possession.⁷⁶

§ 1720. Quashing writ—Forms

A motion to quash the writ of replevin must be filed in apt time, and must be interposed before pleading in chief, or answering to the merits.⁷⁷

MOTION TO QUASH WRIT OF REPLEVIN

(Caption.)

Comes now the said defendant, C. D., and moves the court to quash, set aside, vacate, and hold for naught the writ of replevin issued in this cause on the ——— day of ———, 19—, by the clerk of this court, and to order the release of the property seized by the sheriff thereunder, for the reason that no bond or undertaking was given by the plaintiff herein for such writ of replevin, as required by law, prior to the issuance thereof.

X. Y., Attorney for Defendant.

ORDER QUASHING WRIT OF REPLEVIN

(Caption.)

Now, on this ——— day of ———, 19—, comes on for hearing the motion of the defendant herein, C. D., to quash and set aside the writ of replevin issued herein on the ——— day of ———, 19—, by the clerk of this court, plaintiff appearing by his attorney, G. H., and defendant appearing by his attorney, X. Y., and the court after hearing the argument and being fully advised in the premises, finds that no bond or undertaking was given by the plaintiff, A. B., herein for such writ of replevin, as required by law, prior to the issuance thereof.

third party and that he held it as his agent. *Boyce v. Augusta Camp No. 7,429*, M. W. A., 78 P. 322, 14 Okl. 642.

⁷⁶ *Grossman Co. v. White*, 52 Okl. 117, 152 P. 816.

⁷⁷ *Hutchings v. Cobble*, 30 Okl. 158, 120 P. 1013.

Where the plaintiff filed her petition, affidavit, and undertaking in replevin with the justice, who immediately issued a summons and an order of replevin separately, and delivered them to a constable, who seized the property in dispute, and delivered it to plaintiff, and afterwards, on motion of defendant, the summons and order of replevin were quashed, and an alias summons in proper form issued, plaintiff retaining possession of the property, the action should be deemed to have been commenced when the original summons and order of replevin was issued. *Gilbert v. Stephens*, 55 P. 1070, 6 Okl. 673.

(1612)

It is therefore ordered that said writ of replevin be and the same is hereby quashed, set aside, vacated, and held for naught, and the sheriff of _____ county, Oklahoma, is hereby commanded to return to said defendant, C. D., all property seized and held by him by virtue of said writ of replevin. _____, Judge.

§ 1721. Return.

"The return day of the order of delivery, when issued at the commencement of the suit, shall be the same as that of the summons; when issued afterwards, it shall be ten days after it is issued."⁷⁸

ARTICLE IV

PLEADINGS AND EVIDENCE

Sections

- 1722. Complaint—Form and requisites.
- 1723. Demand.
- 1724. Amended and supplemental complaint.
- 1725. Amendment of affidavit.
- 1726. Issues, proof, and variance—Matters to be proved.
- 1727. Variance.
- 1728. Burden of proof.
- 1729. Defenses under answer—General denial.
- 1730. Evidence admissible.
- 1731. Sufficiency of evidence.

§ 1722. Complaint—Form and requisites

A petition in replevin alleging plaintiff's ownership of property and his right to immediate possession, and defendant's wrongful detention thereof stated a cause of action.⁷⁹

In order to state a cause of action to recover a building, the petition should specifically aver such a state of facts as will clearly show that such building is personal property, and that plaintiff has a right to maintain the action. It is not sufficient to aver generally that such building is personal property.⁸⁰ The petition should allege that defendant is in possession.⁸¹

⁷⁸ Rev. Laws 1910, § 4802.

⁷⁹ Walker v. Hinton (Okla.) 172 P. 73; Stone v. American Nat. Bank, 127 P. 393, 34 Okl. 786.

⁸⁰ Bridges v. Thomas, 58 P. 955, 8 Okl. 620.

⁸¹ A petition in replevin which shows that defendant W. obtained a stock of goods from plaintiff by fraud, and further stated that, after rescission and

Where the affidavit in replevin, there being no separate petition, contains all the essentials of a petition, it should be treated as both affidavit and petition, and the filing of the same and the issuance of a summons therein constitutes commencement of the action.⁸² But where a petition has been filed, the affidavit and bond for an ancillary order of replevin are not parts of the pleadings, and whether a cause of action has been stated is determined by the averments of the petition, which is not affected by defects in the averments of the affidavit or by irregularities in the bond.⁸³

The fact that in a petition it appeared from the exhibits attached for the purpose of identifying the goods that a third person was at one time a purchaser of the goods does not render it necessary, in order to state a cause of action, that the inference of such sale be rebutted by an allegation of facts avoiding the effect of the sale.⁸⁴

Where, after personal service the only objection to the petition is by motion to vacate a judgment by default, and the grounds relied on are that the special ownership of plaintiff and its rights to the property are insufficiently pleaded, but the petition sets forth the specific facts constituting plaintiff's title, alleging it to be that of a mortgagee under a chattel mortgage, and stating that it deeming itself insecure, it took possession of the property, it is sufficient.⁸⁵

demand for return of the goods, W. sold and delivered them to defendant E., who "now claims said jewelry or an interest therein," sufficiently states facts showing that E. was in possession of the property at the commencement of the action. *Wails v. Farrington*, 116 P. 428, 27 Okl. 754, 35 L. R. A. (N. S.) 1174.

⁸² *Mann v. Ridenhour*, 46 Okl. 565, 149 P. 124.

⁸³ *Jantzen v. Emanuel German Baptist Church*, 112 P. 1127, 27 Okl. 473, Ann. Cas. 1912C, 659.

A petition which fails to state that the property sought to be recovered is wrongfully detained by plaintiff from defendant, is fatally defective, and the fact that the affidavit filed in the case to obtain an order of delivery contained such an allegation will not cure the defect. *Wilbrite v. Williams*, 21 P. 256, 41 Kan. 288, 13 Am. St. Rep. 281.

In replevin, where both an affidavit and a petition or bill of particulars are filed, the office of the affidavit ceases when the property is delivered, and the action thereafter proceeds upon the petition, and the facts set forth in the affidavit form no part of the issues unless again set forth in the petition or other pleadings. *First Nat. Bank v. Cochran*, 87 P. 855, 17 Okl. 538.

⁸⁴ *Samuels v. Burnham*, 61 P. 755, 10 Kan. App. 574.

⁸⁵ *Thompson v. Caddo County Bank*, 82 P. 927, 15 Okl. 615.

The petition should allege plaintiff's ownership and right of possession, and defendant's wrongful detention, as of the time when the action was commenced.⁸⁶

Where a petition is sufficiently broad to admit proof of a wrongful taking by defendant in the first instance, which was the sole contention in plaintiff's opening statement, it was not error to overrule defendant's objection to the introduction of evidence on the ground that the petition did not state a cause of action.⁸⁷

A plaintiff, claiming a right of possession under special ownership, must set forth, and prove all the facts on which his claim is based.⁸⁸

An error in stating the age of cattle sought to be recovered both in the petition and in the chattel mortgage under which plaintiff claims, is not fatal to plaintiff's case, where the identity of the cattle is shown.⁸⁹

A petition for the recovery of "six head of one year old heifers, twelve head of one year old steers, twenty-one head of mixed cows." of a certain value, is insufficient as to description.⁹⁰

PETITION IN REPLEVIN

(Caption.)

Comes now the plaintiff, A. B. Company, and for cause of action against the defendant, C. D., alleges and states:

1. That at all times hereinafter mentioned plaintiff was a corporation duly organized and existing under and by virtue of the laws of the state of ———.

⁸⁶ *Burgwald v. Donelson*, 43 P. 100, 2 Kan. App. 301.

A petition in the district court which fails to state that the property sought to be recovered is wrongfully detained by defendant from plaintiff is fatally defective. *Wilbite v. Williams*, 21 P. 256, 41 Kan. 288, 13 Am. St. Rep. 281.

Petition in an action to recover personal property from constable, alleging that it had been taken from plaintiff by officer under writ of attachment issued by justice of the peace and that action was decided for defendant, whereupon attachment was dissolved, and that plaintiff never perfected an appeal, was not demurrable as showing that property was taken by mesne or final process against plaintiff in view of Rev. Laws 1910, §§ 4798, 4799. *Thompson v. Grove* (Okl.) 180 P. 553.

⁸⁷ *Parkhurst v. Sharp*, 61 P. 531, 10 Kan. App. 575.

⁸⁸ *Scott v. Vulcan Iron Works Co.*, 122 P. 186, 31 Okl. 334.

⁸⁹ *George R. Barse Live Stock Commission Co. v. Turner*, 44 P. 987, 56 Kan. 778.

⁹⁰ *Smith v. McCoole*, 46 P. 988, 5 Kan. App. 713.

(1615)

2. That it has a special ownership in and is entitled to the immediate possession of the following described personal property, to wit: (Describe same), of the value of _____ dollars.

3. That plaintiff's special ownership consists in that on the _____ day of _____, 19____, in _____ in the state of _____, plaintiff sold and delivered to one E. F., at his special instance and request, the above named and described _____, for the sum of _____ dollars under a conditional sale whereby the plaintiff retained the title until the purchase price should be paid in full.

4. That thereafter and before said purchase price was paid, the said E. F., without the knowledge or consent of plaintiff, wrongfully took the said cash register out of the state of _____, and brought the same to _____ in _____ county, Oklahoma, and before plaintiff knew the same had been removed from the state of _____, wrongfully disposed of the same.

5. That under the laws of the state of _____ a conditional sale of personal property, wherein title is retained by the seller, is valid, not only between the parties thereto, but as to innocent purchasers as well, and the laws of the state of _____ at the time this contract was made did not require that the contract itself, or a copy thereof, should be recorded in any of the public offices thereof, and such continued to be the law to the time of the bringing of this action.

6. That there is due plaintiff on said _____ the sum of _____ dollars.

7. That defendant herein has purchased the same from said E. F., or his vendees, and, though demanded, has refused and still refuses to surrender the said _____, and unlawfully detains the same from plaintiff, from the _____ day of _____, 19____, to his damage in the sum of \$_____.

Wherefore plaintiff prays judgment against the defendant that the defendant do return to plaintiff the said _____, so unlawfully detained, and for the sum of \$_____, his damages as aforesaid, and costs of this action.

X. Y., Attorney for Plaintiff.⁹¹

⁹¹ Form in National Cash Register Co. v. Hans Paulson, 16 Okl. 204, 83 Pac. 204.

§ 1723. — Demand

Where defendant claims title and a right of possession, he cannot complain that the petition does not allege demand.⁹² Where the petition shows that defendant came into possession wrongfully, it need not allege demand for a return of the property before the commencement of the action.⁹³

§ 1724. Amended and supplemental complaint

It is proper to permit an amendment of a petition which changes the allegation of plaintiffs' ownership in the property from that of absolute ownership to a special ownership, the parties and the property being the same.⁹⁴

⁹² *Farmers' & Merchants' Bank v. Bank of Glen Elder*, 26 P. 680, 46 Kan. 376.

⁹³ A petition in replevin which, after showing that a stock of jewelry was parted with by plaintiff in a trade to defendant W. as a result of his fraud, further stated that, after rescission and demand for its return, W. sold the jewelry to E. for the consideration only of a credit on a promissory note held by W. against E., and delivered the jewelry to E., "who now claims said jewelry or an interest therein," sufficiently shows that E. came wrongfully into the possession of the property, so that a demand for its return was unnecessary before commencement of a suit. *Walls v. Farrington*, 116 P. 428, 27 Okl. 754, 35 L. R. A. (N. S.) 1174.

⁹⁴ *Swope v. Burnham*, 52 P. 924, 6 Okl. 736.

It is within the reasonable discretion of the court to allow a petition in replevin, based upon the claim of general ownership, to be amended by setting up a claim of special ownership under a pledge to secure the payment of a debt. *Gray v. Doty*, 94 P. 1008, 77 Kan. 446.

It is not error to allow an amendment in replevin, changing allegations of absolute ownership to allegations of special ownership based on notes and chattel mortgages, and by adding a count for conversion and praying for the value if delivery cannot be had. *Continental Gin Co. v. Pannell*, 61 Okl. 102, 160 P. 598.

Where the affidavit in replevin alleged generally a specific ownership and interest in, and that plaintiff was entitled to immediate possession of, certain chattels, and the petition set up a special ownership in the chattels, specifically pleading such ownership by virtue of two mortgages, and described a portion of the indebtedness secured by such mortgages, it was error to strike from the files an amended petition which did not change the chattels sought to be recovered nor the parties, but, in stating the special ownership and wrongful detention, pleaded two additional mortgages held by plaintiff at the beginning of the action covering the same property, the indebtedness secured thereby then due, and default as to payment and demand for possession having been made at such time, under Wilson's Rev. & Ann. St. 1903, § 4343, providing that the court may amend any pleading by inserting other material allegations, where such amendment does not substantially change the claim. *Robinson & Co. v. Stiner*, 109 P. 238, 26 Okl. 272.

The petition may be amended as to the value of the property.⁹⁵

General damages such as necessarily result from the unlawful retention of property need not be specifically pleaded,⁹⁶ and general allegations of damages authorize recovery of such damages as are the natural consequence of the wrongful acts, but damages for an injury to the property while in defendant's possession must be specially pleaded.⁹⁷

§ 1725. Amendment of affidavit

The original affidavit in replevin may be amended so as to state sufficiently what is already stated therein indefinitely.⁹⁸ It may be amended after issuance and execution of the order of delivery.⁹⁹

Irregularities and defects in the affidavit in an action in replevin, sufficient to give ground for dismissal of an action, if timely objections had been made, will be waived, and the court will obtain jurisdiction to try the case, if the defendant answer to the merits without raising objection thereto.¹

Where, after the granting of a new trial, a party asks leave of court to amend the affidavit and leave is granted by the court on condition that the same be made within 10 days, and that the plaintiff pay all costs in the action to date within 10 days, the conditions only apply to the right to amend, and if the party fails to comply with the conditions, he only forfeits his right to amend; and hence it is error for the court to make an order dismissing

⁹⁵ It was not error to permit a plaintiff in replevin to so amend her petition as to increase the value of the articles above that alleged in her replevin affidavit. *Chandler v. Parker*, 70 P. 368, 65 Kan. 860.

A plaintiff in replevin, who, in ignorance of the real value of property sought to be recovered, alleged its value at an excessive sum, is entitled, upon motion therefor, to amend his petition in such respect, notwithstanding he failed to amend when (as before answer) he could have done so without leave, and also failed to apply for leave as early as he might have done, if the amendment, when applied for, can be made without prejudice to the rights of the defendant, and if a denial of leave to make it will increase the liability of the plaintiff to the extent of \$1,000, or a fifth of the value of the property in dispute. *McManus v. Walters*, 61 P. 686, 62 Kan. 128.

⁹⁶ *Jackson v. Glaze*, 41 P. 79, 3 Okl. 143.

⁹⁷ *Hunt v. Cohen* (Okl.) 179 P. 1.

⁹⁸ *Meyer v. Lane*, 20 P. 258, 40 Kan. 491.

⁹⁹ *Washington Nat. Bank v. Rooney*, 150 P. 555, 96 Kan. 133.

¹ *Hutchings v. Cobble*, 30 Okl. 158, 120 P. 1013.

the case for a failure to comply with the conditions attached to the leave to amend.²

§ 1726. Issues, proof, and variance—Matters to be proved

When the plaintiff claims the personal property in controversy as sole owner, he must stand or fall on that claim, and cannot recover by showing his right to a lien;³ but an allegation of absolute ownership of the property has been held sustained by evidence which shows the plaintiff to be a chattel mortgagee in possession.⁴

Where the petition in action to recover specific personal property from a constable, alleges that after final judgment for defendant, dissolving an attachment, plaintiff served notice of intention to appeal but never perfected the appeal, and where defendant filed a general denial, whether such appeal was perfected was a material issue the burden of establishing which was on plaintiff.⁵

§ 1727. — Variance

That replevin was brought against an officer in his individual name, and the evidence showed that he acted in an official capacity under process in seizing the property in controversy, does not constitute a fatal variance.⁶

Where a petition alleges that the plaintiff is entitled to possession by reason of a special interest evidenced by notes and a chattel mortgage, but the proof shows that, if entitled to possession at all, it is by reason of a certain other agreement, there is not a fatal variance.⁷

Where the petition prayed for nine mules, the affidavit, order, and redelivery bond, which described only five mules, were no part of the pleading, and the cause was properly tried on the averments contained in the petition.⁸

In an action to recover a certificate of corporate stock pledged with defendant by one who obtained the certificate from the plaintiff's husband, her agent, a variance between an averment that the pledgor was a trustee and proof that he wrongfully obtained pos-

² Bayless v. McFarland, 63 P. 859, 10 Okl. 747.

³ Parry Mfg. Co. v. Myton, 54 P. 291, 8 Kan. App. 533.

⁴ Falk v. Decou, 61 P. 760, 8 Kan. App. 765.

⁵ Thompson v. Grove (Okl.) 180 P. 553.

⁶ Mann v. Ridenhour, 46 Okl. 565, 149 P. 124.

⁷ J. E. McMillan Hardware Co. v. Ross, 104 P. 343, 24 Okl. 696.

⁸ King v. King, 141 P. 788, 42 Okl. 405.

session of the stock was immaterial.⁹ Under a plea of special ownership, evidence that the intervener is the absolute owner is inadmissible.¹⁰

§ 1728. Burden of proof

The burden is on the plaintiff to establish his right to recover by a preponderance of the evidence.¹¹ A plaintiff having a special interest in the property replevined cannot recover the usable value thereof without proof that the special interest includes the right to the use.¹²

Where, in replevin against a constable to recover possession of property held by him as such, he attempted to justify by virtue of levies made under an execution in his hands, he must show that the execution was issued by competent authority upon a valid and unsatisfied judgment.¹³

Where a mortgagee seeks to recover possession of property under a chattel mortgage given to secure the payment of notes, and the mortgagor admits the execution of the notes and mortgage, and defends only upon the grounds that the mortgagee has no right to maintain the action and that the property is exempt, the burden of proving such issues is upon the mortgagor.¹⁴

In replevin between two mortgagees, where the plaintiff proves all the facts necessary to entitle it to recover, unless the defendant has a prior lien, the defendant must not only establish that its mortgage is first in date of execution, but must show, where such fact is denied by the plaintiff, that the property is the same property included in the defendant's mortgage.¹⁵

Where both parties in replevin claim under the same person—plaintiff by bills of sale, and the defendant by chattel mortgages—the burden is on the defendant to show that he had authority, outside the mortgage, to apply the proceeds of the mortgaged property on notes not secured by the mortgage.¹⁶

⁹ State Nat. Bank v. Scales, 60 Okl. 225, 159 P. 925.

¹⁰ International Bank of Bristow v. Bowser, 125 P. 458, 33 Okl. 316.

¹¹ Kerfoot v. State Bank of Waterloo, 77 P. 46, 14 Okl. 104.

¹² Francis v. Guaranty State Bank of Texola, 44 Okl. 446, 145 P. 324.

¹³ Williams v. Foreman (Okl.) 166 P. 700.

¹⁴ Colean Mfg. Co. v. Johnson, 109 P. 403, 82 Kan. 655, 20 Ann. Cas. 296.

¹⁵ State Bank of Waterloo, Ill., v. City National Bank of Kansas City, Mo., 89 P. 206, 18 Okl. 10.

¹⁶ First Nat. Bank v. Parkhurst, 37 P. 1001, 54 Kan. 155.

In replevin by the payee for possession of a time certificate of deposit, where the plaintiff proves to the jury's satisfaction that possession was obtained through fraud and without consideration, the burden shifts to the party claiming as innocent holder in due course for value to show that he is such holder.¹⁷

To sustain a judgment in favor of an officer who claims the right of possession by virtue of a seizure under a judicial process, the evidence should show his official character, and the proceedings and process under which he acted and claims possession.¹⁸

§ 1729. Defenses under answer—General denial

An answer by the defendant disclaiming any right, title, or interest in the property in controversy presents no issue upon the allegations of the petition, since the gist of the action is not the title to the property, but its wrongful detention.¹⁹

Where facts have arisen since the commencement of the action which would vary the relief to which the plaintiff is entitled, such facts may be alleged in a supplemental answer.²⁰

Under a general denial the defendant may make any defense that will defeat the plaintiff's claim,²¹ and therefore a motion by the

¹⁷ Thompson v. Clark (Okl.) 178 P. 655.

¹⁸ Graham v. Shaw, 17 P. 832, 38 Kan. 734; Arn v. Parker, 18 P. 201, 39 Kan. 338.

¹⁹ Zeisler v. Bingman, 60 P. 657, 9 Kan. App. 447.

²⁰ Haltom v. Nichols & Shepard Co., 64 Okl. 184, 166 P. 745.

Where, in replevin, the falsity of the affidavit is relied on by defendant to recover the property taken on a writ based thereon, the issue cannot be raised on motion, but by answer. Perryman v. Brown, 105 P. 630, 25 Okl. 138.

²¹ Broyles v. McInteer, 120 P. 233, 29 Okl. 767; De Hart Oil Co. v. Smith, 140 P. 1154, 42 Okl. 201; Williams v. Gibson Bros., 60 Okl. 147, 159 P. 649; French v. Brown (Okl.) 174 P. 748; Thompson v. Grove (Okl.) 180 P. 553; Payne v. McCormick Harvesting Mach. Co., 66 P. 287, 11 Okl. 318; Dewey v. Bobbitt, 100 P. 77, 79 Kan. 505; Shaddock v. Stotts, 59 P. 39, 9 Kan. App. 776, judgment affirmed 61 P. 1131, 62 Kan. 866.

Where plaintiff alleges ownership generally, defendant need not allege that the bill of sale under which plaintiff claims is only a mortgage in order to introduce evidence to that effect. Francis v. Guaranty State Bank of Texola, 44 Okl. 446, 145 P. 324.

Where, in replevin, the answer contains a general denial, the title of plaintiff is put in issue, and the answer states a defense. Bancroft-Whitney Co. v. Mayfield, 129 P. 702, 36 Okl. 535.

Where, in replevin, defendant's answer was a general denial, proof may be made thereunder that at the commencement of the action defendant had

plaintiff for judgment on the pleadings, where there has been a general denial, is properly overruled.²²

Where the defendant answers by a general denial, evidence that ownership of the property is in a third person is admissible.²³ An averment additional to the general denial that the defendant is the owner of the property, and that it had been delivered to him by an officer who seized it in replevin between the same parties, does not enlarge the issues raised by the general denial.²⁴

§ 1730. Evidence admissible

Any evidence is admissible which properly determines ownership and the right of possession,²⁵ but evidence outside the issues is not admissible.²⁶

possession, taken in enforcing a lien for unpaid rent. *Wester v. Long*, 66 P. 1032, 63 Kan. 876.

In replevin by a mortgagee for the possession of the mortgaged property, defendant may, under a general denial, defeat a recovery by proof that, after the execution and delivery of the mortgage, she sold the property to the mortgagee, who refused to take it and pay the contract price. *Deford v. Hutchinson*, 26 P. 60, 45 Kan. 332, modifying judgment 25 P. 641, 45 Kan. 318, 11 L. R. A. 257.

One claiming a lien for repairs and care bestowed on a vehicle may show under his general denial that plaintiff parted with the ownership and right of possession before commencement of the action. *Ely v. Holloway*, 147 P. 1128, 95 Kan. 8.

In replevin, with general denial plaintiffs were entitled to have submitted to the jury not only whether a contract of exchange under which defendant claimed title had been actually completed, but, whether, if there was a contract, it was invalid for fraud of defendant. *Campbell v. Mowrer*, 155 P. 956, 97 Kan. 496.

Defendant may prove that a chattel mortgage relied on by plaintiff is void under the law of the state where made without pleading it. *Woods County Union Bank v. Shore*, 123 P. 880, 87 Kan. 140.

²² *White v. Gemeny*, 28 P. 1011, 47 Kan. 741, 27 Am. St. Rep. 320.

²³ *McLaughlin v. Dugan* (Okl.) 166 P. 1069.

²⁴ *Street v. Morgan*, 87 P. 448, 64 Kan. 85.

²⁵ In replevin against a cropper for crops, evidence that the landlord had surrendered or abandoned his title under contract to purchase under which he claimed when he made contract with the cropper is admissible. *Merchants' Nat. Bank of Sallisaw v. Frazier*, 60 Okl. 156, 159 P. 647.

In replevin by a lessor against a creditor of the lessee for property which plaintiff claims by virtue of the lease, which gave him an agister's lien, securing the payment of rent, the lease and the note for rent are admissible in evidence, notwithstanding plaintiff had recovered judgment against the lessee for the rent. *Parkhurst v. Sharp*, 61 P. 531, 10 Kan. App. 575.

²⁶ Where replevin is brought by the owner to recover possession of cattle

The affidavit in replevin is competent evidence against plaintiff as to the value of the property replevied.²⁷

Where defendant claims the property under a sale made under a chattel mortgage, he may introduce such mortgage in evidence.²⁸ Plaintiff may attack the mortgage on which defendant relies when both the parties claim title under the same person.²⁹ He may prove that, subsequent to the commencement of the action, defendant has sold and assigned all his right to, or claim upon, the property in dispute, since that fact, if established, would disentitle defendant to a return of the property.³⁰

The exclusion of evidence that plaintiffs were indebted to defendants, when offered to show want of malice in the taking, is not error.³¹

Testimony that persons other than the plaintiff claimed the property is not admissible unless it is shown, or offered to be shown, that the right claimed is derived through the plaintiff or owner of such property.³²

§ 1731. Sufficiency of evidence

The sufficiency of the evidence in replevin is to be determined in accordance with the general rules of evidence under the facts of each particular case.³³

held by a sheriff under an order of the live stock sanitary commission requiring him to hold said cattle in quarantine, and plaintiff does not allege payment prior to the commencement of the action, nor file supplemental pleading, alleging payment subsequent thereto of the expense of keeping the cattle, evidence tending to show such payment is inadmissible, and constitutes no valid defense to the action. *Hardwick v. Brookover*, 30 P. 21, 48 Kan. 609.

In replevin for wheat taken from a bin, evidence of the ownership of the land on which the bin was located was not admissible to establish ownership of the wheat. *Wilson v. Panne*, 41 P. 984, 1 Kan. App. 721.

²⁷ *American Box Ball Co. v. Wood*, 50 Okl. 242, 150 P. 1047; *First Nat. Bank v. Staab*, 171 P. 3, 102 Kan. 369.

²⁸ *Shattuck v. Hall*, 42 P. 1101, 3 Kan. App. 374.

²⁹ *State Bank of St. John v. Norduff*, 43 P. 312, 2 Kan. App. 55.

³⁰ *Campbell v. Quinton*, 45 P. 914, 4 Kan. App. 317.

³¹ *Ray v. Navarre*, 47 Okl. 438, 147 P. 1019.

³² *Kennett v. Fickel*, 21 P. 93, 41 Kan. 211.

³³ A sheriff levied an execution on a warehouse, but his return was silent as to whether he took it into his possession. In replevin for the warehouse, brought against the sheriff by one claiming to be the owner, plaintiff testified that she had kept the key, and used and permitted others to use the building, since the levy, and that the defendant could not get into it unless he broke

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Where plaintiff in replevin alleges and proves ownership, defendant, in order to prevail on his claim of fraudulent conveyance by a judgment debtor, must show something more substantial than a mere conjecture or suspicion of wrongdoing.³⁴

ARTICLE V

DAMAGES

Sections

1732. Elements of compensation.

1733. Exemplary damages.

§ 1732. Elements of compensation

In replevin, the measure of damages is properly fixed by adding to the value of the use of the usable property its usable value from the time of the taking to the date of judgment, and to the value of the rest of the property interest thereon for the same time.³⁵

the lock. Held, that no wrongful detention by the defendant was shown and that there was no error in sustaining defendant's demurrer to the evidence. *Brand v. Hedwick*, 23 P. 111, 48 Kan. 131.

In an action for replevin, evidence held insufficient to sustain a judgment for defendant. *Harrison Bank v. Porter*, 87 P. 535, 17 Okl. 256.

Evidence held not to show that plaintiff was estopped to maintain replevin. *Alexander v. Busch* (Okl.) 166 P. 900, L. R. A. 1918E, 125. In replevin, verdict allowing recovery of damages for detention of personalty cannot be sustained in absence of any evidence of damages. *Id.*

In a replevin action, evidence held insufficient to sustain verdict and judgment for plaintiff for possession of property or its value, awarding damages for wrongful detention. *Lucas v. King* (Okl.) 172 P. 939.

In action of replevin for cattle covered by mortgage, judgment denying claim of an intervener claiming under subsequent mortgage was sustained by the evidence. *Iowa Nat. Bank v. Citizens' Nat. Bank of Woonsocket, R. I.* (Okl.) 172 P. 924.

In action of replevin by chattel mortgages, evidence held not sufficient to sustain a verdict and judgment for defendant for damages for wrongful detention of property. *McAnaw v. Williamson* (Okl.) 171 P. 715.

Evidence in an action by a surety on a lease, to whom the lessee had yielded possession, to replevin corn raised on the premises by plaintiff's tenant, and sold by him to defendant, held insufficient to prove that plaintiff had title to the corn. *Dudley v. Fisher*, 45 Okl. 709, 146 P. 708.

³⁴ *Alderson v. Hume*, 139 P. 955, 40 Okl. 533.

³⁵ *State Bank of Stockton v. Showers*, 70 P. 332, 65 Kan. 431; *Hunt v. Cohen* (Okl.) 179 P. 1; *Rev. Laws 1910, § 4807*; *Francis v. Guaranty State Bank of Texola*, 145 P. 324, 44 Okl. 446; *Kennett v. Fickel*, 21 P. 93, 41 Kan. 211; *Wer-*

The reasonable value of the use of such property during wrongful detention is determined by the ordinary market price of such use at the place of taking.³⁶ If the property has no usable value, the measure of damages for the wrongful detention is the interest on the value of the property while wrongfully detained.³⁷ A general allegation of damages authorizes the recovery of distinct usable value.³⁸

Where animals distrained for damages are replevied by the owner, the defendant may, in the replevin action, recover for the damage done by the animals.³⁹

A judgment wherein no damages were alleged, based on evidence of speculative damages, cannot be sustained, though no objection was made to the admission of the evidence.⁴⁰

To support an award of damages to the defendant in replevin, he must show that he was entitled to possession at the time the suit was commenced.⁴¹

A judgment for the plaintiffs for an amount certain as the value of the property is improper, without evidence of value.⁴²

ner v. Graley, 38 P. 482, 54 Kan. 383; *Weleetka Light & Water Co. v. Castleberry*, 142 P. 1006, 42 Okl. 745.

The measure of damages for the wrongful detention of a team of work mules is the usable value thereof while they were wrongfully detained. *First State Bank of Mannsville v. Howell*, 137 P. 657, 41 Okl. 216; *Same v. Lawson*, 137 P. 661, 41 Okl. 226.

³⁶ *Thomas v. First Nat. Bank of Tecumseh*, 121 P. 272, 32 Okl. 115, Ann. Cas. 1914A, 376; *Francis v. Guaranty State Bank of Texola*, 145 P. 324, 44 Okl. 446.

³⁷ *Werner v. Graley*, 38 P. 482, 54 Kan. 383.

³⁸ *Chilton v. Carpenter*, 78 Okl. 210, 189 P. 747.

³⁹ *Bottoms v. Clark*, 38 Okl. 243, 132 P. 903. Where animals distrained by two persons were replevied by the owner, each defendant could recover his separate damages caused by the animals and establish a lien therefor. *Id.*

Where about 25 head of cattle belonging to plaintiff trespassed on defendant, who was able to impound only 5 head, held that, in a replevin action brought by plaintiff, defendant was entitled to judgment for damages done by the entire herd. *Holmberg v. Will*, 52 Okl. 745, 153 P. 832.

⁴⁰ *Smith v. Bryant*, 41 P. 1069, 1 Kan. App. 754.

In replevin to recover 10 horses, the cost of caring for 15 other horses belonging to plaintiffs in another town, while the 10 were detained, cannot be recovered as damages, on the ground that plaintiffs intended to ship all of the horses to market in one car, as such damages are too remote and speculative. *Haas v. Tough*, 72 P. 856, 67 Kan. 253.

⁴¹ *J. E. McMillan Hardware Co. v. Ross*, 104 P. 343, 24 Okl. 696.

⁴² *Gross v. Lincoln (Okl.)* 196 P. 960.

§ 1733. Exemplary damages

A verdict assessing exemplary damages is proper, where the defendants, without legal process, and by force and threats of violence, and against the plaintiff's consent, carried away personality belonging to them, and a verdict, assessing damages for plaintiffs, will not be set aside for excessiveness in including smart money, where it appears that the taking was vexatious and oppressive.⁴³ But in the absence of such fraud or oppression the granting of exemplary damages is error.⁴⁴

ARTICLE VI

TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW

Sections

- 1734. Failure to prosecute.
- 1735. Scope of inquiry.
- 1736. Trial.
- 1737. Questions for jury.
- 1738. Directed verdict—Instructions.
- 1739. Verdict and findings—Requisites.
- 1740. Value of property—Description.
- 1741. New trial.
- 1742. Judgment—In general—Form.
- 1743. For defendant.
- 1744. Description of property.
- 1745. Possession or return.
- 1746. For value of property.
- 1747. Judgment in alternative.
- 1748. Damages.
- 1749. Operation and effect.
- 1750. Enforcement of judgment.
- 1751. Appeal and error.
- 1752. Costs.

§ 1734. Failure to prosecute

"If the property has been delivered to the plaintiff, and judgment rendered against him, on demurrer, or if he otherwise fail to prosecute his action to final judgment, the court shall, on application of

⁴³ Ray v. Navarre, 27 Okl. 438, 147 P. 1019; Rev. Laws 1910, § 2851.

Exemplary damages are recoverable for oppression, fraud, or malice. Lanyon v. Byus (Okl.) 197 P. 162.

⁴⁴ McCormick Harvesting Mach. Co. v. Drake, 48 P. 944, 5 Kan. App. 882; Remund v. McCool, 50 Okl. 69, 150 P. 1055.

the defendant or his attorney, proceed to inquire into the right of property, and right of possession of the defendant to the property taken."⁴⁵

Where the plaintiff obtains possession of the property, and his action is dismissed, the defendant can have his right to the property determined and recover judgment for its return or for its value.⁴⁶

§ 1735. Scope of inquiry

The issue is the wrongful detention of the property at the time of the commencement of the action.⁴⁷

It is the policy of the law to settle in one action all the conflicting claims of the parties for the possession of the property or for damages for detention or loss.⁴⁸ Both legal and equitable rights of the parties may be determined.⁴⁹

Between the mortgagee and mortgagor, when the mortgagee has obtained possession of the mortgaged property under the writ, the question whether he had sold the mortgaged property prior to the determination of the action cannot be made an issue in that action.⁵⁰

§ 1736. Trial

Either party is entitled to a verdict under proper instructions, but, if the parties agree on the determinative facts thereof, judgment becomes a question of law for the court.⁵¹

Though the sureties on a replevin bond become insolvent, and

⁴⁵ Rev. Laws 1910, § 4806.

⁴⁶ *Thomas v. First Nat. Bank of Tecumseh*, 121 P. 272, 32 Okl. 115, Ann. Cas. 1914A, 376.

Where plaintiff took property under the writ and sold it and dismissed his suit, defendant was entitled to have his right of property and right of possession determined. *Roberts v. Wilkins*, 137 P. 111, 40 Okl. 138.

⁴⁷ *Wyandotte Nat. Bank v. Simpson*, 55 P. 347, 8 Kan. App. 748.

Where, in replevin for wheat, the issue was ownership, it was error to admit evidence as to the means by which plaintiff procured the judgment on which the sheriff's deed was based, under which he held title to the land on which the wheat was raised. *Jordan v. Johnson*, 42 P. 415, 1 Kan. App. 856.

⁴⁸ *Brown v. Chowning*, 59 Okl. 278, 159 P. 323.

⁴⁹ *Broyles v. McInteer*, 120 P. 283, 29 Okl. 767; *Holmberg v. Will*, 52 Okl. 745, 153 P. 832; *McFadyen v. Masters*, 66 P. 284, 11 Okl. 16.

In replevin, where plaintiff claimed special interest under chattel mortgage, the statute is flexible enough to authorize determination of legal and equitable rights. *Emerson-Brantingham Implement Co. v. Ritter* (Okl.) 170 P. 482.

⁵⁰ Rev. Laws 1910, § 4807; *First Nat. Bank v. Kreuzberg* (Okl.) 181 P. 717.

⁵¹ *McKinney v. Grant*, 93 P. 180, 76 Kan. 779.

the plaintiff cannot give additional security, it is error to dismiss the action, and give judgment against the plaintiff, as he is entitled to a trial of the issues without regard to the possession of the property.⁵²

§ 1737. Question for jury

Replevin is a possessory action, and where there is any evidence tending to join an issue of fact on the question of the right of possession, where the facts are uncertain, the question must be submitted to the jury.⁵³

§ 1738. Directed verdict—Instructions

Where the evidence shows that the plaintiff had never parted with title to the property, but only the possession thereof to another, it was error to refuse to instruct for the plaintiff, though the evidence showed the defendant to be an innocent purchaser for value from such possessor.⁵⁴

An instruction that if the plaintiff was the owner of property, describing it, he was entitled to recover, and if the defendant took the property under instructions from a third person, who was the owner, the verdict should be for the defendant, was not error, notwithstanding a mistake in the description of the property.⁵⁵

An instruction that the plaintiff might recover if, when the ac-

⁵² Varner v. Bowling, 38 P. 481, 54 Kan. 380.

⁵³ Damerson v. McClaren, 116 P. 792, 29 Okl. 340; Sawyers v. Schuler, 122 P. 199, 31 Okl. 684.

Direction of verdict for defendant, in an action for possession of a mule, held error where testimony tended to show value and the evidence of ownership was conflicting and the entire evidence such that the court would not have been compelled to set aside a verdict for plaintiff. Jones v. First State Bank of Bristow, 136 P. 737, 39 Okl. 784.

Special ownership.—In replevin by one having only a special ownership under a mortgage, it is for the jury under proper pleadings to determine value of such special interest. Emerson-Brantingham Implement Co. v. Ritter (Okl.) 170 P. 482.

⁵⁴ Hussey v. Blaylock, 95 P. 773, 21 Okl. 220.

⁵⁵ Simpson v. Mauldin, 61 Okl. 92, 160 P. 481.

Where plaintiff made out a prima facie case an instruction that, if the jury found that plaintiffs were the owners, "the property had not been sold either by themselves or through a court having jurisdiction, and that there were no liens against the same in favor of defendant, they should find for plaintiffs," was erroneous as placing an excessive burden on plaintiff. De Hart Oil Co. v. Smith, 140 P. 1154, 42 Okl. 201.

tion was instituted, he was entitled to immediate possession or if his right to possession was subsequently acquired was reversible error.⁵⁶

In an action by the payee for the possession of a time certificate of deposit on account of fraud of the transferee in securing the certificate, the refusal of an instruction that the defendant had the burden of showing that it acquired it in the ordinary course of business for value before maturity and without notice of fraud was error.⁵⁷ It is error for a court to give an instruction covering a matter on which there is no evidence introduced, and a jury may not be instructed to use their common knowledge as to values.⁵⁸

§ 1739. Verdict and findings—Requisites

A general verdict for the plaintiff, under a petition alleging ownership and right of possession in the plaintiff and wrongful detention by the defendant, finds all these issues for the plaintiff, and is proper.⁵⁹

Where the verdict in replevin is in favor of the plaintiff, and where, if construed in the light of the issues and the evidence, it shows beyond all question that the defendant wrongfully detained the property from the plaintiff, the verdict is not fatally defective because it does not expressly state that the property was so detained.⁶⁰

A finding in replevin by a wife, for property seized under execution against the husband, that the defendant was entitled to the

⁵⁶ *Tulsa Rig, Reel & Mfg. Co. v. Arnold*, 64 Okl. 160, 166 P. 135.

⁵⁷ *Thompson v. Clark* (Okl.) 178 P. 655.

⁵⁸ *Brown v. Morris*, 45 P. 98, 3 Kan. App. 86.

⁵⁹ Pleading and proof in a replevin action held to present the issue of fraud so as to warrant the giving of an instruction thereon. *Burdett v. Surdez*, 146 P. 1025, 94 Kan. 494.

Where, in replevin, there was no evidence as to the value of the property, nor as to the value of plaintiff's special interest in it, his claim being based on an agister's lien under a lease, nor that a judgment for rent, which was the basis of plaintiff's claim, had not been satisfied from other property liable to be sold therefor, and the evidence shows that defendant had a first mortgage on the property at the commencement of the suit, and was given possession by the mortgagor, the court should have granted defendant's motion for a peremptory instruction. *Parkhurst v. Sharp*, 61 P. 531, 10 Kan. App. 575.

⁶⁰ *O'Farrel v. McClure*, 47 P. 160, 5 Kan. App. 880.

⁶⁰ *Clouston v. Gray*, 28 P. 983, 48 Kan. 31.

property or the value thereof, was properly corrected, on the court's attention being called to the fact that the amount of the execution was less than the value of the property, so as to entitle the defendant to the property or the amount of his special interest therein.⁶¹

§ 1740. Value of property—Description

The value of the property taken is to be determined from its value at the time and place it was taken.⁶²

It is only necessary that the jury find the aggregate value of the goods, and no finding of value is necessary if the goods have been delivered to the plaintiffs, and judgment is in their favor.⁶³

The right of the defendant to a separate valuation in the verdict of each distinct item of property is waived if he does not demand a separate valuation in the verdict, or object to the verdict in *solido* before the jury is discharged.⁶⁴

The value stated in the affidavit is not conclusive, but the jury may assess the value at any amount which the proof may show, within the value alleged in the petition.⁶⁵

In replevin against a sheriff, holding the property under a writ of execution, where the property is delivered to the plaintiff, a verdict in the defendant's favor which fails to fix the value of the defendant's interest in the property is defective, as it is impossible for the court to render the alternative judgment provided by statute.⁶⁶

Where a mortgagor of chattels brings replevin against the mortgagee for the possession of the mortgaged property, if at the time

⁶¹ Pope v. Bowzer, 41 P. 1048, 1 Kan. App. 727.

⁶² Werner v. Graley, 38 P. 482, 54 Kan. 383.

In replevin by the mortgagee against the purchaser of personal property, the mortgagee's damages, the property having been sold, should be measured by the value of the property at the time of purchase. *Morrison v. Montgomery*, 101 Kan. 670, 168 P. 674.

⁶³ Samuels v. Burnham, 61 P. 755, 10 Kan. App. 574.

⁶⁴ Dunlap & Taylor v. Flowers, 96 P. 643, 21 Okl. 600.

In replevin for two mares, where value of each was stated in the affidavit and there was a verdict for return of mares and off-spring, defendant having retained possession, the judgment, in view of Rev. Laws 1910, § 4807, would not be vacated because verdict found gross value and did not state separate value of each animal. *Humphrey v. Baker* (Okl.) 176 P. 896.

⁶⁵ Mills v. Mills, 18 P. 521, 39 Kan. 455.

⁶⁶ Chandler v. Colcord, 32 P. 330, 1 Okl. 260.

the action was commenced the plaintiff was the owner and entitled to the immediate possession of the property, and the defendant unlawfully detained the same, although the debt secured became due, or a default occurred in the condition of the mortgage, between the time of commencing the suit and the trial, the plaintiff would nevertheless be entitled to a verdict for the value of his interest in the property, and for damages and costs.⁶⁷

A description of an animal, giving its age, sex, and color, is all that is required; and a verdict of a jury, containing such description, is sufficient to sustain a judgment.⁶⁸

§ 1741. New trial

Where the plaintiff consents to judgment for the defendant who introduced evidence as to the value of the property without objection, and judgment is rendered for the defendant in the alternative, it is error, as a matter of law, to grant a new trial.⁶⁹

§ 1742. Judgment—In general—Form

"In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or the value thereof in case a delivery cannot be had, and of damages for the detention. If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same."⁷⁰

Where an issue of fact is submitted to the jury and a verdict returned thereon, the judgment should be rendered in conformity therewith.⁷¹

The gist of the action is the right of the plaintiff to the immediate possession of the property at the commencement of the action; and, if the title or rights of the parties to the property should change pendente lite, the judgment should adjust the equities be-

⁶⁷ *Brook v. Bayless*, 52 P. 738, 6 Okl. 568.

⁶⁸ A verdict in replevin for a horse, describing it as "one three year old dark gray filly," sufficiently identified the animal in controversy to sustain a judgment. *McConnell v. Watkins*, 140 P. 1167, 42 Okl. 214.

⁶⁹ *Baker v. Van Ness*, 130 P. 536, 37 Okl. 122.

⁷⁰ Rev. Laws 1910, § 4807.

⁷¹ *Everett v. Akins*, 56 P. 1062, 8 Okl. 184.

tween them as such equities stand at the time of the rendition of the judgment.⁷²

In an action to replevin mortgaged property, the judgment for the plaintiff should be for possession of the property or its value if delivery cannot be had, not to exceed the mortgage debt, together with damages for detention.⁷³ But the amount due the mortgagee is only incidentally involved; the real question in issue being the mortgagee's right to possession of the mortgaged property.⁷⁴

Where a mortgagee procured possession before default, and the mortgagor brought replevin, and thereafter made default, defendant was entitled to judgment for the property, and plaintiff was entitled to damages for the usable value while the mortgagee unlawfully retained possession.⁷⁵

In an action against four parties to recover property, where it appears that two of them had previously held a chattel mortgage, but had transferred it before the commencement of the action, and it is not shown that they ever took, held, or claimed possession of the property, or that they were connected with the other two defendants in the taking and holding possession of the property, a judgment against the two former mortgagees for the return of the property cannot be upheld.⁷⁶

JUDGMENT IN REPLEVIN

(Caption.)

Now, on this ——— day of ———, 19——, the same being one of the regular judicial days of the ——— term, 19——, the above entitled cause came on for trial, the court having taken the same under advisement on the agreed statement of facts and briefs of counsel, the court, having fully considered the same, finds for the defendant, and that said defendant was entitled to the possession of

⁷² Brook v. Bayless, 52 P. 738, 6 Okl. 568.

Though replevin is a possessory action, the court may determine both legal and equitable rights and settle all the equities in the property; and, on failure to do so, the reviewing court will do so, if the record permits. Stone v. American Nat. Bank, 127 P. 393, 34 Okl. 786.

⁷³ King v. King, 141 P. 788, 42 Okl. 405.

⁷⁴ Stockyards State Bank v. Johnston, 52 Okl. 32, 152 P. 535.

⁷⁵ McDonald v. Schantz, 44 Okl. 648, 146 P. 36.

⁷⁶ Ream v. McElhone, 31 P. 1075, 50 Kan. 409.

the said ——— at the time of the institution of this action, ———, 19—.

It is therefore ordered that the petition of plaintiff herein be dismissed, and that the defendant and his sureties be and are hereby released from any further liability on the redelivery bond given herein, and that the plaintiff pay the costs of this action.

———, Judge.

§ 1743. — For defendant

Where the plaintiff, having obtained possession of the property, fails to show a right to its possession, the defendant is entitled to a judgment in the alternative for the return of the property, or of its value, if a return cannot be made,⁷⁷ with damages for the wrongful detention.⁷⁸

§ 1744. — Description of property

Where it appears that by levy of the writ the property had been brought into the custody of the court to be disposed of on its order, to which property plaintiff was entitled to possession, the court will award possession to him and not to the defendant, although the description of the property does not correspond with that given in the pleadings and writ.⁷⁹

§ 1745. — Possession or return

Where the plaintiff recovers as mortgagee, and no issues have been framed relating to any equity of third persons in the property, and it does not appear that there was a residue after the satisfaction of the mortgage, there was no error in rendering judgment confirming the plaintiff's right to the possession of all the property, though it may appear that at the time the action was brought, and the property delivered to the plaintiff, its value very considerably exceeded the mortgage debt.⁸⁰

⁷⁷ *Keen & De Wade v. Fletcher*, 123 P. 842, 31 Okl. 791; *Oklahoma State Bank v. Hicklin*, 164 P. 257, 100 Kan. 301.

⁷⁸ *Roberts v. Wilkins*, 137 P. 111, 40 Okl. 138; *Rev. Laws 1910*, § 4806.

⁷⁹ *Citizens' Nat. Bank v. Larabee*, 67 P. 546, 64 Kan. 158.

In replevin to recover a gray mare and a sorrel mare, the fact that the record reveals the word "gray" in one place instead of the word "sorrel," will not invalidate the judgment where the record recites that judgment was rendered for plaintiff for the return of a gray mare and a sorrel mare, or the value thereof. *Mullaney v. Humes*, 29 P. 691, 48 Kan. 368, affirming judgment 27 P. 817, 47 Kan. 99.

⁸⁰ *Swope v. Burnham*, 52 P. 924, 6 Okl. 736.

On trial of an action of replevin brought by a mortgagee against a mortgagor to secure possession of certain wheat, it having developed that the wheat taken on the writ by the sheriff, though in possession of the mortgagor, belonged to a third party, a judgment denying possession to the plaintiff and awarding it to the defendant was not error.⁸¹

§ 1746. — For value of property

At common law a replevin action tested only the right of possession at the commencement of the action and provided no method whereby the prevailing party might have judgment for the value of his property, in case the adjudged return thereof could not be had.⁸²

But under the statute, after obtaining possession, if the plaintiff dismisses his action, or if for any other reason the defendant is found entitled to the return of the property, he is also entitled to judgment for its whole value, if return cannot be had.⁸³

It is error to render judgment for the plaintiff for a sum certain

⁸¹ *First Nat. Bank v. Farquharson*, 97 P. 559, 22 Okl. 27.

⁸² *Humphrey v. Baker* (Okl.) 176 P. 896.

⁸³ *Hines v. Stahl*, 99 P. 273, 79 Kan. 88, 20 L. R. A. (N. S.) 1118, 131 Am. St. Rep. 280, 17 Ann. Cas. 298; *Lake v. Same*, 99 P. 275, 79 Kan. 854. Where, in replevin against an officer, it is found that he is entitled to return of the property, recovery is not defeated by the fact that his term of office has expired. *Id.*

Where defendant retains the property, or a portion thereof, the judgment for plaintiff should be in the alternative for a return of the property held by defendant, or for its value in case a return cannot be had; but where it is shown on the trial that defendant sold the property, and placed it beyond his control, a judgment for its value only will not be held materially erroneous. *Clouston v. Gray*, 28 P. 983, 48 Kan. 31.

Where replevin is brought by a judgment debtor to recover possession of specific personal property taken on execution by an officer, and the property is delivered to plaintiff, and judgment is afterwards rendered for the return of the property to the officer, or, in case return cannot be had, for its value, such judgment for the value of the property cannot exceed the amount for which the execution was issued, and costs. *Friend v. Green*, 23 P. 93, 43 Kan. 167.

Where, in attachment by a landlord for unpaid rent, the property seized included corn on which the landlord had a statutory lien, in replevin by a purchaser from the tenant the defendant is entitled to judgment for the return not only of the corn, but of any property the possession of which was rightfully held under the attachment proceedings, and of which defendant was deprived by the writ of replevin. *Wester v. Long*, 66 P. 1032, 63 Kan. 876.

as the value of the property if delivery cannot be had, where there is no evidence as to such value.⁸⁴

In an action against an officer who holds the property under an attachment, the defendant on judgment in his favor, is entitled to recover, in default of a return of the property, only the value of his special interest under the attachment.⁸⁵

§ 1747. — Judgment in alternative

Where the finding is for the plaintiff, and it appears that plaintiff was in possession of the property described in the petition at the time of trial, it is not proper to render judgment for the return of the property, or, in case return cannot be had, for its value.⁸⁶ But, where the defendant retains possession of the property, the judgment for plaintiff should be in the alternative, for a return of the property, or for its value in case a return cannot be had, though plaintiff may only ask in his petition for the possession of the property.⁸⁷

If the verdict assesses the value of the property replevied, or the damages for the detention thereof, at a sum greater than that alleged in the petition, and no amendment is made or asked the judgment should be entered only for the sum stated in the petition.⁸⁸

One suing to recover a cow taken by the defendant, but which is the property of the plaintiff, is entitled to the cow and the increase since conversion, and, in the alternative, to the value of the cow and increase at the time of judgment.⁸⁹

Where the plaintiff has secured the property, and the defendant is found to have a special ownership therein, the judgment should be for a return of the property, or, if a return cannot be had, for an amount equal to the value of the special ownership, not to exceed the value of the property.⁹⁰

If the plaintiff obtains possession of the property in replevin

⁸⁴ *Wills v. Fuller*, 47 Okl. 720, 150 P. 693.

⁸⁵ *Shahan v. Smith*, 16 P. 749, 38 Kan. 474.

⁸⁶ *Marrinan v. Knight*, 54 P. 656, 7 Okl. 419; *Colean Mfg. Co. v. Johnson*, 109 P. 403, 82 Kan. 655, 20 Ann. Cas. 296.

⁸⁷ *Chase County Nat. Bank v. Thompson*, 38 P. 274, 54 Kan. 307.

⁸⁸ *Brook v. Bayless*, 52 P. 738, 6 Okl. 568; *Burton v. Cochran*, 47 P. 569, 5 Kan. App. 508.

⁸⁹ *Wade v. Gould*, 59 P. 11, 8 Okl. 690.

⁹⁰ *Scott v. Beard*, 47 P. 986, 5 Kan. App. 560.

against the sheriff for goods taken on execution, and the jury finds for the defendant, the verdict and judgment should be in the alternative for a return of the goods, or the value of the officer's special interest, in case a return cannot be had.⁹¹

If the findings entitle the plaintiff to a judgment in the alternative, but through neglect or omission a judgment not in the alternative form is entered, it may be corrected thereafter on motion of the plaintiff.⁹²

Where the plaintiff obtained possession and the verdict for defendant did not fix the value, but no objection was made until three days thereafter, on motion for a new trial it was not error to render judgment against the plaintiff for the value of property fixed by the court if it should not be returned.⁹³

If plaintiff obtains possession of the property, and his action is dismissed, the defendant can have his right to the property determined, and recover judgment for its return or its value.⁹⁴

The right of defendant to have a judgment in his favor in the alternative is not an exclusive remedy, and if he does not avail himself of it he may yet maintain his separate action to accomplish the same result.⁹⁵

Where plaintiff claims by virtue of a chattel mortgage, and defendant by virtue of an attachment lien, the defendant's interest is but a special one, and is measured by the amount necessary to satisfy his lien; and in no event can an alternative judgment be had for an amount exceeding his lien, where the property cannot be returned.⁹⁶

In replevin by a mortgagee for the possession of the mortgaged property, defendant may, under a general denial, defeat a recovery by proof that, after the execution and delivery of the mortgage, she

⁹¹ *Ponceter v. Marshall*, 26 P. 32, 45 Kan. 672.

⁹² *First State Bank v. Stevenson*, 70 P. 875, 65 Kan. 816.

⁹³ *Swaydan v. Ellis*, 59 Okl. 175, 158 P. 434.

⁹⁴ *Thomas v. First Nat. Bank of Tecumseh*, 121 P. 272, 32 Okl. 115, *Ann. Cas.* 1914A, 376.

In replevin, where jury have determined value of plaintiff's special interest in property, it is proper for court, in entering judgment, to provide, if defendant deposit amount of its value and costs, for return of property to defendant. *Emerson-Brantingham Implement Co. v. Ritter* (Okl.) 170 P. 482.

⁹⁵ *Johnson v. Boehme*, 71 P. 243, 66 Kan. 72, 97 Am. St. Rep. 357.

⁹⁶ *Nichols & Shepard Co. v. Bishop*, 70 P. 188, 12 Okl. 250.

sold the property to the mortgagee, who refused to take it and pay the contract price, and, if the goods have been delivered to the plaintiff under the writ of replevin, the defendant may have judgment in the alternative for a return of the property, or for the value of her interest therein.⁹⁷

§ 1748. — Damages

Upon judgment being given for plaintiff, he is entitled to damages for the wrongful detention in addition to the value of the property, where a return cannot be had.⁹⁸

When a taking or detention has been attended with circumstances of aggravation, plaintiffs should be allowed their full measure of redress without being compelled to resort to an action for damages.⁹⁹

Where a failing merchant has sold his property for the purpose of hindering or delaying his creditors, and the purchaser receives notice of such fraud when only a portion of the purchase money has been paid, and before further payment the creditors of the seller seize the property on attachments, and the purchaser replevies the property from the officer, who gives bond and retains possession, the judgment should be for a return of the property to the purchaser, or that he recover the amount that he paid on the purchase price prior to any notice of the fraud of the vendor. He is not entitled to the entire value, unless it is less than the amount he actually paid before notice.¹

Where an action of replevin for mortgaged chattels is commenced against the mortgagee by a person who was appointed receiver thereof, but whose appointment was void, and afterwards, as between the parties, he becomes such receiver, and in that manner obtains an interest in the property in controversy, of which property he has the possession, while he must fail in the replevin action for the reason that when he commenced the same he had no right to do

⁹⁷ Deford v. Hutchinson, 26 P. 60, 45 Kan. 332.

In replevin for certain cattle, a judgment in favor of defendant for all the cattle, or in the alternative for \$1,948 on return of a certain number, is not inconsistent with the theory that defendant held the cattle as mortgagee of plaintiff mortgagor. Armel v. Layton, 5 P. 441, 33 Kan. 41.

⁹⁸ Chase County Nat. Bank v. Thompson, 38 P. 274, 54 Kan. 307.

⁹⁹ Ray v. Navarre, 47 Okl. 438, 147 P. 1019.

¹ McFadyen v. Masters, 66 P. 284, 11 Okl. 16.

so, yet the mortgagee cannot recover in the action to an extent greater than his own special interest in the property in controversy; and the rendition of judgment in his favor for the entire value of the property without proof of his interest therein, is error.²

Where the plaintiff claimed goods under a void chattel mortgage, and took possession and converted them to his own use, and denied defendant's lien under a valid mortgage, it was proper to render a money judgment against plaintiff in replevin for the amount due on defendant's mortgage.³

A judgment for damages for the depreciation in value of property wrongfully replevied is not a judgment for affirmative relief.⁴

A verdict is not excessive merely because it is for a sum greater than that for which the goods have been sold by the sheriff.⁵

§ 1749. — Operation and effect

When a judgment has been given for the property or its value, the return of other than the identical property will not satisfy the judgment.⁶

A judgment for a return of the property and a fixed sum as damages for the detention or for a larger fixed sum if no return could be had, entitles plaintiff to the damages only in case of a return.⁷

Where, in compliance with the alternative judgment providing for a return of the specific property or its value the property returned is depreciated in value, an action may be maintained to recover for the depreciation.⁸

§ 1750. Enforcement of judgment

Where the defendant gave a redelivery bond and retained possession, judgment was rendered for plaintiff, and, in the event he was unable to obtain possession, plaintiff was to recover a money

² *Guy v. Doak*, 27 P. 968, 47 Kan. 236, 366.

³ *Lehman-Higginson Grocer Co. v. McClain*, 64 P. 1029, 63 Kan. 881.

⁴ *Bowersock v. Adams*, 54 P. 1064, 59 Kan. 779.

⁵ In replevin for goods seized by the sheriff under attachments, where the plaintiff testifies that the goods are worth \$1,400, and it is shown that the sheriff sold them for \$650, a verdict for \$1,000, as the value of such goods, is not excessive. *Lamont v. Williams*, 23 P. 592, 43 Kan. 558.

⁶ *Binkley v. Dwall*, 58 P. 1028, 9 Kan. App. 891.

⁷ *Jackson v. Glaze*, 41 P. 79, 3 Okl. 143.

⁸ *Fair v. Citizens' State Bank*, 76 P. 847, 69 Kan. 353, 105 Am. St. Rep. 168, 2 Ann. Cas. 960.

judgment, it was the duty of defendant to tender back possession of the replevied property, and not the duty of plaintiff to demand it as a prerequisite to the enforcement of the money judgment.⁹

Where the plaintiff took certain personal property from the defendant in replevin and a judgment was rendered for its return or its value, and plaintiff tendered all of the property taken except a small portion thereof, and there was no showing that he wilfully withheld such part, and the same could not be supplied readily in open market, it was error to render judgment for the value of the whole property.¹⁰

When property is turned over to the plaintiff, and judgment is rendered for defendant, and the value found to be much less than the amount stated by plaintiff in the affidavit, such finding of value cannot be complained of by plaintiff where he fails to return the property, as directed by the judgment.¹¹

The judgment in the replevin suit is ordinarily conclusive in a subsequent suit on a redelivery bond.¹²

§ 1751. Appeal and error

While a judgment in replevin for the plaintiff for the value of the property only is irregular, it is not necessary to modify such judgment on appeal if it appears that delivery in specie cannot be made.¹³

After the defendant has tried an action of replevin on the theory that he is in possession of the property, and after the lower court has, without objection, found such to be the fact, the defendant cannot insist, on appeal, that plaintiffs were in possession of the property as bailees for defendant because they had executed a bond in a former action of replevin brought by the defendant for the same property, in which action they acknowledged the possession of the property, and promised to deliver it to the defendant on demand, or to pay to him its value.¹⁴

⁹ *MacRae v. Kansas City Piano Co.*, 77 P. 94, 69 Kan. 457.

¹⁰ *Leeper Graves & Co. v. First Nat. Bank*, 110 P. 655, 26 Okl. 707, 29 L. R. A. (N. S.) 747, Ann. Cas. 1912B, 302.

¹¹ *Weil v. Ryus*, 18 P. 524, 39 Kan. 564.

¹² *Boyd v. Huffaker*, 20 P. 459, 40 Kan. 634; *Boyd v. Huffaker*, 18 P. 508, 39 Kan. 525.

¹³ *Babb v. Aldrich*, 25 P. 558, 45 Kan. 218.

¹⁴ *Allen v. Gardner*, 27 P. 982, 47 Kan. 337.

If the plaintiff in a replevin action demands a certain sum as damages for the detention of the property claimed, and, without any amendment to the petition before or after the trial, a judgment is rendered for a greater sum than prayed for for the detention, the difference between the amount prayed for and the sum awarded is excessive, and the Supreme Court may order the district court to modify the same in accordance with the prayer of the petition.¹⁵

In replevin in justice court, where the bill of particulars and affidavit fix the value of the property at a certain sum it is error for the district court, on appeal, to render an alternative judgment for the property for a sum in excess of its value as so fixed.¹⁶

§ 1752. Costs

The failure of defendant, on a finding in his favor, to claim a return of the property, does not bar him of a right to a judgment for the costs.¹⁷

In an action for possession of property the defendant is entitled to costs where he was rightfully in possession, and there was no evidence of demand.¹⁸

When an action is brought by a judgment debtor, to recover specific personal property, against an officer in possession of the same by virtue of a levy of an execution, and such judgment debtor recovers possession of only a part of the property, and judgment is rendered in favor of the officer for the remainder, it is not error for the court to divide the costs.¹⁹

Where it is shown that the plaintiff is entitled to recover a portion of the property included in the writ, and the judgment contains no reference thereto, from which judgment the plaintiff appeals, the plaintiff is entitled to have judgment rendered for the property not awarded to defendant and to recover his costs.²⁰

¹⁵ *Frankhouser v. Cannon*, 32 P. 379, 50 Kan. 621.

¹⁶ *Church v. Welch* (Okl.) 170 P. 1168.

¹⁷ *Cowling v. Greenleaf*, 4 P. 855, 32 Kan. 392.

¹⁸ *Chipman v. McDonald*, 57 P. 252, 9 Kan. App. 882; *Citizens' State Bank of Lawton v. Chattanooga State Bank of Chattanooga*, 101 P. 1118, 23 Okl. 767.

¹⁹ *Friend v. Green*, 23 P. 98, 43 Kan. 167.

²⁰ *First Nat. Bank v. Farquharson*, 97 P. 559, 22 Okl. 27,

ARTICLE VII

LIABILITIES ON BONDS AND UNDERTAKINGS

Sections

- 1753. Replevin bonds.
- 1754. Redelivery bonds.
- 1755. Discharge of sureties.
- 1756. Extent of liability.

§ 1753. Replevin bonds

One who executes an ordinary bond in replevin is bound to cause the action in which it is given to be prosecuted to final judgment, and, to that end, must do all things necessary to maintain the standing of the plaintiffs in court, and to keep the case pending until the same is finally determined.²¹

If the action is dismissed for want of prosecution, the plaintiff is liable on his bond, though the defendant fails to claim judgment for a return of the property.²²

In an action on a replevin bond executed by the plaintiff in replevin, where it appears that such plaintiff failed to prosecute the action, but it does not appear that the right of possession was determined in favor of the defendant, nominal damages only can be recovered.²³

The defendant being adjudged the owner and entitled to possession of the property, in the absence of malice, want of probable

²¹ McCormick Harvesting Mach. Co. v. Fisher, 65 P. 223, 63 Kan. 199.

A condition in a replevin bond, that, if a return of the property therein delivered to plaintiff should be adjudged, it would redeliver it to defendant, does not warrant an action on the bond, where defendant procured a judgment for costs which was paid, but where there was no judgment for a redelivery of the property. Citizens' State Bank v. Morse, 57 P. 115, 60 Kan. 526.

Petition in an action on a replevin bond held not demurrable, where it recited the proceedings, the filing of the bond, the judgment for defendant, and plaintiff's failure to return the property. Green v. Rhebine, 44 Okl. 96, 144 P. 182.

²² Little v. Bliss, 89 P. 1025, 55 Kan. 94.

Where plaintiff in replevin, after obtaining possession of the property, voluntarily dismisses his suit, without prejudice, and retains the property secured under the order of delivery, defendant may sue on the replevin bond, if the title to the property is in him, and recover damages for the value thereof. McKey v. Lauffin, 30 P. 16, 48 Kan. 581.

²³ Little v. Bliss, 89 P. 1025, 55 Kan. 94.

cause, or bad faith on the plaintiff's part, cannot recover on the plaintiff's bond for damages for loss of time, attorney's fees and expenses incurred in making his defense, the judgment extinguishing further liability.²⁴

Where judgment is rendered for the defendant for damages and a return of the property, but its value is not determined, the defendant may sue on the bond for the value of the property taken.²⁵

§ 1754. Redelivery bonds

The surety on a redelivery bond, as well as sureties on a supersedeas bond and bonds for stay of execution given on appeal, judgment having gone against the defendant, are all liable to the plaintiff in replevin,²⁶ and they are estopped to claim that the defendant did not have the property in his possession, and are bound by the judgment in the replevin action.²⁷

The sureties on a redelivery bond in a justice's court are not released by the defendant taking an appeal to the district court, and filing an appeal bond.²⁸

²⁴ *Lake v. Hargis*, 109 P. 670, 82 Kan. 711, 30 L. R. A. (N. S.) 366.

In an action on a replevin bond, where plaintiff dismissed his suit after return of the property, attorney's fees and expenses incurred in preparing the defense to the replevin suit cannot be recovered. *Edwards v. Bricker*, 71 P. 587, 66 Kan. 241.

²⁵ *Green v. Rehbine*, 44 Okl. 96, 144 P. 182.

²⁶ *Southwestern Surety Ins. Co. v. King* (Okl.) 172 P. 74, L. R. A. 1918D, 1188.

²⁷ *First State Bank v. Martin*, 106 P. 1056, 81 Kan. 794.

²⁸ *Swartz v. English*, 44 P. 1004, 4 Kan. App. 509.

In an action to recover from the sureties on a redelivery bond given in an action of replevin before a justice of the peace, and taken on an appeal to the district court, the plaintiff must prove a judgment of the district court, and a breach of the conditions of the redelivery bond, before he can recover upon said bond. *Swartz v. English*, 44 P. 1004, 4 Kan. App. 509.

Plaintiff in replevin excepted to the sureties on a redelivery bond, which the sheriff had accepted and approved. The sureties justified and the bond was approved. Afterwards defendant notified the sheriff that he did not desire to retake the property, and demanded that the bond be withdrawn. Judgment was rendered for plaintiff in replevin. Held, that the liability of the sureties was fixed when the bond was approved by the sheriff, and the fact that plaintiff excepted to the surety, and that defendant demanded that the bond be withdrawn, did not relieve them from liability. *First State Bank v. Martin*, 106 P. 1056, 81 Kan. 794.

§ 1755. Discharge of sureties

An action against sureties on a redelivery bond may be maintained without an execution on the judgment or a demand for the return of the property.²⁹

In an action on an undertaking in replevin given to a sheriff in his individual name, but put in suit by the real parties in interest, the sheriff has no authority by a stipulation with a surety, to dismiss, as to him, without the consent of the beneficiaries.³⁰

A redelivery bond in the ordinary form, by two defendants in replevin, with no other signer, binds each to perform any judgment against either or both of them.³¹

In an action to enforce a redelivery bond it is unnecessary that the petition contain an allegation that an affidavit was filed in the replevin action prior to the issuance of the order of delivery. It is sufficient that the rendition of the judgment be alleged.³²

Where a bank was party plaintiff in a replevin action, and no summons was issued until the day following that on which it obtained possession of the property under the writ, and it then dismissed the action without prejudice, it was estopped, in an action on the replevin bond, to assert that there was no action pending when the property was taken.³³

An offer to return all the property in question to the plaintiff is sufficient to constitute a legal tender, and is a defense to a suit on the bond.³⁴

²⁹ First State Bank v. Martin, 106 P. 1056, 81 Kan. 794.

³⁰ Norton v. Lawrence, 18 P. 526, 39 Kan. 458.

³¹ Kendall v. Black, 160 P. 1015, 99 Kan. 101.

³² O'Loughlin v. Carr, 60 P. 478, 9 Kan. App. 818.

³³ Central Nat. Bank v. Brechelsen, 70 P. 895, 65 Kan. 807.

³⁴ Kansas Nat. Drill & Mfg. Co. v. Redd, 154 P. 250, 97 Kan. 1. Evidence held to sustain a finding that the sheriff, holding property under a redelivery bond, had made a sufficient tender of a return of the property. *Id.* In an action in which a redelivery bond was given for unwieldy well-drilling property seized under attachment, evidence held to show a sufficient tender of return of the property, where the sheriff's representative said to plaintiff's agent, "If they are your machines, take them." *Id.* That the representative of the sheriff and the attaching creditor, in making a tender to the mortgagor of the property seized by the sheriff under attachment and held under a redelivery bond given in replevin brought by the mortgagor, stated that he would pay such damages as the judge and jury might determine did not make the tender insufficient. *Id.*

§ 1756. **Extent of liability**

Where the plaintiff within a reasonable time makes a good faith tender of a substantial part of the property taken in replevin, it is the duty of the defendant to accept the same and recoup on plaintiff's bond for any damages.²⁵

²⁵ *Leeper, Graves & Co. v. First Nat. Bank*, 110 P. 655, 26 Okl. 707, 29 L. R. A. (N. S.) 747, Ann. Cas. 1912B, 302.

Where defendant was surety on a redelivery bond in replevin, which recited that the obligors bound themselves that the defendant should deliver to the plaintiff the property delivered to him if such delivery be adjudged when the property, or any part of it, was returned, the obligation of the sureties should be reduced to the extent of the property returned at the value designated in the bond. *Larabee v. Cook*, 61 P. 815, 8 Kan. App. 776.

In an action by a plaintiff in replevin on a redelivery bond given by defendant and sureties, it appeared that while the action of replevin was pending the defendant therein had delivered the property in controversy to a receiver appointed by the court on application by a creditor of the owner, and that the property was sold by the receiver, and after the trial of the replevin action the owner applied to the court for the proceeds of such sale and received a portion thereof; the remainder being retained to abide the result of the action in which the receiver was appointed. Held that such facts constitute a defense to the action of the redelivery bond for the amount for which the property was sold at the receiver's sale. *Boyd v. Huffaker*, 18 P. 508, 39 Kan. 525.

(1644)

CHAPTER XXIV

EJECTMENT

Sections

- 1757-1759. Article I.—Nature and right of action.
1760-1766. Article II.—Trial, recovery, and defenses.
1767-1769. Article III.—Damages.

ARTICLE I

NATURE AND RIGHT OF ACTION

Sections

1757. Possessory right.
1758. Form of action.
1759. Plaintiff must have right at commencement of action.

§ 1757. Possessory right

It is the right of possession that is tried in ejectment, and this right is the title to be adjudged.¹

As between two parties, neither of whom has a right to possession of real estate of which one is in possession, the other cannot oust him therefrom.²

§ 1758. Form of action

An action to recover the possession of a tract of land, the real gravamen of which is to set aside a recorded deed which purports to have been executed by the plaintiff for the reason that such deed was fraudulently obtained by the grantee, is in form an action in ejectment, but, in substance, is an action for relief on the ground of fraud.³

§ 1759. Plaintiff must have right at commencement of action

Plaintiff must have a right to the possession of the land at the time of the commencement of the action.⁴

¹ McElroy v. Moose, 51 Okl. 173, 151 P. 857.

² Robertson v. Howard, 112 P. 162, 83 Kan. 453.

³ New v. Smith, 119 P. 380, 86 Kan. 1.

⁴ Hurst v. Sawyer, 37 P. 817, 2 Okl. 470.

Where defendant denies plaintiff's right of possession, the latter to recover must prove such right at the commencement of the action and that defendant unlawfully keeps him out of possession.⁵

ARTICLE II

TRIAL, RECOVERY, AND DEFENSES

Sections

- 1760. Title to sustain action.
- 1760a. Petition—Form.
- 1761. Right to recover.
- 1762. Oil leases.
- 1763. Recovery where right ceases during action.
- 1764. Defenses.
- 1765. Evidence and instructions.
- 1766. New trial.

§ 1760. Title to sustain action

Plaintiff must recover on the strength of his own title, and not upon the weakness of that of his adversary.⁶

Ejectment is not maintainable by one who has conveyed his title.⁷

A person holding the duplicate final receipt of the receiver of the United States land office for land taken under the homestead laws of the United States can maintain ejectment for the possession of the land therein described.⁸

The action of ejectment lies to recover lands under lease.⁹

⁵ *McElroy v. Moose*, 51 Okl. 173, 151 P. 857.

⁶ *Lynch v. Calkins*, 75 Okl. 137, 182 P. 225; *Haseltine v. Nuss*, 155 P. 55, 97 Kan. 228; *Linam v. Beck*, 51 Okl. 727, 152 P. 344; *Aldridge v. Whitten*, 56 Okl. 694, 156 P. 667; *Reirdon v. Smith*, 62 Okl. 48, 161 P. 798; *Starr v. Thompson*, 80 Okl. 223, 195 P. 758; *Mullen v. Glass*, 143 P. 679, 43 Okl. 549; *Mitchell v. Humphrey*, 129 P. 744, 36 Okl. 711; *Shaffer v. Turner*, 144 P. 366, 43 Okl. 744.

⁷ *Starr v. Thompson*, 80 Okl. 223, 195 P. 758.

⁸ *McClung v. Penny*, 70 P. 404, 12 Okl. 303.

Code Civ. Proc. § 411, which provides that "the usual duplicate receipt of the receiver of any land office * * * is proof of the title equivalent to a patent against all but the holder of an actual patent," does not authorize a recovery in ejectment on such duplicate receipt. *Adams v. Couch*, 26 P. 1009, 1 Okl. 17.

⁹ *Hurst v. Sawyer*, 37 P. 817, 2 Okl. 470; *Long v. Bagwell*, 38 Okl. 312, 133 P. 50.

An occupant of a town lot, before the legal title has passed from the gov-
(1646)

One who is in possession of land with no right or title thereto except mere possession cannot question the right of one who has a chain of title thereto which is apparently perfect, except that one of the grantors in the line of conveyances was a minor when he executed a deed to said premises.¹⁰

An equitable title will support ejectment.¹¹ Plaintiff must have some title, either legal or equitable, and a contract in form a lease, but in fact an option contract, will not warrant recovery against one claiming title.¹² However, one holding a valid contract for a deed, and having fully complied with its conditions, has such an interest as will enable her to maintain ejectment against one in possession claiming the land under the same contract for a deed.¹³

In an action to recover the possession of land, where defendant shows no title except such as his possession may give him, and

ernment, can maintain ejectment against one who is in possession thereof as his tenant. *Shy v. Brockhause*, 54 P. 306, 7 Okl. 35.

Under Code 1890, c. 70, art. 32, ejectment will lie by a landlord to obtain possession of property for the nonpayment of rent. *Pappe v. Trout*, 41 P. 397, 3 Okl. 260.

Under article 32, c. 70, Laws 1890, a landlord may maintain an action for the possession of property held by his tenant. *Hamill v. Jalonick*, 41 P. 139, 3 Okl. 223.

¹⁰ *Rickershauser v. McMahan*, 18 P. 217, 39 Kan. 288.

¹¹ *Mitchell v. Humphrey*, 129 P. 744, 36 Okl. 711.

An equitable title, if the paramount one to the land, is sufficient to maintain ejectment against the holder of the legal title. *Pope v. Nichols*, 59 P. 257, 61 Kan. 230.

An equitable title to a tract of land is sufficient to authorize the maintaining of an action in the nature of ejectment by the holder thereof for the possession of said tract, under section 614 of the Code of Civil Procedure. *Laughlin v. Fariss*, 50 P. 254, 7 Okl. 1.

¹² *McElroy v. Moose*, 51 Okl. 173, 151 P. 857.

¹³ *Landrum v. Landrum*, 50 Okl. 746, 151 P. 479.

A man who had settled on government land, and entered it under the homestead laws, left the west half of it by will to his wife, and the east half to his daughter. The wife orally gave the east half to the daughter, promised her a deed, and then took out the government patent to herself. The daughter occupied for two years and made valuable improvements on the faith of the promise, and then went away for 10 years, the mother in the meantime occupying, but recognizing her daughter's right. Then the daughter returned, occupied, and improved further. The mother could not maintain ejectment against the daughter. *Newkirk v. Marshall*, 10 P. 571, 35 Kan. 77.

plaintiff shows prior possession under an invalid tax deed, and the payment of taxes, a judgment for plaintiff is proper.¹⁴

Where one in peaceable possession of land is ousted by a bare trespasser, who enters without claim of title, he may recover in ejectment on proof of prior possession, though such possession was not held for the time and in the manner required for a prescriptive title.¹⁵

Where the secretary and general manager of a corporation, engaged in selling town lots, verbally agree to sell a lot to defendant, who paid for said lot by labor, entered thereon, and made valuable improvements, he acquires an equitable title.¹⁶

§ 1760a. Petition—Form

(Caption.)

Now comes the plaintiff, herein complaining, and says:

1. That the defendant is a municipal corporation of Oklahoma, being a city of the first class, and located in ——— county, aforesaid.

2. That the plaintiff is the legal and equitable owner of the real estate herein described, and fully entitled to the possession thereof, and of which the defendant unlawfully keeps him out of the possession, being the following described property, to wit: (Describing same.)

3. That prior to the filing hereof, being far more than four weeks thereto, plaintiff presented his claim to defendant for uses, rents and profits thereon, as well as a demand for possession of said real estate, described as aforesaid, but that the defendant refused to pay said claim, and still retains possession of said real estate, to the damage of plaintiff in the sum of ——— dollars per year, since the ——— day of ———, 19—.

4. Said real estate is further described on the ——— plat, being the original plat of said city, as lots Nos. ——— of block No. ——— of said plat, as filed in the office of the county clerk of said county.

Wherefore plaintiff prays judgment herein against defendant:

¹⁴ Christy v. Richolson, 29 P. 398, 48 Kan. 177.

¹⁵ Redden v. Tefft, 29 P. 157, 48 Kan. 302.

A person who held possession of real estate under a claim of ownership is entitled to recover the same as against one who has no right or title to the same. Judgment, Manspeaker v. Pipher, 48 P. 868, 5 Kan. App. 879, affirmed. Hentig v. Pipher, 51 P. 229, 58 Kan. 788.

¹⁶ Southside Town Min. & Mfg. Co. v. Rhodes, 6 P. 278, 33 Kan. 229.

First. For the recovery of said real estate, and damages for withholding the possession thereof.

Second. For other and further relief.

X. Y., Attorney for Plaintiff.

NOTE.—From petition in *Oklahoma City v. McMaster*, 12 Okl. 570, 73 P. 1012.

§ 1761. Right to recover

Under the statute, a judgment for plaintiff in ejectment can be had only upon proof of allegations of his petition, irrespective of defendant's default, appearance, demurrer, or other action.¹⁷

Plaintiff must show that the defendant unlawfully and without right keeps the plaintiff out of possession before he can recover in the action.¹⁸

An action by one who has never voluntarily parted with title to realty to recover it, with allegation that the proceedings under which defendant claimed title by adverse possession are void on the face of the mandatory record, is in equity questioning the validity of such prior proceeding.¹⁹

Where one without claim of title occupies land theretofore vacant as the property of a holder of a tax title with the consent of such holder and in subordination to his title, and the tax title has been of record for more than five years, the holder of the title is in actual possession and may maintain ejectment against a party wrongfully dispossessing him.²⁰

One claiming possession under a lease executed by one purporting to be the owner's guardian must show the alleged guardian's authority to make the lease.²¹

Plaintiff need only show color of title, as against defendant in possession without color or claim of title, other than by possession.²²

¹⁷ *Buell v. U-Par-Har-Ha*, 60 Okl. 79, 159 P. 507.

¹⁸ *Hurst v. Sawyer*, 37 P. 817, 2 Okl. 470.

¹⁹ *Richardson v. Carr* (Okl.) 171 P. 476.

²⁰ *Buehler v. Teetor*, 114 P. 387, 84 Kan. 281.

²¹ *Bilby v. Brockman*, 55 Okl. 714, 155 P. 257.

²² *Douglass v. Ruffin*, 16 P. 783, 38 Kan. 530.

As between E., in possession under a void tax deed, and B. and D., asserting title under a quitclaim from one having no interest, E. has the paramount right to possession. *Sarver v. Beal*, 13 P. 743, 36 Kan. 555.

Plaintiff need not have the legal title or a title paramount to that of all others, but need only have some estate, legal or equitable, paramount to that of defendant;²³ that is, plaintiff may recover without having all the title, either legal or equitable, or without having a title paramount to all others, if he has some estate paramount to any right thereto in defendant, although the legal title may be outstanding in third person.²⁴

A deed intended merely as security leaves the grantor the real owner, with rights sufficient to entitle him to maintain ejectment against a stranger to the deed in possession under a redeemable tax lien.²⁵

Where a husband and his son conspired to defraud the wife of her interest in the real estate of her husband, and the husband executed a note, without consideration, to a fictitious person, under

²³ *Wilson v. Bombeck* (Okl.) 127 P. 440.

In an action of ejectment, or in an action for the recovery of real property, the party holding the paramount title is entitled to recover, whether such title be legal or equitable. *Atchison, T. & S. F. Ry. Co. v. Pracht*, 1 P. 319, 30 Kan. 66.

In ejectment plaintiff claimed title under a certificate issued by a town-site company, duly assigned, showing the holder to be entitled to a good and sufficient warranty deed as soon as such company should receive the title to the town site and such town-site company obtained the title through the probate judge, but never made a deed to the assignee of such certificate, because its corporate existence had expired by limitation. Defendant claimed under tax deeds which were void, and the fact that he had been in possession of the premises and made lasting and valuable improvements thereon more than one year before suit was brought. Held, that plaintiff's title was paramount to that of defendant, and that he was entitled to recover as the equitable owner of the land. *Riggs v. Anderson*, 27 P. 112, 47 Kan. 66.

Plaintiff can recover only by showing either a legal or equitable title in himself and the right of possession. *Jennings v. Brown*, 94 P. 557, 20 Okl. 294.

L. died, leaving land to his heirs, subject to a lease to R., who, after remaining in possession for over 11 years, abandoned it to the heirs. Afterwards R. executed a warranty deed to P., who recorded the deed, and remained in possession for over a year, when she abandoned the premises, and the heirs took peaceable possession. P. could not recover possession of the land from the heirs and their tenant. *Pankau v. Larzelere* (Kan. App.) 52 P. 906.

²⁴ *Blanchard v. Reed* (Okl.) 168 P. 664, 418.

²⁵ *Hulsman v. Deal*, 136 P. 220, 90 Kan. 716.

Where a purchaser moves upon the land purchased, places a dwelling house thereon, makes other permanent improvements, and continues to live thereon, one who furnished the purchase money and holds a deed absolute in form given to secure the same cannot maintain ejectment against the purchaser. *Abrams v. Abrams*, 88 P. 70, 74 Kan. 888.

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which they caused a judgment to be rendered and the land sold and the title thereto passed to the son, the wife may maintain ejectment to recover her interest against the son at any time within the period of limitations after the death of her husband.²⁶

Ejectment will not lie by a vendor against the purchaser in possession under an executory contract and not in default;²⁷ but a vendor may maintain ejectment against a vendee in possession under an executory contract of purchase, when the vendee is in default.²⁸

Where the vendor of real estate seeks to recover the possession of premises against a purchaser to whom he has made a contract for the sale of the land, and whom he has put in possession thereof, and who has made default in the payment of the purchase price, the remedy is by an action in the district court to rescind the contract, or to foreclose the equitable interest of the purchaser.²⁹

§ 1762. — Oil leases

Though the statute authorizes a recovery of land held for a term of years in ejectment, it does not authorize the maintenance of such action to recover land covered by an oil and gas lease as against the lessor or his grantee when the lessee has never had possession under the lease.³⁰

§ 1763. Recovery where right ceases during action

"In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact, and the plaintiff may recover for withholding the property."³¹

²⁶ McKelvey v. McKelvey, 89 P. 663, 75 Kan. 325, 121 Am. St. Rep. 435.

Where plaintiff seeks to recover real estate on the strength of a paramount equitable title against a defendant holding legal title, the action is in the nature of a suit in equity, and the rights of the parties must be governed by the rules pertaining to suits in equity. *Wilson v. Bombeck* (Okla.) 127 P. 440.

²⁷ *Talley v. Kingfisher Improvement Co.*, 103 P. 591, 24 Okla. 472, 20 Ann. Cas. 352; *Kingfisher Improvement Co. v. Talley*, 51 Okla. 226, 151 P. 873.

²⁸ *Lonsdale v. Reinhard* (Okla.) 176 P. 924.

²⁹ *Smith v. Kirchner*, 54 P. 439, 7 Okla. 166.

³⁰ *Kolachny v. Galbreath*, 110 P. 902, 26 Okla. 772, 38 L. R. A. (N. S.) 451.

³¹ Rev. Laws 1910, § 4931.

§ 1764. Defenses

Where both parties claim title from a common source, the first conveyance, though only a lease if unexpired, will entitle defendant to a judgment against plaintiff claiming under a deed.³²

A forged deed confers no title or equities whatever on the alleged grantee which he can set up in defense to an action in the nature of ejectment.³³

Certain equitable defenses are available in ejectment.³⁴

A recorded plat of lands within a city, showing lots, blocks, streets, and alleys, when filed by the owner of land embraced in the

³² *Young v. Chapman*, 130 P. 289, 37 Okl. 19.

As between N., a successful plaintiff in a former action of ejectment, which was begun in June, 1872, and in which judgment was rendered in 1875, and H., a mortgagee of defendant in that action, who took the mortgage in November, 1872, foreclosed it in 1874, and got her deed in 1876, the title of N. is paramount in ejectment by his grantees against those of H., who bought the land in at the foreclosure, the first ejectment suit having given H. notice of N.'s claim to the land, and N.'s title taking date, by relation, as of the commencement of that action. *Sarver v. Beal*, 13 P. 743, 36 Kan. 555.

Grantors in deed reserving life estate held entitled to recover possession of the property and the value of its use, subject to deduction for taxes and interest paid, and any other equitable counterclaims, though they had made no formal demand. *Scott v. Scott*, 137 P. 971, 91 Kan. 372, rehearing denied 139 P. 488, 91 Kan. 922.

³³ *Redden v. Tefft*, 29 P. 157, 48 Kan. 302. Where defendant claims title on account of the prior possession of his grantor, and such prior possession is founded on a forged deed, such possession will not avail against plaintiff, who took actual possession of the land at about the same time under an invalid tax deed, made lasting and valuable improvements thereon, and paid taxes for many years. *Id.*

³⁴ Plaintiff deeded all his interest in certain realty to defendant's grantor, representing it to be an undivided half interest. After his wife's death their children, as her heirs, conveyed their various interests to defendant. After 11 years, plaintiff instituted ejectment to recover the interest of a child which had died before its mother, and whose interest in the mother's estate plaintiff inherited. Defendant pleaded plaintiff's laches, and also estoppel of record, based on the conveyance of "all his interest" in the property. Held, that these defenses, though one was of an equitable character and the other might necessitate equitable interference to reform the deed, were available in ejectment. *Frazier v. Jeakins*, 62 P. 354, 9 Kan. App. 850, judgment reversed *Jeakins v. Frazier*, 67 P. 854, 64 Kan. 267.

Plaintiff claimed under one M., and defendant alleged a prior purchase from M. by a verbal contract under which defendant took possession, and made lasting and valuable improvements, and that within the time fixed by the contract he tendered the purchase money. Held, that a good defense was stated. *Chandler v. Neil*, 26 P. 470, 46 Kan. 67.

plat, constitutes such dedication to public uses of the streets shown as will prevent the owner of the fee from maintaining an action for possession against an adverse claimant of a portion of the street.³⁵

Where plaintiff has shown that he fenced the land, and defendant, claiming by possession merely, fails to show that he found it abandoned, the improvement will be presumed to have continued, and defendant has no right nor interest in the land.³⁶

Where defendant has paid off mortgages placed on the property by plaintiff, plaintiff cannot oust him from possession until he has accounted to him for the amount thus paid.³⁷

A defendant cannot plead an outstanding superior title in a third person, to defeat recovery by the plaintiff.³⁸

Where defendant had made a conveyance before the action, but it was withheld from record, and plaintiff had no notice of it or any interest of any person except defendant, and judgment was rendered for plaintiff, a writ of possession should issue, under which defendant and such grantee should be dispossessed.³⁹

Recovery by plaintiff may be defeated by defendant showing title in himself; and title in defendant may be shown, though it be acquired subsequent to commencement of action.⁴⁰

The pendency in a federal court of a suit to cancel a deed does not preclude a subsequent action of ejectment in a state court to recover possession.⁴¹

§ 1765. Evidence and instructions

Plaintiff need not state, on offering in evidence the record of the patent to the land in controversy, that he intends to follow up the conveyance of title from the patentee down to himself, as,

³⁵ *Edwards v. Brusha*, 90 P. 727, 18 Okl. 234.

³⁶ *Douglass v. Ruffin*, 16 P. 783, 38 Kan. 530.

³⁷ *New v. Smith*, 145 P. 880, 94 Kan. 6, L. R. A. 1915F, 771, Ann. Cas. 1917B, 362.

³⁸ *Thomas v. Bauer*, 64 P. 80, 62 Kan. 568.

Where plaintiff in ejectment establishes an interest in land paramount to that of defendant, the latter cannot avail himself of an outstanding title in a stranger, though superior to that of plaintiff. *McBride v. Steinweden*, 83 P. 822, 72 Kan. 508.

³⁹ *Hillyard v. Flick*, 130 P. 675, 89 Kan. 108.

⁴⁰ *Eller v. Noah* (Okl.) 168 P. 819.

⁴¹ *Davis v. Mimey*, 60 Okl. 244, 159 P. 1112.

without proof of this original conveyance of title, proof of other conveyances would be futile.⁴³

Where heirs, subsequent to an administrator's action in ejectment, conveyed all their interest to defendant, it was error to instruct a verdict for plaintiff merely on his proof of title in deceased before commencement of the action.⁴⁴

In ejectment by a vendor against a vendee in possession under an executory contract, the burden was on the vendor to prove the default relied on.⁴⁵

§ 1766. New trial

"In all actions for the recovery of real property one trial only shall be granted as a matter of right, but the party against whom the judgment is rendered may secure a new trial in the same manner and for the same reasons as new trials are awarded in other civil cases."⁴⁶

ARTICLE III

DAMAGES

Sections

1767. Questions to be determined.

1768. Improvements and taxes.

1769. Recovery of rent.

§ 1767. Questions to be determined

The only questions to be determined in an action for damages for wrongfully withholding real property are whether plaintiff is entitled to the actual possession of the property, whether defendant wrongfully withholds the property from him, and whether defendant's wrongful possession has resulted in damages to plaintiff.⁴⁶

§ 1768. Improvements and taxes

Recovery of the value of improvements is statutory.⁴⁷

A defendant who based his claim on a tax deed which was ad-

⁴² Green v. Holmes, 58 P. 128, 9 Kan. App. 886.

⁴³ Eller v. Noah (Okl.) 168 P. 819.

⁴⁴ Kingfisher Improvement Co. v. Talley, 51 Okl. 226, 151 P. 873; Talley v. Kingfisher Improvement Co., 103 P. 591, 24 Okl. 472, 20 Ann. Cas. 352.

⁴⁵ Rev. Laws 1910, § 4932.

⁴⁶ Meriwether v. Howe, 82 P. 723, 72 Kan. 645.

⁴⁷ A judgment for improvements by an unsuccessful defendant in ejectment cannot be allowed in that action; but recovery must be had under

judged invalid was entitled to be repaid such of the taxes paid by him as were levied on the valuation of the land exclusive of improvements.⁴⁸

§ 1769. Recovery of rent

Where defendants surrender possession of the premises to their landlord, and file a supplemental answer disclaiming any interest in the land, they should not be adjudged liable for the rental value of the land after their surrender and disclaimer, although they are properly retained as parties for the purpose of determining their liability for rent while in possession under their lease.⁴⁹

Where defendant took possession under a void tax deed, and erected a house, and the lot, without improvements, had but a trifling value, plaintiff has no right to rent for the improvements erected prior to the service of summons.⁵⁰

In an action to recover realty, in which plaintiff seeks judgment for rents for five years next preceding and including the year in which the action was commenced, the wrongful occupation of the premises having been determined, the period of limitation for the recovery of the usable value is not exceeding six years next preceding the commencement of the action.⁵¹

Where plaintiff sought to recover rent under an agreed statement reciting that defendant occupied the premises up to a certain date, when he moved out retaining the keys, and thereafter other persons with his consent occupied the premises and without paying rent to him, he could not recover rent beyond the time when defendant moved out.⁵²

An action for damages for wrongfully withholding real property may be maintained against any person so wrongfully withholding

Comp. Laws 1909, §§ 6128-6134. *Wolcott v. Smith*, 124 P. 970, 33 Okl. 249. Judgment for value of improvements, under Comp. Laws 1909, §§ 6128-6134, made by unsuccessful defendant in ejectment, may be recovered on return of the mandate of the Supreme Court. *Id.*

⁴⁸ *Hentig v. Redden*, 41 P. 1054, 1 Kan. App. 163.

⁴⁹ *Crane v. Cameron*, 81 P. 480, 71 Kan. 880; *Same v. Peninger*, *Id.*; *Cameron v. Crane*, *Id.*; *Peninger v. Same*, *Id.* Motion to retax costs granted 87 P. 466.

⁵⁰ *Deitzler v. Willhite*, 40 P. 272, 55 Kan. 200.

⁵¹ *Campbell v. Dick* (Okl.) 176 P. 520.

⁵² *Haish v. Pollock*, 101 P. 8, 79 Kan. 624.

the same, however he may have come into possession, and regardless of whether or not plaintiff ever had actual possession, or had been in possession and was wrongfully removed by the wrongful possessor's grantor.⁵³

Grantors in a deed reserving a life estate are not limited to an action for damages.⁵⁴

⁵³ Meriwether v. Howe, 82 P. 723, 72 Kan. 645.

⁵⁴ Scott v. Scott, 187 P. 971, 91 Kan. 372, rehearing denied 139 P. 488, 91 Kan. 922.

CHAPTER XXV

AUXILIARY PROCEEDINGS

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- 1770-1848. Article I.—Attachment.
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ARTICLE I

ATTACHMENT

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DIVISION I.—NATURE AND GROUNDS

§ 1770. Purpose and nature

The purpose of an attachment is to seize and hold property of a debtor, and to appropriate it to the satisfaction of the creditor's claim, when established.¹

The writs of attachment and execution are essentially different; the former is issued for the purpose of seizing property and holding the same in order that, if a judgment should be obtained, the property thus seized will be forthcoming to satisfy said judgment, while the latter is a writ issued for the purpose of enforcing a judgment that has been obtained.²

¹ Farmers' & Merchants' Nat. Bank v. Sprout, 104 Kan. 348, 179 P. 301.

² Mount v. Trammel (Okla.) 175 P. 232.

§ 1771. **Grounds**

"The plaintiff in a civil action for the recovery of money may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon the grounds herein stated:

"First. When the defendant, or one of several defendants, is a foreign corporation, or a nonresident of this state, (but no order of attachment shall be issued on the ground or grounds in this clause stated for any claim other than a debt or demand arising upon contract, judgment or decree, unless the cause of action arose wholly within the limits of this state, which fact must be established on the trial."

"Second. When the defendant, or one of several defendants, has absconded with intention to defraud his creditors; or,

"Third. Has left the county of his residence to avoid the service of summons; or,

"Fourth. So conceals himself that a summons cannot be served upon him; or,

"Fifth. Is about to remove his property, or a part thereof, out

** Money judgment.*—The plaintiff in a civil action for the recovery of money may have an attachment on the grounds set forth in the statute, and the fact that some specific relief is necessary, or that the action is one that formerly would have been a suit in equity, will not defeat the right to an attachment, if the action is one in which, in addition to such specific relief, a money judgment may also be rendered. *Hendrickson v. Brown*, 65 P. 935, 11 Okl. 41.

Nonresidents.—The plaintiff in a civil action for damages arising from tort, where the cause of action arose wholly within the limits of this territory, is entitled to an attachment when the defendant is a nonresident of the territory. *Kidd v. Seifert*, 65 P. 931, 11 Okl. 32.

Defendant sold nearly all his personalty, placed his farm in the hands of an agent for sale, and left the state, and did not return till after attachment had been levied on his farm, when he admitted that when he left he did not expect to make Kansas his home again. Held, that there was sufficient evidence that he was a nonresident at the time of the attachment. *Ritter v. Phoenix Mut. Life Ins. Co.*, 4 P. 1032, 32 Kan. 504.

Defendant, after 12 years' residence in the state, took his wife to Texas for her health, leaving their house and household goods in charge of the rest of the family. Defendant's intention always was to return as soon as his wife's health would permit. Held, that he was not liable to attachment as a nonresident. *Garlinghouse v. Mulvane*, 19 P. 798, 40 Kan. 428.

—*Contract liability.*—Where a bank clerk appropriates the money of the bank, it may sue on an implied contract that the clerk would be honest and faithful, and may attach his property, where he is a nonresident. *Lipscomb v. Citizens' Bank of Galena*, 71 P. 583, 66 Kan. 243.

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of the jurisdiction of the court, with the intent to defraud his creditors; or,⁴

"Sixth. Is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or,

"Seventh. Has property or rights in action, which he conceals; or,

"Eighth. Has assigned, removed or disposed of, or is about to dispose of, his property, or a part thereof, with the intent to defraud, hinder or delay his creditors; or,⁵

⁴ A citizen of the territory has a right in good faith to remove all of his property to another state, and such removal will not authorize the levy of an attachment; but it is only where such removal is with intent to defraud his creditors that an attachment will lie. *Dunn v. Claunch*, 76 P. 143, 13 Okl. 577.

⁵ *Existence of fraud*.—Where an insolvent sells his stock of goods, the purchaser agreeing to pay a note of the insolvent, and delivering to him a team of mules, and giving him credit payable in goods from the stock for the balance, and the insolvent takes the mules on a farm, and claims them as exempt, there is no such fraud as warrants an attachment. *Long v. Hopper*, 38 P. 809, 54 Kan. 572.

The facts that a debtor had failed before, and cheated his creditors, was guilty of violating the criminal laws of the state, and had mortgaged his real estate for its full value before the execution of a note which plaintiffs were induced to sign as sureties by false promises, do not establish that he had disposed of his property with intent to defraud his creditors or delay them in the collection of their debts. *Hegwer v. Kiff & Co.*, 2 P. 553, 31 Kan. 440.

A conveyance of land by an insolvent debtor to his attorney to pay for services to be rendered for him and for other persons with whom he has business relations for two years in the future, and with the provision that any fees allowed to the attorney by the courts in such further litigation should be returned to the debtor, constitutes a fraud against existing creditors, and furnishes the ground for the issuance of an attachment. *Winfield Nat. Bank v. Croco*, 26 P. 942, 46 Kan. 629.

In an action on a promissory note, the filing of an answer by defendant, falsely alleging that the note has been paid, is not sufficient of itself to authorize plaintiff to procure an order of attachment. *Hosea v. McClure*, 22 P. 317, 42 Kan. 403; *Id.*, 22 P. 319, 42 Kan. 408; *Henry v. Same*, *Id.*

Intent.—When an insolvent debtor makes a disposition of his property which the law inhibits as against creditors, and which naturally tends to defraud creditors, it is conclusively presumed that he intended his act should have that effect. *Cook v. Burnham*, 44 P. 447, 3 Kan. App. 27.

In attachment on the ground that defendants had disposed of their property with an intent to hinder and delay creditors, it is not necessary to establish a specific intent to defraud, hinder, or delay the plaintiff in the collection of his debt, but it is sufficient if such an intent exists as to any creditor. *Clayton v. Clark*, 92 P. 1117, 76 Kan. 832, 123 Am. St. Rep. 169.

The fact that an attaching creditor's claim was contracted by means of a

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"Ninth. Fraudulently contracted the debt, or fraudulently incurred the liability or obligations for which the suit is about to be or has been brought; or,⁶

false property statement did not show that a mortgage executed by the debtor of his stock four months afterwards, was made with intent to defraud creditors. *Swofford Bros. Dry-Goods Co. v. Zeigler*, 42 P. 592, 2 Kan. App. 296.

Evidence of false statements by the debtor in reference to his financial condition at the date of maturity of his debts, in order to secure an extension of time to enable him to raise the money to pay his debts, will not sustain an attachment upon the ground that the debtor is about to assign or dispose of his property with intent to hinder and delay creditors. *Kemper, Hundley & McDonald Dry-Goods Co. v. Fischel*, 44 P. 205, 4 Okl. 250. An offer by the debtor to make a voluntary assignment for the benefit of all his creditors is no evidence of fraud, and is no ground for attachment. *Id.*

Evidence held to sustain finding that the grounds stated in affidavit for attachment that defendants had assigned and removed property, and were about to transfer it in fraud of creditors, were not true. *Farmers' State Bank v. Schuette*, 163 P. 1073, 100 Kan. 45.

Where a debtor is owing the sum of \$150 or \$160, and such debtor has at the time over \$1,600 in cash, which he could use for the purpose of paying such debt, if he chose, and the creditor demands the payment of the debt, and the debtor refuses to pay the same, held, that this does not alone or with the other circumstances of the case prove that the debtor has disposed of, or is about to dispose of, his property, or a portion thereof, for the purpose of hindering, delaying or defrauding his creditors. *Tootlie, Hosea & Co. v. Coldwell*, 1 P. 329, 30 Kan. 125.

Preference.—A preference to one bona fide creditor over others is not a ground for attachment. *Swofford Bros. Dry-Goods Co. v. Zeigler*, 42 P. 592, 2 Kan. App. 296.

The fact that a debtor has sold, transferred and mortgaged all his prop-

⁶ The right of an assignee of a debt to procure a writ of attachment exists only against his immediate assignor, on the ground that the debt was fraudulently contracted. *Thwing v. Winkler*, 75 P. 1126, 13 Okl. 643; *Same v. Humphrey*, 75 P. 1127, 13 Okl. 646.

Where a debtor obtained credit by financial statements to the creditor, omitting an indebtedness to his wife substantially equal to his original investment in the business, which were relied upon, the debt sued upon was fraudulently contracted within the attachment statute authorizing the attachment of the debtor's land at the creditor's suit. *Western Grocer Co. v. Alleman*, 106 P. 460, 81 Kan. 543, 27 L. R. A. (N. S.) 620, 135 Am. St. Rep. 398, rehearing denied 106 P. 997, 81 Kan. 900, 27 L. R. A. (N. S.) 620, 135 Am. St. Rep. 398.

Where one in failing circumstances makes various statements to different persons as to his financial ability, representing it as being better than it is in fact, but does not make such statements to B., or for the purpose of defrauding B., and at no time has any intention to defraud B., but afterwards B. gives a credit to A., evidence of such statements does not necessarily prove that A. fraudulently contracted the debt to B. *Long Bros. v. West & Co.*, 31 Kan. 298, 1 P. 545.

"Tenth. Where the damages for which the action is brought are for injuries arising from the commission of some felony or misdemeanor, or the seduction of any female; or,

erty for the purpose of paying bona fide debts, thereby preferring some of his creditors to others, is not of itself ground for the issue of an attachment against him. *Abernathy Furniture Co. v. Armstrong*, 26 P. 693, 46 Kan. 270, following *Tootle, Hosea & Co. v. Coldwell*, 30 Kan. 125, 1 P. 329; *De Wolf v. Armstrong*, 26 P. 1038, 46 Kan. 523; *Cooper v. Clark*, 24 P. 422, 44 Kan. 358.

That a conveyance has been made with intent to defraud will not be inferred, as a basis of attachment, from the mere fact that the defendant has disposed of his property to prefer a creditor, and to delay collection of plaintiff's claim until such creditor has been paid. *First State Bank of Durant v. Smith*, 140 P. 150, 43 Okl. 320. That a debtor in failing circumstances prefers one creditor to the exclusion of others is not alone sufficient to sustain an attachment on the ground that he has disposed of his property with intent to defraud, hinder, or delay his creditors. *Id.* See *McPike v. Atwell*, 8 P. 118, 34 Kan. 142.

An attachment was issued on the ground that defendant had disposed of his property to defraud creditors. On a motion to dissolve it appeared that defendant had mortgaged his stock of goods to secure bona fide debts; that the goods were being sold for the benefit of the mortgagees; that defendant had offered plaintiff a mortgage on his store building, which was declined, and was subsequently mortgaged to another creditor. Held, that the writ was properly dissolved. *Gregory Grocer Co. v. Young*, 36 P. 713, 53 Kan. 339.

The fact that a debtor, just before he makes, in good faith, an assignment for the benefit of creditors, attempts to give preferences to certain creditors by mortgages, the mortgages being therefore void, and the property conveyed by them passing under the assignment does not warrant an attachment on the ground that he is disposing of his property to defraud creditors. *Watkins Nat. Bank v. Sands*, 28 P. 618, 47 Kan. 591; *Douglas County Nat. Bank v. Same*, 28 P. 620, 47 Kan. 596; *National Bank v. Same, Id.*; *Banks v. Same, Id.*

Mortgage.—A disposition of property with intent to defraud creditors may be effected by a mortgage thereon, so as to constitute a ground for attachment. *Millus v. Lowrey Bros.*, 63 Okl. 261, 164 P. 663, L. R. A. 1918B, 336.

The act of giving a mortgage to a creditor to secure his claim does not, of itself, constitute ground for a writ of attachment. *Hosea v. McClure*, 22 P. 317, 42 Kan. 408; *Id.*, 22 P. 319, 42 Kan. 408; *Henry v. Same, Id.*; *Miller v. Wichita Overall & Shirt Mfg. Co.*, 35 P. 799, 53 Kan. 75.

A chattel mortgage executed in good faith is always valid unless void for some technical reason, and whether void or valid it will probably never support an attachment; while, on the other hand, a mortgage executed in bad faith, or to hinder, delay, or defraud the mortgagor's creditors, is generally void, and will probably always sustain an attachment issued on the ground of such fraud. The fraud alone is sufficient to sustain the attachment, without reference to the validity or invalidity of the mortgage. *Leser v. Glaser*, 4 P. 1026, 32 Kan. 546.

Where a firm of druggists having a large quantity of intoxicating liquors executes to a creditor a chattel mortgage on their entire stock, including such liquors, and delivers the entire stock to the mortgagee, the mortgage being

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"Eleventh. When the debtor has failed to pay the price or value of any article or thing delivered, which by contract he was bound to pay upon delivery."⁷

The eleventh ground does not apply if the contract to pay upon

void, there is sufficient ground to sustain an attachment issued on an affidavit alleging that the defendants have disposed of their property with intent to hinder, delay, and defraud their creditors. *First Nat. Bank v. Gerson*, 32 P. 908, 50 Kan. 589; *Westheimer v. Same, Id.*; *McPike v. Same, Id.*; *Stickney v. Same, Id.*; *Rosenberg v. Same, Id.*; *Vannatta-Lynds Drug Co. v. Same*, 32 P. 908, 50 Kan. 591.

Where a debtor mortgages his personal property for the purpose of hindering and delaying his creditors, such act is sufficient to justify the issuance of an attachment against the debtor; and it is no defense for him to show that a short time before the attachment he caused such fraudulent mortgage to be released, where it is further shown that immediately upon such release, and upon suspicious circumstances, the mortgaged property was remortgaged to other parties. *Buford & George Implement Co. v. McWhorter*, 21 P. 86, 41 Kan. 262.

A chattel mortgage made by an insolvent debtor, when pressed by his creditors, to pay or secure for his attorney \$500, most of which is in consideration of future legal services, operates to delay and defraud his creditors in the collection of their debts, and furnishes sufficient ground for the issuance of an attachment against him. *Shellabarger v. Mottin*, 28 P. 199, 47 Kan. 451, 27 Am. St. Rep. 306.

To sustain an attachment on the ground that defendant had disposed of his property with intent to cheat and defraud his creditors, it was shown that the defendant was insolvent; that he had executed to another four promissory notes, and to secure the same had given to the payee thereof four chattel mortgages; and that he had included in the notes and chattel mortgages an amount of indebtedness in excess of the bona fide amount due to the payee of the notes, with the intent to transfer all of his nonexempt personal property to the mortgagee in satisfaction of an indebtedness very much less than the face of the notes, and for the purpose of defrauding his other creditors, and hindering them in the collection of their debts. Held, that the court properly overruled the motion to dissolve the attachment. *Marbourg v. Lewis Cook Mfg. Co.*, 5 P. 181, 32 Kan. 629.

A mortgage given on a stock of goods, which, by its terms, contains a provision that the mortgagor shall retain possession and control and have the ordinary use and benefit of the mortgaged property, and permits him to sell the same in the usual course of trade without restriction, and contains no requirement that the proceeds thereof shall be applied to the payment of the mortgaged debt, or that any accounting shall be made arising from the proceeds thereof, operates as a fraud upon the other creditors of the mortgagor,

⁷ Rev. Laws 1910, § 4812.

Where goods are sold on condition that the title shall not pass until the price is paid, the buyer has no attachable interest therein until payment of the price. *McIver v. Williamson-Halsell-Frazier Co.*, 92 P. 170, 19 Okl. 454, 13 L. R. A. (N. S.) 696.

delivery has been modified by the vendor, or if he has waived the right to demand payment upon delivery.⁸

It is not necessary in order that plaintiff may have an attachment that the damages should be capable of definite estimation.⁹

In an action for the recovery of money, an attachment will lie, if a money judgment may be entered in addition to the specific relief sought.¹⁰

and is a sufficient ground to sustain an attachment. *Ranney-Alton Mercantile Co. v. Watson*, 65 P. 98, 10 Okl. 675.

To permit a mortgagor to retain possession of the mortgaged property, and sell the same, in any other capacity than that of agent or trustee of the mortgagee, tends to show such bad faith and fraud as will sustain an attachment. *Leser v. Glaser*, 4 P. 1026, 32 Kan. 546.

Where a merchant in failing circumstances, caused by poor business management, gave a chattel mortgage to a creditor to whom he was heavily indebted, and turned over to him all his property not exempt from execution, and gave other mortgages thereon to other creditors, in the order they applied for them such acts do not establish a fraudulent disposition of his property warranting an attachment on that ground. *Burnham v. Patmor*, 45 P. 115, 3 Kan. App. 257.

Where an attachment is granted on the ground that defendant has disposed of part of his property with intent to hinder his creditors, and is based on the making of a chattel mortgage, on a motion to discharge the attachment, plaintiff can show that after the mortgage was made to defendant's brother it was assigned to defendant's wife, and that defendant continued to carry on the business and used the property as his own, except that he used her name in his business transactions. *Burnham v. Johnson*, 48 P. 460, 5 Kan. App. 321.

Time of act.—Where a note is accepted in the settlement of an open account, and is taken as absolute payment and extinguishment of the former debt, the fraudulent disposition of a part of his property by the debtor several months prior to the execution of the note, but during the existence of the open account, is not a ground for attachment in an action brought to recover upon the promissory note. *Hershfield v. Lowenthal*, 11 P. 173, 35 Kan. 407.

The dissolution of an attachment, obtained on the ground that defendant was disposing of his property with intent to defraud creditors, was sustained, where it appeared that although defendant had given a mortgage to a brother to secure a somewhat larger sum than the debt actually due him, the mortgage was put on record about a year before the debt to plaintiffs was contracted, that there was no concealment or misrepresentation of facts by defendant, and that, at about the time of the attachment, he was negotiating a loan on his home to pay his debts. *Allen v. Fuget*, 22 P. 725, 42 Kan. 672.

⁸ *Young & Co. v. Lynch*, 1 P. 503, 30 Kan. 205.

The attachment could not be sustained, where plaintiff had waived payment on delivery by subsequent dealings with defendant. *Young & Co. v. Lynch*, 1 P. 503, 30 Kan. 205.

⁹ *Cain v. Perfect*, 131 P. 573, 89 Kan. 361.

¹⁰ *Graham v. Schooler*, 80 Okl. 124, 194 P. 1080.

A failure of the purchaser of merchandise in bulk to comply with the law raises such a presumption of fraud as will justify the attachment of the stock in the hands of the transferee.¹¹ But where a transferor complies with the Bulk Sales Act, except that the notice is signed by him, and not the transferees, a resident creditor receiving such notice and assenting to the sale waives any right to attach the goods for failure to comply with the statute.¹²

The fact that the action is one that formerly would have been a suit in equity will not defeat the right to an attachment, if the action is one in which, in addition to such specific relief, a money judgment may also be rendered.¹³

Conveyance of property with intent to defraud may be treated as a nullity and the property attached as if no conveyance had been made.¹⁴

§ 1772. — Rent

A lien for rent may be enforced by attachment against crops.¹⁵

In attachment by a landlord to recover rent, the attachment must conform to the provisions of the act; and where the statute requires the defendant to state if there is due a certain sum for rent of farming lands, and the plaintiff claims a lien on the crop, an affidavit stating that the claim is just and the plaintiff ought to recover a sum named as rent is insufficient.¹⁶ An affidavit of attachment by a landlord for rent does not justify a levy on property other than crops growing or grown on the land.

The order of attachment authorized by statute is not limited to rents accruing on farm lands, but goes beyond the lien authorized and covers rent on a store building.¹⁷

¹¹ Galbraith v. Oklahoma State Bank, 130 P. 541, 36 Okl. 807.

¹² First Bank of Texola v. Terrell, 44 Okl. 719, 145 P. 1140, Ann. Cas. 1917A, 681.

¹³ Graham v. Schooler, 80 Okl. 124, 194 P. 1080.

¹⁴ Wells v. Guaranty State Bank, 56 Okl. 688, 156 P. 896.

¹⁵ Rev. Laws 1910, §§ 3806-3812.

Lien for rent may be enforced by attachment against any or all products of the farm. Dorsett v. Watkins, 59 Okl. 198, 108 P. 608, 9 A. L. R. 278.

Landlord held entitled to attachment for rent on removal of property by tenant. Turner v. Wilcox, 121 P. 658, 32 Okl. 56, 40 L. R. A. (N. S.) 498. Where tenant had paid no rent, but has removed a large portion of the crops and deposited it in an elevator, refusal to sustain attachment held error. Id.

¹⁶ Greeley v. Greeley, 73 P. 295, 12 Okl. 659.

¹⁷ Tootle, Wheeler & Motter Mercantile Co. v. Floyd, 114 P. 259, 28 Okl. 308.

§ 1773. — On claim not due

"Where a debtor has sold, conveyed or otherwise disposed of his property with the fraudulent intention of cheating or defrauding his creditors, or to hinder or delay them in the collection of their debts, or is about to make such sale or conveyance or disposition of his property with such fraudulent intent, or is about to remove his property or a material part thereof, with intent or to the effect of cheating or defrauding his creditors or of hindering or delaying them in the collection of their debts, a creditor may bring an action upon his claim before it is due, and have an attachment against the property of the debtor as in other cases; but before such attachment shall be issued or such action maintained, the plaintiff or his agent or attorney shall make oath in writing setting forth the grounds of such attachment as in other cases, and also showing the nature of plaintiff's claim that it is just, when the same will become due, and the existence of some one or more of the grounds for an attachment enumerated in this section."¹⁸

The remedy of attachment on claims not due is not a matter of grace, in the discretion of the court, but a right given the creditor.¹⁹

"The plaintiff in such action shall not have judgment on his claim before it is due, but the proceedings on the attachment may be conducted without delay."²⁰

DIVISION II.—PROPERTY SUBJECT TO ATTACHMENT**§ 1774. Personal property**

Annual crops sown by the owner of the soil,²¹ shares of corporate stock,²² and an equitable interest in land are subject to attachment.²³

¹⁸ Rev. Laws 1910, § 4864.

¹⁹ *Nelson v. Stull*, 70 P. 590, 65 Kan. 585, affirming judgment 68 P. 617, 65 Kan. 585.

²⁰ Rev. Laws 1910, § 4865.

²¹ Annual crops sown by the owner of the soil, and which are the result of care, are, while growing, personal property subject to attachment. *Polley v. Johnson*, 35 P. 8, 52 Kan. 478, 23 L. R. A. 258.

²² Corporate stock is subject to attachment. Sess. Laws 1919, p. 141, §§ 1-7; *Harris v. Mid-Continent Life Ins. Co.*, 75 Okl. 105, 182 P. 85.

²³ S. made a parol contract with D. to exchange a stock of goods for land. D. executed a deed, leaving blank the space for the grantee's name, and

Money received by a wife from her husband as her share in the division of their property is not exempt from attachment, notwithstanding an agreement that it was in full settlement of her rights, including alimony, where a divorce was subsequently granted for her fault and without any allowance to her.²⁴

The right of a domestic railroad to use, on its return trip, a foreign railroad's car which it has unloaded, which right is superior to that of an attaching creditor of the foreign road, is not waived by its local agent requesting that the attaching officer remove the car from the domestic road's tracks or by setting the car on stub tracks so as to be under control of the officer.²⁵

§ 1775. — Mortgaged chattels

A levy of attachment on mortgaged chattels, whereby the officer takes possession of the property, to the exclusion of the rights of every one except the mortgagee, is good as against defendant.²⁶

§ 1776. Real property

Where the debtor holds only the legal title to property, the creditor cannot subject such property to liabilities of the debtor.²⁷

Where the claimant of lots had been adjudged entitled thereto, though deed has not been delivered pending his protest as to fees, he had both legal and equitable title and attachable interest.²⁸

A devisee's interest in real estate is subject to attachment, although the will gives a power to the executor to sell the property and distribute the proceeds among the devisees.²⁹

placed it with a third person, to be delivered on delivery of the goods at his place of residence. The goods were consigned by S. to D., and thereafter, and before they arrived, attachments were levied by creditors of S. on the land. Afterwards the goods were received by D. in due time, and the deed was thereupon delivered to S. who inserted his wife's name as grantee, and delivered the deed to her. Held, that S. had an equitable interest in the land; hence the attachments were valid. *Shanks v. Simon*, 46 P. 774, 57 Kan. 385.

²⁴ *Milberger v. Veselsky*, 155 P. 957, 97 Kan. 433.

²⁵ *Dye v. Denver & R. G. R. Co.*, 153 P. 502, 96 Kan. 676.

²⁶ *Myers v. Cole*, 4 P. 166, 32 Kan. 138.

²⁷ Where purchaser of agency contract, void as against public policy, gave deed to secure price, attaching creditor of grantee cannot subject the land, since that would, in effect, enforce void contract. *Saylor v. Crooker*, 156 P. 737, 97 Kan. 624, Ann. Cas. 1918D, 473.

²⁸ *Richardson v. Carr* (Okla.) 171 P. 476.

²⁹ *Ward v. Benner*, 131 P. 609, 89 Kan. 369.

§ 1777. Property in custodia legis

That possession of personal property had been obtained under a replevin bond did not preclude it from being taken on an attachment issued against both claimants.³⁰

Where property has been attached in good faith, and subsequently taken from the officer on an order of replevin under a void mortgage, and it appears that there is not a bona fide controversy between the attaching creditor and the officer on the one hand and the mortgagee on the other, the property is not in custodia legis pending the result of the replevin suit, and so exempt from a levy under further orders of attachment against the original judgment debtor.³¹

DIVISION III.—PROCEDURE**§ 1778. Jurisdiction and venue**

For purposes of attachment the situs of shares of corporate stock is within the state where corporation resides, and they may be lawfully levied on therein, though owned by a nonresident.³²

An action in attachment may be brought in any county where a nonresident has property, though he is at the time personally present in another county of the state, and service of the summons on him in such other county will give the court jurisdiction, at least to the extent of the attached property.³³

Where two joint makers of a promissory note, residing in different counties, are sued before the note is due, in the county in which one of them resides, and a summons is served upon a defendant residing in the county in which the action is commenced, and a summons and order of attachment are issued to the other county, and are there served upon the defendant residing in that county, and his property situated therein is attached, and no order of attachment is issued, and no ground for an attachment exists against the defendant residing in the county in which the ac-

³⁰ *Rothweller v. Mason*, 141 P. 245, 92 Kan. 612, rehearing denied 142 P. 267, 93 Kan. 4.

³¹ *First Nat. Bank v. Gerson*, 32 P. 905, 50 Kan. 582, modifying order 32 P. 366; *Id.*, 32 P. 908, 50 Kan. 589; *Westhelmer v. Same, Id.*; *McPike v. Same, Id.*; *Stickney v. Same, Id.*; *Rosenberg v. Same, Id.*

³² *Harris v. Mid-Continent Life Ins. Co.*, 75 Okl. 105, 182 P. 85; *Rev. Laws 1910*, §§ 1237, 4815, 4819, 4820.

³³ *Reynolds v. Williamson*, 74 P. 1122, 68 Kan. 239.

tion is commenced, the action is not rightfully brought in the county in which it is brought, and the defendant in the other county may have the attachment dissolved.³⁴

§ 1779. Affidavits—Form

"The order of attachment shall be issued by the clerk of the court in which the action is brought, in any case mentioned in the preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing:

"First. The nature of the plaintiff's claim.

"Second. That it is just.

"Third. The amount which the affiant believes the plaintiff ought to recover.

"Fourth. The existence of some one of the grounds for an attachment enumerated in the preceding section."³⁵

The verification of an affidavit for attachment before the attorney of record of the plaintiff is unauthorized.³⁶

An affidavit in the language of the statute, unaccompanied by any facts showing them to be true, will support the writ.³⁷

³⁴ *Rullman v. Hulse*, 5 P. 176, 32 Kan. 598, rehearing denied 7 P. 210, 33 Kan. 670.

³⁵ Rev. Laws 1910, § 4813.

Before an attachment is issued, the existence of some one of the statutory grounds therefor must be shown by affidavit. *Doggett v. Bell*, 4 P. 292, 32 Kan. 298.

³⁶ *Tootle v. Smith*, 7 P. 577, 34 Kan. 27.

³⁷ *Dunn v. Claunch*, 76 P. 143, 13 Okl. 577.

Under Civ. Code, § 190 (St. 1893, § 4068), providing that plaintiff may have an attachment in a civil action on the ground that defendant fraudulently contracted the debt for which suit was brought, a positive statement in an affidavit of attachment in the language of the statute is sufficient. *Thwing v. Winkler*, 75 P. 1126, 13 Okl. 643; *Same v. Humphrey*, 75 P. 1127, 13 Okl. 646.

An attachment may be based on both of the grounds that the defendant so conceals himself that a summons cannot be served upon him, and that the defendant is a nonresident of the territory, and both may be alleged in the affidavit. *Raymond v. Nix*, 49 P. 1110, 5 Okl. 656.

Allegations of affidavit for an attachment held to sufficiently show that action in which attachment was asked was "a civil action for the recovery of money" within Rev. Laws 1910, § 4812, permitting the attachment. *Millus v. Lowrey Bros.*, 63 Okl. 261, 164 P. 663, L. R. A. 1918B, 336.

Requirement of Rev. Laws 1910, § 4813, that affidavit for attachment shall show that plaintiff's claim "is just" is satisfied by allegation in language of the section that it "is just." *Millus v. Lowrey Bros.*, 63 Okl. 261, 164 P. 663, L. R. A. 1918B, 336.

An affidavit in attachment in an action on a claim not due alleged that de-

The affidavit for attachment must state the amount claimed to be due.³⁸

Where allegations of the affidavit are insufficient to show that the action in which it was sought was a civil action for the recovery of money, either the answer filed or the evidence in the case may cure the defect.³⁹

An affidavit which has been lost or destroyed is presumed, when attacked collaterally, to have been sufficient.⁴⁰

Where an "affidavit alleged that defendants have sold, conveyed, or otherwise disposed of their property with a fraudulent intent," etc., such allegation is sufficient to sustain an attachment, since it is simply a disjunctive statement of two phases of the same ground of attachment, and not two grounds disjunctively stated.⁴¹

Where an affidavit is sworn to 18 days before it is filed, or the action commenced, and the charge is of some fact which, having occurred, is not subject to change, as that the debt was fraudulently contracted, the lapse of time is not of itself so great as to compel the discharge of the attachment.⁴²

Where the grounds for an order of attachment are stated in the disjunctive or in the alternative, and not positively or directly, but no point with reference to this manner of stating the grounds is presented to the court below, such point will not be considered by the supreme court.⁴³

defendants had disposed of their property and were causing the same to be removed out of the county for the purpose and with the fraudulent intent to defraud their creditors. Held sufficiently broad to include an intent to "hinder and delay their creditors," so that it was error to sustain a motion to dismiss for the reason that a specific intent to defraud had not been established when the acts complained of were done with intent to hinder and delay creditors. *Clayton v. Clark*, 92 P. 1117, 76 Kan. 832, 123 Am. St. Rep. 169.

³⁸ *Tootle v. Smith*, 7 P. 577, 34 Kan. 27.

³⁹ *Millus v. Lowrey Bros.*, 63 Okl. 261, 164 P. 663, L. R. A. 1918B, 336.

⁴⁰ An affidavit for an attachment was filed, and the property attached pursuant thereto was, after final judgment, sold on execution. Subsequently, in an action relative to said property, the affidavit was attacked collaterally; but it had been lost or destroyed, and there was no evidence showing wherein it was not sufficient. Held, that it must be presumed to have been sufficient. *Head v. Daniels*, 15 P. 911, 38 Kan. 1.

⁴¹ *Cook v. Burnham*, 44 P. 447, 3 Kan. App. 27.

⁴² *Adams v. Lockwood*, 2 P. 626, 30 Kan. 373.

⁴³ *Leser v. Glaser*, 4 P. 1026, 32 Kan. 546.

AFFIDAVIT FOR ORDER OF ATTACHMENT

(Caption.)

_____, plaintiff being first duly sworn deposes and says that _____ ha— commenced an action in the district court against _____ to recover the sum of \$_____ now due and payable to the plaintiff from the defendant, and affiant says that the said claim is just, and he ought, as he believes, to recover thereon the sum of \$_____, and the defendant has _____ with the intent to defraud his creditors.

Subscribed in my presence and sworn to before me this _____ day of _____, 19—.

_____, Court Clerk.

ANOTHER FORM

A. B., being first duly sworn, on oath says: That he is the plaintiff in the above entitled cause; that said plaintiff has commenced this action against said defendant for the ultimate recovery of sixteen thousand dollars (\$16,000.00); that the defendant is about to convey or otherwise dispose of her property with the fraudulent intent of defrauding or cheating her creditors, or to hinder or delay them in the collection of their debts, and is about to remove her property, or a material part thereof, with intent or to the effect of cheating or defrauding the plaintiff, or of hindering or delaying him in the collection of his debts; that the defendant is indebted to said plaintiff in said sum, and that said claim is just and wholly unpaid and will become due as follows, to wit:

Five promissory notes of the defendant, bearing date of May 1, 1920, for the sum of twenty-seven hundred dollars (\$2,700.00) each. The first one of said notes became due and payable on May 1, 1921; the second one of said notes will become due and payable on May 1, 1922; the third one of said notes will become due and payable on May 1, 1923; the fourth one of said notes will become due and payable on May 1, 1924; and the fifth one of said notes will become due and payable on May 1, 1925.

There is also due and owing by defendant to plaintiff two thousand dollars (\$2,000.00) for one lot of household furniture hereto-

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fore delivered to defendant, of a value of two thousand dollars (\$2,000.00).

That there is also due and owing by defendant to plaintiff five hundred dollars (\$500.00) for one grandfather's clock, heretofore sold and delivered to defendant by plaintiff.

Affiant further says that said defendant is a nonresident, and that this cause of action is one arising upon contract.

A. B.

Subscribed and sworn to before me this _____ day of _____, 19—.

_____ Notary Public.

My commission expires _____.

ANOTHER FORM—(NOTES NOT YET DUE)

A. B., being first duly sworn according to law, on oath says:

That he is the plaintiff in the above entitled cause; that the defendant in the above entitled cause, C. D., owns and holds title to, under her former name of C. B., certain property in the city of _____, county of _____, state of Oklahoma; that the said defendant is about to make a sale or conveyance or disposition of her property with the fraudulent intent of cheating or defrauding the plaintiff, or to hinder or delay him in the collection of his debts, or is about to remove her property or a material part thereof or the proceeds therefrom, with intent or to the effect of cheating or defrauding the plaintiff, or of hindering or delaying him in the collection of his debts; that the defendant, C. D., is indebted to the plaintiff on four (4) promissory notes executed by the defendant under the name of C. B. to the plaintiff, bearing date of _____, 19—, each for the sum of _____ dollars (\$_____); that said notes are not yet due and are wholly unpaid, and are now held and owned by said plaintiff, and that said notes shall mature and shall become due respectively two, three, four, and five years from date; that said plaintiff has commenced an action against said defendant on said notes not yet due by reason of the proposed acts of the defendant above alleged; that said defendant, C. D., is a nonresident of the state of Oklahoma; that the said claims against Ina Goldman

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are just and arise from contract; that plaintiff herein respectfully asks that an order of attachment be issued in this action.

Subscribed and sworn to before me this _____ day of _____, 19____.

_____, Notary Public.

My commission expires _____.

§ 1780. — Amendment

An affidavit in attachment, which is merely defective, may be amended, the same as any other pleading in the case.⁴⁴

Where the original affidavit alleged nonresidence of defendant, that allegation need not be repeated in an amended affidavit.⁴⁵

⁴⁴ *Reister v. Land*, 76 P. 156, 14 Okl. 34.

A clerical error in naming plaintiff as the affiant in the body of the affidavit, which was signed by his attorney, may be amended. *Dunn v. Drummond*, 51 P. 656, 4 Okl. 461.

In an attachment suit for the price of goods purchased from plaintiff under fraudulent representations, plaintiff may amend the attachment affidavit so as to show that defendant has disposed of the goods, thus preventing plaintiff from recovering by replevin. *Jaffray v. Wolf*, 4 Okl. 303, 47 P. 496.

An attachment affidavit which fails to state the nature of plaintiff's claim may be amended after levy. *Rothweiler v. Mason*, 141 P. 245, 92 Kan. 612, rehearing denied 142 P. 267, 93 Kan. 4.

The affidavit sworn to by the plaintiff before a notary public, who is the attorney of record of the plaintiff in the action, is only voidable, and may be amended. *Swearingen v. Howser*, 14 P. 436, 37 Kan. 126; *Yoakam v. Same*, 14 P. 438, 37 Kan. 130.

Where the original affidavit stated that plaintiff's claim was due when the action was commenced, but did not sufficiently show its nature, and an amended affidavit stated how the demand originated, the two affidavits together were sufficient, though the amended affidavit failed to show that the claim accrued before action brought. *Rothweiler v. Mason*, 142 P. 267, 93 Kan. 4, denying rehearing 141 P. 245, 92 Kan. 612.

Where the jurat to the affidavit is by mistake postdated, so that it appears to have been sworn to after the issuance of the writ, it is error to refuse to allow it to be amended. *Arkansas City Lumber Co. v. Scott*, 47 P. 545, 5 Kan. App. 636.

Where an affidavit in attachment charging fraudulent acts and intentions was properly held insufficient to sustain an attachment for a debt not due, though it was sufficient for a debt due, it was error to refuse a sufficient amendment and discharge the attachment. *Baker Wire Co. v. Kingman*, 24 P. 476, 44 Kan. 270.

⁴⁵ *Schultz v. Stiner*, 157 P. 265, 98 Kan. 45, denying rehearing 155 P. 1073, 97 Kan. 555.

When the right of attachment under one section of the statute has been fully determined against plaintiff, he cannot be allowed to amend his affidavit so as to change his cause of action, and re-try his cause.⁴⁶

§ 1781. Bond—Form

"The order of attachment shall not be issued by the clerk until an undertaking on the part of the plaintiff has been executed by one or more sufficient sureties, approved by the clerk and filed in his office, in a sum not less than double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay to the defendant all damages that he may sustain by reason of the attachment, including reasonable attorneys' fees, if the order be wrongfully obtained; but no undertaking shall be required where the party or parties defendant are all non-residents of the State, or a foreign corporation."⁴⁷

Where all defendants against whom attachment is issued are nonresidents, no bond need be given, although there be other defendants in the case who are residents.⁴⁸

Where an attachment bond is given and approved by the clerk of the court, and appears to be valid on its face, and no objection is made in the district court, it will be presumed that it was satisfactory to defendant.⁴⁹

ATTACHMENT BOND

(Caption.)

Whereas, said plaintiff has commenced a civil action against said defendant in said court to recover the sum of \$—— and has applied to the clerk of said court, by filing the necessary affidavit, for an order of attachment to be issued in said action against the said defendant:

Now, therefore, we, ——, as principal, and ——, —— and ——, as sureties hereby undertake to said defendant in the penal sum of \$—— that the plaintiff shall pay to the said defendant all

⁴⁶ *Jaffray v. Wolfe*, 33 P. 945, 1 Okl. 312.

⁴⁷ Rev. Laws 1910, § 4814.

⁴⁸ *Head v. Daniels*, 15 P. 911, 38 Kan. 1.

⁴⁹ *Myers v. Cole*, 4 P. 169, 32 Kan. 138.

damages which the said defendant may sustain by reason of said attachment if the order be wrongfully obtained.

Witness our hands this _____ day of _____, A. D. 19____.

The above undertaking and securities thereto approved this _____ day of _____, 19____.

_____, Clerk of said Court,

By _____, Deputy.

(Qualification of sureties.)

§ 1782. Additional security

"The defendant may, at any time before judgment, after reasonable notice to the plaintiff, move the court for additional security on the part of the plaintiff; and if, on such motion, the court is satisfied that the surety in the plaintiff's undertaking has removed from this State, or is not sufficient for the amount thereof, it may vacate the order of attachment and direct restitution of any property taken under it, unless, in a reasonable time, to be fixed by the court, sufficient security be given by the plaintiff."⁵⁰

§ 1783. Judgment

Where an attachment is issued on negotiable notes not due, judgment cannot be entered thereon before the last day of grace.⁵¹

A judgment in an attachment proceeding entered by default determines the truth of attachment affidavit and the propriety of the attachment.⁵²

Where the judgment is for the recovery of so much money and the costs of the action, and the sale of the attached property, the judgment for costs is a lien on the attached property, and may be enforced by an order of sale.⁵³

The final judgment, in an action wherein a devisee's interest in realty is attached, may allow the executor to sell the attached property as directed by the will and provide for the application of the defendant's share of the proceeds upon the judgment against him.⁵⁴

⁵⁰ Rev. Laws 1910, § 4861.

⁵¹ Miller v. Wichita Overall & Shirt Mfg. Co., 35 P. 799, 53 Kan. 75.

⁵² Gooden v. Lewis, 101 Kan. 482, 167 P. 1133.

⁵³ Merwin v. Hawker, 1 P. 640, 31 Kan. 222.

⁵⁴ Ward v. Benner, 131 P. 609, 89 Kan. 369.

Where a devisee's interest in real estate is attached and service is made upon him by publication only, the devisee's share of proceeds in personal property in the executor's hands, but not attached, cannot be applied upon the judgment.⁵⁵

DIVISION IV.—ORDER

§ 1784. Attachment order—Form

"The order of attachment shall be directed and delivered to the sheriff. It shall require him to attach the lands, tenements, goods, chattels, stocks, rights, credits, moneys and effects of the defendant in his county, not exempt by law from being applied to the payment of the plaintiff's claim, or so much thereof as will satisfy the plaintiff's claim, to be stated in the order as in the affidavit, and the probable cost of the action, not exceeding fifty dollars."⁵⁶

ORDER OF ATTACHMENT

(Caption.)

State of Oklahoma to the Sheriff of ——— County—Greeting:

You are commanded to attach and safely keep the lands, tenements, goods, chattels, stocks, or interest in stocks, rights, credits, moneys, and effects of the defendant, ———, not exempt by law from being applied to the payment of the claims of the plaintiff, ———, for the sum of ———, or so much thereof as will satisfy said claim and ——— dollars, the probable costs of this action.

You will make the return of this order on the ——— day of ———, A. D. 19—.

In witness whereof I have hereunto set my hand and the seal of said court at ——— this ——— day of ———, A. D. 19—.

———, Court Clerk,

By ———, Deputy Court Clerk.

§ 1785. Issuance

Under the statute providing that an attachment may issue "at or after the commencement" of an action, the writ may issue after verdict and before final judgment is rendered and recorded.⁵⁷

Where an attachment is properly issued on filing a sufficient affi-

⁵⁵ Ward v. Benner, 131 P. 609, 89 Kan. 369.

⁵⁶ Rev. Laws 1910, § 4815.

⁵⁷ Davis v. Jenkins, 26 P. 459, 46 Kan. 19.

davit and bond, and property is taken thereunder, the lien of attachment is not lost by failure to make proper entries of the issuance of such order of attachment.⁵⁸

§ 1786. Several orders—To different counties

"Orders of attachment may be issued to the sheriffs of different counties, and several of them may, at the option of the plaintiff, be issued at the same time, or in succession; but only such as have been executed shall be taxed in the costs, unless otherwise directed by the court."⁵⁹

§ 1787. Defects

Even if lands and tenements of a defendant may not be attached in an action in a county court, that part of an order of attachment in such proceeding which directs the sheriff to levy on the lands and tenements of the defendant is surplusage, and does not affect the validity of the remaining portion of the order, where it directs a seizure of the defendant's personal property, and such command alone is executed.⁶⁰

An attachment order is not void because the sheriff is not directed to return it in 10 days, but is directed to "make due return of this order, with your proceedings thereon, when fully executed or discharged."⁶¹

§ 1788. Service of process

The court does not acquire jurisdiction to pass absolutely on rights of parties until defendant has been given legal notice, either actual or constructive, to appear and defend.⁶²

⁵⁸ First Nat. Bank v. Hesser, 77 P. 36, 14 Okl. 115; Rev. Laws 1910, § 5521.

⁵⁹ Rev. Laws 1910, § 4816.

⁶⁰ Raymond v. Nix, 49 P. 1110, 5 Okl. 656.

⁶¹ Raymond v. Nix, 49 P. 1110, 5 Okl. 656.

⁶² Davies v. Thompson, 61 Okl. 21, 160 P. 75, L. R. A. 1917B, 395.

Testimony of officer executing order of attachment held not to show such failure to comply with Rev. Laws 1910, § 4820, by leaving copy of order, etc., as to render attachment proceeding void. Richardson v. Carr (Okl.) 171 P. 476.

When an action is commenced by filing a petition and an affidavit for attachment, and a summons is issued, and an order of attachment is obtained and levied on land, but no service of summons is had within 60 days from the filing of the petition, the attachment falls; and a deed, though actually made

§ 1789. — By publication—Form of affidavit

A notice by publication, not describing the real estate attached, and failing to state the nature of the judgment sought, is void.⁸³ But such defect in omitting the description of the attached property is remedied by a subsequent general appearance.⁸⁴

To support service by publication against a nonresident defendant in attachment proceedings, the affidavit for such service should show that the defendant has property within this state subject to attachment.⁸⁵

It is not necessary that an ordinary summons be issued before service by publication can be had.⁸⁶

before the 60 days expired, will convey the land free from the lien. *Kincaid v. Frog*, 31 P. 704, 49 Kan. 766.

Under Code Civ. Proc. § 57, providing that a civil action may be commenced by filing with the clerk of the court a petition, and causing a summons to be issued thereon, an attachment in which the petition was filed and a summons issued and a writ levied was begun, though no personal service was made on defendant, and no service by publication was attempted for 60 days after filing the petition, as Code Civ. Proc. § 20, providing that an attempt to commence an action must be followed by the first publication or service of the summons within 60 days, applies only to the statute of limitations. *Wester v. Long*, 66 P. 1032, 63 Kan. 876.

⁸³ *Ballew v. Young*, 103 P. 623, 24 Okl. 182, 23 L. R. A. (N. S.) 1084; *Rev. Laws 1910*, § 4725.

In attachment against a nonresident, under *Rev. Laws 1910*, § 4723, a publication notice, not describing the land attached, or stating even inferentially the nature of the judgment to be taken, is fatally defective. *City Nat. Bank v. Sparks*, 50 Okl. 648, 151 P. 225. Failure of an affidavit for publication to allege facts showing the case to be one provided for by *Wilson's Rev. & Ann. St. 1903*, § 4276 (*Rev. Laws 1910*, § 4722), renders it insufficient to support service by publication. *Id.*

In an action by attachment against a nonresident whose land is levied upon, a publication notice which fails to describe the land attached is defective. *Cackley v. Smith*, 17 P. 156, 38 Kan. 450.

⁸⁴ *Schultz v. Stiner*, 157 P. 265, 98 Kan. 45, denying rehearing 155 P. 1073, 97 Kan. 555.

Under Code Civ. Proc. § 57, providing that a civil action may be commenced by filing a petition and causing a summons to be issued thereon, and sections 72 to 75, providing for service by publication, an attachment proceeding is commenced when plaintiff files an affidavit for publication, which is thereafter made good by pursuing the requirements of the statute, or where the regularity of the subsequent proceedings is waived by the entry of the defendant's appearance within 60 days. *Raymond v. Nix*, 49 P. 1110, 5 Okl. 656.

⁸⁵ *Mortgage Trust Co. of Pennsylvania v. Norris*, 54 P. 283, 8 Kan. App. 699.

⁸⁶ When an action is commenced against a nonresident of this state, by filing a petition, bond for costs, an affidavit for the publication of a summons, a

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AFFIDAVIT FOR SERVICE BY PUBLICATION IN ATTACHMENT

(Caption.)

A. B., being duly sworn according to law, says: That he is the attorney for the above named plaintiff. That on the —— day of ——, 19——, said plaintiff filed in the above entitled court his petition, with an affidavit for attachment against the said defendant. That in said petition plaintiff shows that defendant, C. D., made, executed, and delivered to the plaintiff four (4) notes, dated ——, 19——, each for the sum of —— (\$——) dollars, payable to the plaintiff two, three, four and five years after date, respectively, without interest, and that said notes are unpaid and are now held and owned by said plaintiff. That defendant, C. D., has property in the city of ——, county of ——, state of Oklahoma, of the following description, to wit: (Describing same.) That in said affidavit plaintiff shows that defendant is about to convey or otherwise dispose of her property with the fraudulent intent of defrauding or cheating her creditors, or to hinder or delay them in the collection of their debts. That the defendant is not a resident of the state of Oklahoma, and that the plaintiff is unable with due diligence to cause service of summons to be made on said defendant within the state of Oklahoma. That plaintiff has caused summons to issue to the sheriff of —— county, and that the same has been returned not found. That plaintiff has made inquiry at every possible source of information for the purpose of locating said defendant, and that affiant as a result of such efforts states that said defendant has been outside of the state of Oklahoma at all times since a time prior to the institution of this suit, and that she has not had since a time prior to the institution of this suit any residence in the state of Oklahoma. That plaintiff at commencement of this action caused the above described property to be attached,

præcipe for a summons by publication and an affidavit for an order of attachment and an order of attachment is issued and levied on land of the nonresident defendant and constructive service of a summons is begun, by causing a publication to be made in the first issue of a newspaper after the petition was filed and attachment issued, it is error to discharge the attachment because an ordinary summons was not issued to the sheriff of the county in which the action was commenced, under Code, § 57, providing that a civil action shall be begun by "causing a summons to be issued." *Bannister v. Carroll*, 22 P. 1012, 43 Kan. 64.

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and that plaintiff wishes to obtain service on said defendant by publication.

Subscribed and sworn to before me this _____ day of _____, 19—.

_____, Notary Public.

§ 1790. Return—When made

"The return day of the order of attachment, when issued at the commencement of the action, shall be the same as that of the summons. When issued afterwards, it shall be twenty days after it is issued." ⁶⁷

§ 1791. — Contents and form

"The officer shall return, upon every order of attachment, what he has done under it. The return must show the property attached, and the time it was attached; when garnishees are served, their names, and the time each was served, must be stated. The officer shall also return with the order all undertakings given under it." ⁶⁸

⁶⁷ Rev. Laws 1910, § 4817.

⁶⁸ Rev. Laws 1910, § 4844.

That sheriff's return of order of attachment did not state compliance with Rev. Laws 1910, § 4820, as to leaving copy of order of attachment, did not show want of jurisdiction in attachment proceeding and consequent invalidity of sheriff's deed. *Richardson v. Carr* (Okla.) 171 P. 476.

The mere omission of a return to an attachment to state in words that a copy was served is an irregularity only, if it otherwise shows an attachment to have been levied. *Wagstaff v. Moser*, 55 P. 554, 8 Kan. App. 855. A return to an attachment of real property may describe the property by reference to the inventory and appraisalment. *Id.*

Return upon an order of attachment describing land as northeast and northwest quarters of section 22 in township 7, range 38, was not void for uncertainty. *Hodgen v. Roy*, 102 Kan. 197, 169 P. 1143.

When the sheriff's return on an order of attachment refers for a description of the property seized to papers in some other case, the attachment creates no lien, since Code Civ. Proc. § 205, requires the return to show the property attached. *Harding v. Guaranty Loan & Trust Co. of Kansas City*, 43 P. 835, 3 Kan. App. 519.

Where sheriff returned writ of attachment with forthcoming bond with space for stating amount of liability blank, an order permitting amount to be inserted, on ground of an oversight, resisted by signers of bond, did not entitle them to reversal for informality of proceedings. *Larimore v. Parker*, 101 Kan. 729, 168 P. 859. Where sheriff's return to order of attachment showed a levy, and a return to defendant on giving of forthcoming bond, but omitted to describe the property, an amendment should have been allowed for that purpose. *Id.*

SHERIFF'S RETURNS

Received this order on the _____ day of _____, 19____, at _____ o'clock _____ m., I executed the same by going to the place where the property of the within named defendant, _____, described in the inventory and the appraisement hereunto annexed, was found, and there on the _____ day of _____, 19____, at _____ o'clock _____ m., of said day, in the presence and hearing of _____ and _____, two credible persons, declared that by virtue of said order I attached said property at the suit of the within named plaintiff and with _____ and _____, two householders of the county, who were by me first duly sworn, did make a true inventory and appraisement of said property, which inventory and appraisement was by me and said householders signed, and is hereunto annexed and returned with this order. I delivered a copy of this order duly certified to each of said defendants _____

I cannot find the within defendant, _____, in my county.

Said property is in my custody, held subject to the order of the within named court. _____, 19____, I delivered said property attached to _____, in whose possession it was found, upon the execution by such person in my presence of the undertaking herewith returned.

_____, Sheriff.

_____, 19____, I executed the same by going to the place where the property described in an inventory and appraisement made by me under an order of attachment made in the action of _____ against the within named defendant, _____, was held, and there on the _____ day of _____, 19____, at _____ o'clock _____ m., of said day in the presence and hearing of _____ and _____, two credible persons, I did declare that by virtue of the within named order I attached said property of said defendant, _____, at the suit of the within named plaintiff, _____, as in my hands and subject to said prior attachment. I delivered a copy of this order duly certified to said defendant, _____, in my county.

_____, Sheriff,
_____, Deputy.

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I cannot find any property of the within named defendant, ———, in my county.

————, Sheriff,
By ———, Deputy.

§ 1792. — Defects

A defect in the description of the property levied upon, contained in the sheriff's return on a writ of attachment, is cured by judgment foreclosing attachment lien and more fully describing property, so as to withstand attack in subsequent proceeding alleging invalidity of former proceeding on the face of a mandatory record.⁶⁹

Where the return of an order of attachment shows that the officer attached certain real estate, and that when he attached the same he in fact took possession thereof, and left a true copy of the order, but does not state in so many words that he left a copy of the order with the occupant, or, if there were no occupant, in a conspicuous place on the real estate, it will be presumed that the officer did his duty when he attached the property, and therefore that the service of the order of attachment by him was properly and legally made.⁷⁰

§ 1793. — Operation and effect

The return of a sheriff as to property taken in an attachment proceeding or as to the value thereof is not conclusive against the defendant.⁷¹

Where the return of an officer is regular in form, and the property is held by him under the writ, the burden is on the debtor, in a motion to quash for irregular service, to show that it was not served as stated in the return.⁷²

A writ of attachment, with a proper return, is not rendered incompetent as evidence, in an action involving the validity of the at-

⁶⁹ Richardson v. Carr (Okl.) 171 P. 476.

⁷⁰ Wilkins v. Tourtellott, 22 P. 11, 42 Kan. 176, judgment affirmed (1893) 13 S. Ct. 1054, 149 U. S. 791, 37 L. Ed. 965.

An omission from a return of service of an attachment as to whether a copy of the order was left with an occupant is an irregularity, not available to a purchaser in a collateral attack. Stillman v. Hamer, 78 P. 836, 70 Kan. 469, 109 Am. St. Rep. 465.

⁷¹ Schwartzberg v. Central Ave. State Bank, 115 P. 110, 84 Kan. 581.

⁷² Lewis v. Rasp, 76 P. 142, 14 Okl. 69.

tachment, by indorsement thereon of a memorandum of a prior ineffectual levy; such indorsement not being necessary.⁷³

DIVISION V.—LEVY, LIEN, CUSTODY, AND DISPOSITION OF PROPERTY

§ 1794. Execution of order—Inventory and appraisalment

"The order of attachment shall be executed by the sheriff, without delay. He shall go to the place where the defendant's property may be found, and declare that, by virtue of said order, he attaches said property at the suit of the plaintiff; and the officer, with two householders, who shall be first sworn or affirmed by the officer, shall make a true inventory and appraisalment of all the property attached, which shall be signed by the officer and householders, and returned with the order."⁷⁴

It is not essential to a valid levy of an attachment that the officer make a manual seizure of personal property, but is sufficient that he assume control over it.⁷⁵

Attachments can only be levied by bonded officers.⁷⁶

Where property which has been mortgaged in Kansas is attached

⁷³ *Dolan v. Wilkerson*, 48 P. 23, 57 Kan. 758.

⁷⁴ Rev. Laws 1910, § 4819. See, also, Rev. Laws 1910, § 4842.

It is not essential to the validity of an attachment levy executed by taking possession of the property that an appraisalment of the attached property should be immediately made. *Dodson v. Wightman*, 49 P. 790, 6 Kan. App. 835. An attachment levy should not be held wholly invalid because of the fact that the appraisalment involves certain chattels which the officer and the appraisers have not seen, and cannot see, because the same are locked in a bank safe, of which they do not have the combination. *Id.*

The failure of the undersheriff to participate with the appraisers in the appraisalment of the property is not such an omission in the service of the writ as required the court to quash the writ or set aside the levy as to all the property. *Emerson v. Thatcher*, 51 P. 50, 6 Kan. App. 325.

⁷⁵ *Parish v. Van Arsdale-Osborne Brokerage Co.*, 140 P. 835, 92 Kan. 286, Ann. Cas. 1916B, 981.

An officer attempted to levy an attachment on standing corn, which had ceased to grow, but was not sufficiently dry to crib, and caused the same to be appraised. He notified the attachment debtor of the levy, but placed no one in charge of the corn. He did not post any notice under the attempted levy, and no control over the property was exercised by the officer until two months later, when he returned, and posted notice of sale of the corn. Held, that the levy was void as against a mortgagee who filed his mortgage for record four days after the levy. *Throop v. Malden*, 34 P. 801, 52 Kan. 258.

⁷⁶ Sess. Laws 1919, p. 199, §§ 1-4.

in Oklahoma, it is not necessary for plaintiff to pay or tender to the mortgagee the amount of debt.⁷⁷

A court may protect defendants or other creditors against an excessive levy on more property than is necessary to meet the judgment.⁷⁸

§ 1795. Successive levies

"Different attachments of the same property may be made by the same officer, and one inventory and appraisal shall be sufficient; and it shall not be necessary to return the same with more than one order."⁷⁹

That an attaching officer, after levying on the defendant's property, relinquished all claim by reason of the levy, did not prevent him from making another levy under the same writ at any time before actual return thereof.⁸⁰

"Where property is under attachment, it shall be attached under subsequent orders, as follows:

"First. If it be real property, it shall be attached in the same manner prescribed in section 4820.

"Second. If it be personal property, it shall be attached as in the hands of an officer, and subject to any previous attachment.

"Third. If the same person or corporation be made a garnishee, a copy of the order and notice shall be left with him in the manner prescribed in section 4841."⁸¹

§ 1796. Return

An officer serving an attachment writ in a county other than that in which it was issued is not required to have his return recorded with the clerk of the court of the county where the land that was attached is situated.⁸²

An officer's return is prima facie evidence of the value of proper-

⁷⁷ *Haltom v. Nichols & Shepard Co.*, 64 Okl. 184, 166 P. 745.

⁷⁸ *Hodgen v. Roy*, 102 Kan. 197, 169 P. 1143. But the fact that an officer seizes and holds an excessive amount of property does not necessarily invalidate the attachment. *Hodgen v. Roy*, 102 Kan. 197, 169 P. 1143.

⁷⁹ Rev. Laws 1910, § 4842.

⁸⁰ *Dolan v. Wilkerson*, 48 P. 23, 57 Kan. 758.

⁸¹ Rev. Laws 1910, § 4843.

⁸² *Mount v. Trammel* (Okl.) 175 P. 232.

ty attached where there is no other proof, but is not conclusive upon either the officer or the parties to the action or their privies.⁸³

When the officer's return shows that he, at a certain time, attached certain real estate, and posted a copy of the order in a conspicuous place on the premises, in the absence of anything to the contrary, it will be presumed that the officer did his duty, and that there was no occupant.⁸⁴

When an order is levied upon a large number of town lots, the failure to place a copy on each separate lot does not render the service void.⁸⁵

§ 1797. Creation of lien

An attachment creates a lien on the property attached from the time of the service of the order of attachment.⁸⁶

On amendment allowed, making a member of plaintiff's firm a party, the lien of the attachment is not affected.⁸⁷

The lien given to a landlord on crops grown on the rented farm exists independently of seizure by attachment or other process.⁸⁸

§ 1798. Operation and effect

An attachment reaches only the interest then owned by defendant, whether shown by record or not.⁸⁹ An attachment lien does not reach the mere legal title of property in the debtor, when the equitable title is in another.⁹⁰

The levy of an attachment is not subject to collateral attack because of alleged insufficiency of a bond signed by a bank.⁹¹

⁸³ Correll v. Morgan (Okl.) 174 P. 509.

The return as to the value of the property attached may be overcome by parol evidence of a different value. *Id.*

⁸⁴ Head v. Daniels, 15 P. 911, 38 Kan. 1.

⁸⁵ Blake v. Rider, 14 P. 280, 36 Kan. 693.

⁸⁶ R. T. Davis Mill Co. v. Bangs, 49 P. 628, 6 Kan. App. 38. Such lien is in favor of the creditor. *Wafer v. Harvey County Bank*, 13 P. 209, 36 Kan. 292.

⁸⁷ Henderson v. Stetter, 2 P. 849, 31 Kan. 56.

⁸⁸ Wilmering v. Hinkle, 61 Okl. 82, 160 P. 60.

⁸⁹ Jullan v. Eagle Oil & Gas Co., 111 P. 445, 88 Kan. 440, denying rehearing 109 P. 996, 83 Kan. 127. An attaching creditor is not entitled to the rights of a purchaser for value buying on the strength of a record title. *Id.*

Attachment creditor cannot subject any greater interest in property than that owned by debtor. *Saylor v. Crooker*, 156 P. 737, 97 Kan. 624, Ann. Cas. 1918D, 473.

⁹⁰ Farmers' State Bank v. Keen (Okl.) 187 P. 207.

⁹¹ Marquis v. Ireland, 121 P. 486, 86 Kan. 416, Ann. Cas. 1913C, 144.

The attaching creditor of a mortgagor is not required to pay off the amount of the mortgage debt on property mortgaged in another state and subsequently brought into this state.⁹²

"Where there are several orders of attachment against the same defendant, they shall be executed in the order in which they are received by the sheriff."⁹³

§ 1799. Priority—How determined—Reference

"Where several attachments are executed upon the same property, or the same persons are made garnishees, the court, on motion of any of the plaintiffs, may order a reference, to ascertain and report the amounts and priorities of the several attachments, or may determine any such amount and priorities without such reference."⁹⁴

§ 1800. — Between attachments and other liens

A contract of sale of property for which part of the purchase price is paid, the seller agreeing to convey the title to the purchaser on payment of his note for the balance, vests a good equitable title in the purchaser as against an attaching creditor of the vendor, though the latter has no notice of the sale; and the payment of the note by

⁹² St. 1893, § 3280, which provides that, before property covered by a chattel mortgage is attached by a creditor of the mortgagor, the officer shall pay off the amount of the mortgage debt, does not apply to a mortgage executed in the Indian Territory on property located therein and subsequently brought into this territory. *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 60 P. 249, 9 Okl. 353; Rev. Laws 1910, § 4041.

⁹³ Rev. Laws 1910, § 4818.

The sheriff must levy attachments upon the debtor's property in the order in which he receives them, and, if a levy under a junior order is first made, it will inure to the benefit of the senior order. *Atchison, T. & S. F. R. Co. v. Schwarzschild & Sulzberger Co.*, 48 P. 591, 58 Kan. 90, 62 Am. St. Rep. 604.

The priority of such attachments against property, already in the hands of the sheriff under former attachments, is determined by the time of their reception by the sheriff, and not by the order in which he levies them. *Larabee v. Parks*, 23 P. 598, 43 Kan. 436.

An amendment to an affidavit in attachment stating the amount of the indebtedness relates back to the time of the filing of the original affidavit, and the lien of the writ issued thereon is prior to that of a junior attachment levied before such affidavit was amended. *Coyle Mercantile Co. v. Nix*, 54 P. 469, 7 Okl. 267.

⁹⁴ Rev. Laws 1910, § 4850.

the purchaser, and his acceptance of the deed, without actual notice of the attachment, vests in him the legal title also.⁹⁵

Where a debtor, to secure the debt, gives a chattel mortgage on property of value largely in excess of the debt, and on default the mortgagee takes possession, another creditor of the mortgagor, who garnishes the mortgagee so in possession, has a lien prior to a subsequent attachment by a third creditor.⁹⁶

Where attachments and executions are levied upon the same property, by the same officer, and the attachments are levied first, and have priority, and the execution creditors cause the officer to sell the property on their executions to different persons, and in small lots, and to pay the proceeds of the sale to themselves, they are liable to the attaching creditors for so much of the proceeds as will satisfy the judgments rendered in favor of the attaching creditors.⁹⁷

Where the order of a judge for the discharge of an attachment contains a provision that the attachment shall be suspended for 30 days, and during the period of suspension the plaintiff procures the order of dissolution to be rescinded for fraud in obtaining it, such attachment will be considered as continuing in force, so as to retain a priority of lien on the part of the plaintiff in the action as against one who, before the making of the first order by such judge, levied an execution subject to the attachment upon the property seized thereunder.⁹⁸

The lien of an attachment levied on a stock of goods by a deputy sheriff has priority over that of an execution issued out of another court on the same goods, and placed in the sheriff's hands before, but not levied until after, the levy by the deputy.⁹⁹

⁹⁵ *Burke v. Johnson*, 15 P. 204, 37 Kan. 337, 1 Am. St. Rep. 252.

⁹⁶ *R. T. Davis Mill Co. v. Bangs*, 49 P. 628, 6 Kan. App. 38.

⁹⁷ *Eddy v. Weaver*, 15 P. 492, 37 Kan. 540.

⁹⁸ *Guernsey v. First Nat. Bank*, 65 P. 250, 63 Kan. 203.

⁹⁹ St. 1893, § 4336, provides that chattels shall be bound by the lien of a judgment "from the time they shall be seized in execution." Held, that the lien of an attachment issued out of the district court and levied on a stock of goods by the deputy sheriff has priority over that of an execution issued out of the probate court on the same goods, and placed in the sheriff's hands before, but not levied until after, the levy by the deputy. *Burnham v. Dickson*, 47 P. 1059, 5 Okl. 112; Rev. Laws 1910, § 5152.

§ 1801. Transfer—Notice

An attachment levy on real estate is constructive notice only to such persons as may acquire subsequent interests in the attached realty from parties or privies to the action.¹

A purchaser of land, with notice of an attachment lien, takes subject to such lien, and has no better position to contest its validity than the grantor would have had.²

Where a petition is filed, an attachment duly issued and levied on the interest of defendant in real estate, but the only service attempted to be made on defendant, a nonresident, within 60 days of the filing of the petition, was vacated and set aside by the court, the proceedings do not charge third persons with notice of the pendency of the action.³

§ 1802. Duration of lien

In the absence of a statutory provision regulating the continuance of an attachment lien which has been affirmed by judgment, its duration is the duration of the judgment itself.⁴

§ 1803. Release or abandonment

Before an attachment lien will be deemed abandoned, some affirmative act of the creditor must be shown inconsistent with the continuance of the lien.⁵

A sheriff may release attached property on direction of the attaching party or his attorney without an order of court.⁶

§ 1804. Custody of property

"When the property attached is real property, the officer shall leave with the occupant thereof, or, if there be no occupant, in a conspicuous place thereon, a copy of the order. Where it is personal property, and he can get possession, he shall take the same into his custody, and hold it subject to the order of the court."⁷

The attachment of real estate at the commencement of an action

¹ Travis v. Topeka Supply Co., 22 P. 901, 42 Kan. 625.

² Stillman v. Hamer, 78 P. 836, 70 Kan. 469, 109 Am. St. Rep. 465.

³ Wellsford v. Durst, 55 P. 493, 8 Kan. App. 231.

⁴ Stillman v. Hamer, 78 P. 836, 70 Kan. 469, 109 Am. St. Rep. 465.

⁵ Stillman v. Hamer, 78 P. 836, 70 Kan. 469, 109 Am. St. Rep. 465.

⁶ Southwestern Broom & Warehouse Co. v. City Nat. Bank, 52 Okl. 422, 153 P. 204.

⁷ Rev. Laws 1910, § 4820.

gives the plaintiff a contingent lien thereon, but does not give him a right to the possession of the estate, nor to the rent, issues, and profits thereof.⁸

Where a sheriff is in possession of personal property by an order of attachment rightfully issued, he is entitled to continue such possession until the lien is lost, or the property disposed of by force of it, or the lien is satisfied.⁹

§ 1805. Receiver

"The court, or any judge thereof, during vacation, may, on application of the plaintiff, and on good cause shown, appoint a receiver, who shall take an oath faithfully to discharge his duty and shall give an undertaking to the state of Oklahoma, in such sum as the court or judge may direct, and with such security as shall be approved by the clerk of such court, for the faithful performance of his duty as such receiver, and to pay over all money and account for all property which may come into his hands by virtue of his appointment, at such times and in such manner as the court may direct."¹⁰

§ 1806. — Duties

"Such receiver shall take possession of all notes, due bills, books of account, accounts and all other evidences of debt that have been taken, by the sheriff or other officer, as the property of the defendant in attachment, and shall proceed to settle and collect the same. For that purpose, he may commence and maintain actions in his own name as such receiver; but in such actions no right of defense shall be impaired or affected."¹¹

§ 1807. — Notice to debtors

"Such receiver shall forthwith give notice of his appointment to the persons indebted to the defendant in attachment. The notice shall be written or printed, and shall be served on the debtor or debtors, by copy personally, or by copy left at the residence of the debtor or debtors; and from the date of such service, the debtors shall stand liable to the plaintiff in attachment for the amount of

⁸ Kothman v. Markson, 9 P. 218, 34 Kan. 542.

⁹ First Nat. Bank v. Hesser, 77 P. 38, 14 Okl. 115.

¹⁰ Rev. Laws 1910, § 4845.

¹¹ Rev. Laws 1910, § 4846.

money or credits in their hands, or due from them to the defendant in attachment, and shall account therefore to the receiver.”¹²

§ 1808. — Report of proceedings

“Such receiver shall, when required, report his proceedings to the court, and hold all moneys collected by him, and the property which may come into his hands, subject to the order of the court.”¹³

§ 1809. — Sheriff as receiver

“When a receiver is not appointed by the court or a judge thereof, the sheriff or other officer attaching the property, shall have all the powers and perform all the duties of a receiver appointed by the court or a judge, and may, if necessary, commence and maintain actions in his own name as such officer. He may be required to give security other than his official undertaking.”¹⁴

§ 1810. Redelivery bond—Form

“The sheriff shall deliver the property attached to the person in whose possession it was found, upon the execution, by such person, in the presence of the sheriff, of an undertaking to the plaintiff, with one or more sufficient sureties, resident in the county, to the effect that the parties to the same are bound, in double the appraised value thereof, that the property, or its appraised value in money, shall be forthcoming to answer the judgment of the court in the action; but if it shall appear to the court that any part of said property has been lost or destroyed by unavoidable accident, the value thereof shall be remitted to the person so bound.”¹⁵

¹² Rev. Laws 1910, § 4847.

¹³ Rev. Laws 1910, § 4848.

¹⁴ Rev. Laws 1910, § 4849.

¹⁵ Rev. Laws 1910, § 4821.

The omission of a description of the property attached from the space provided for its insertion in a forthcoming bond in attachment will not vitiate the bond, where the recitals in the body of the bond leave no doubt that the property to be redelivered to the sheriff is the same attached in the proceeding, the title of which appears at the head of the bond. *Woodward v. Bingham*, 106 P. 843, 25 Okl. 400.

Where property mortgaged in Kansas and brought to Oklahoma was seized under attachment, mortgagor, who by replevin obtains possession and removes property outside state without foreclosure, is guilty of conversion, and attachment plaintiff is entitled to a return of property or a satisfaction of his judgment. *Haltom v. Nichols & Shepard Co.*, 64 Okl. 184, 186 P. 745.

The giving of a forthcoming bond does not have the effect of dissolving an attachment.¹⁶

A forthcoming bond in attachment is good as a common-law bond, though it does not conform to the statute, if it does not contravene public policy or violate the law.¹⁷

REDELIVERY BOND IN ATTACHMENT

(Caption.)

Know all men by these presents, that we ———, as principal, and ——— and ———, as sureties are held and firmly bound unto ———, plaintiff in the above entitled cause, in the penal sum of ——— dollars, for the payment of which sum, well and truly to be made, we do bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally by these presents.

The condition of the above obligation is such, that whereas, the above named plaintiff did on the ——— day of ———, 19—, begin the above entitled action against the above named defendant, ———, to recover the sum of ——— dollars, and caused an order of attachment to be issued and levied upon property in the possession of ———, principal above named, of the appraised value of ——— dollars; and whereas, said ——— desires to have said property delivered to him:

Now, if the said property or its appraised value in money shall be forthcoming to answer the judgment of the court in this action, then this obligation to be void; otherwise, to remain in full force and effect.

Witness our hands this ——— day of ———, 19—.

(Qualification of sureties.)

§ 1811. Disposition of property

"The court shall make proper orders for the preservation of the property during the pendency of the suit; it may direct a sale of property, when, because of its perishable nature; or of the costs

¹⁶ Larimore v. Parker, 101 Kan. 729, 168 P. 859.

¹⁷ Woodward v. Bingham, 106 P. 843, 25 Okl. 400; Blanchard v. Anderson, 113 P. 717, 27 Okl. 732.

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of keeping it, a sale will be for the benefit of the parties. In vacation, such sale may be ordered by the judge of the court. The sale shall be public, after such advertisement as is prescribed for the sale of like property on execution, and shall be made in such manner and upon such terms of credit, with security, as the court or judge, having regard to the probable duration of the action, may direct. The proceeds, if collected by the sheriff, with all the moneys received by him from garnishees, shall be held and paid over by him, under the same requirement and responsibility of himself and sureties, as are provided in respect to money deposited in lieu of bail.”¹⁸

§ 1812. Judgment for plaintiff

“If judgment be rendered for the plaintiff, it shall be satisfied as follows: So much of the property remaining in the hands of the officer, after applying the moneys arising from the sale of perishable property, and so much of the personal property and lands and tenements, if any, whether held by legal or equitable title, as may be necessary to satisfy the judgment, shall be sold by order of the court, under the same restrictions and regulations as if the same had been levied on by execution; and the money arising therefrom, with the amount which may be recovered from the garnishee, shall be applied to satisfy the judgment and costs. If there be not enough to satisfy the same, the judgment shall stand, and execution may issue thereon for the residue, in all respects as in other cases. Any surplus of the attached property or its proceeds shall be returned to the defendant.”¹⁹

§ 1813. Delivery to sheriff

“The court may compel the delivery to the sheriff, for sale, of any of the attached property for which an undertaking may have been given, and may proceed summarily on such undertaking, to enforce the delivery of the property, or the payment of such sum as may be due upon the undertaking, by rules and attachments, as in cases of contempt.”²⁰

¹⁸ Rev. Laws 1910, § 4850.

¹⁹ Rev. Laws 1910, § 4856.

²⁰ Rev. Laws 1910, § 4857.

§ 1814. Possession by sheriff

"The court may order the sheriff to repossess himself, for the purpose of selling it, of any of the attached property, which may have passed out of his hands, without having been sold or converted into money; and the sheriff shall, under such order, have the same power to take the property as he would have under an order of attachment."²¹

§ 1815. Confirming or setting aside sale—Form of order

Where attached realty is levied upon and duly appraised as required by law, and the attachment lien is foreclosed and the realty sold under an order of sale without further appraisal, the sale is void and should be set aside.²²

Where real estate is attached, and after judgment for plaintiff sold to him and return thereof made by the sheriff, such sale may upon application of plaintiff be confirmed, and a sheriff's deed issued at any time thereafter, if no objection by defendant in the action is or has been made to the sale or confirmation.²³

ORDER CONFIRMING SALE OF ATTACHED PROPERTY

(Caption.)

Now on this ——— day of ———, 19—, comes on for hearing the motion of the plaintiff, A. B., for an order of court confirming the sale of the property heretofore levied on under an order of attachment herein, said sale being made by the sheriff of ——— county, state of Oklahoma, on the ——— day of ———, 19—, under an order of sale issued out of the office of the court clerk of said court under the date of ———, 19—; said sale being of the following described property, to wit: (Describing same.)

And the court, having examined the proceedings of said sheriff under said order of sale, finds that the same have been performed in all respects in conformity to law; and, no exceptions being filed nor objections made, it is ordered and adjudged by the court that the said sale and proceedings be and the same are hereby approved and confirmed, and it is ordered that the said sheriff of ——— coun-

²¹ Rev. Laws 1910, § 4858.

²² *Given v. Owen* (Okl.) 175 P. 345; Rev. Laws 1910, §§ 4819, 4856, 5161.

²³ *Knox v. Doty*, 81 Kan. 138, 105 P. 437, 135 Am. St. Rep. 351; *Menke v. Spaulding*, 81 Kan. 904, 106 P. 1009,

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ty, Oklahoma, make and execute to said purchaser at said sale a good and sufficient deed for the property sold. ———, Judge.

§ 1816. Surplus property

A creditor holding a chattel mortgage, as security for his debt, upon property belonging to the debtor, can maintain an attachment against the same and other property of the debtor; but if the mortgage is ample security to pay the claim in full, together with the interest and costs, the court may, upon proper application therefor, discharge so much of the property not included in the mortgage as is not necessary to satisfy the claim.²⁴

§ 1817. Interest conveyed

A sheriff's deed, under an order of sale of attached real estate, conveys all the title possessed by the judgment debtor when the order of sale was issued or at any time thereafter.²⁵

DIVISION VI.—DISCHARGE OF ATTACHMENT

§ 1818. Form of remedy

"The defendant may, at any time before judgment, upon reasonable notice to the plaintiff, move to discharge an attachment, as to the whole or part of the property attached."²⁶

The existence of the grounds stated in an affidavit for an attachment may be denied, and put in issue in a motion to discharge attachment.²⁷

A motion, denying that the affidavit for attachment is true, may be made at any time before judgment.²⁸

MOTION TO DISCHARGE ATTACHMENT

(Caption.)

Now comes the above named defendants, by X. Y., their attorney, and move the court to dissolve the attachment issued in said above

²⁴ State Bank of Clyde v. Mottin, 28 P. 200, 47 Kan. 455.

²⁵ Knox v. Doty, 81 Kan. 138, 105 P. 437, 135 Am. St. Rep. 351; Menke v. Spaulding, 81 Kan. 904, 106 P. 1009.

²⁶ Rev. Laws 1910, § 4862; Smith-Frazer Boot & Shoe Co. v. Derse, 21 P. 167, 41 Kan. 150; McComb v. Watt, 39 Okl. 412, 135 P. 361.

A motion to discharge an attachment is proper practice. McComb v. Watt, 39 Okl. 412, 135 P. 361.

²⁷ Millus v. Lowrey Bros., 63 Okl. 261, 164 P. 663.

²⁸ Doggett v. Bell, 4 P. 292, 32 Kan. 298.

entitled cause, and to discharge the property attached therein under said writ of attachment, and for grounds of said motion say:

1. That no bond for costs, or security therefor, or poverty affidavit, was filed in said court, at the commencement of said action, as provided by law.

2. That the plaintiff in said action is and was at the commencement thereof, nonresident of the state of Oklahoma.

3. That said claim sued on in said action was not at the commencement of said action, and is not now, and never has been, just, due, and unpaid, but is founded wholly upon a tort.

4. That said defendants were not, at the filing of said affidavit for attachment, nor at any time since, and are not now, nonresidents of the state of Oklahoma, but have, at all times since, and for a number of days prior to the filing of the affidavit for attachment, and are now, residents of the county of O., in the state of Oklahoma.

5. That the defendants were not, at the issuance of said writ of attachment and the filing of the affidavit therefor, and at no time have they, or either of them been, or are they now, about to convert their property, or any part thereof, into money for the purpose of placing it beyond the reach of their creditors.

6. That at no time prior to the issuance of said writ of attachment, nor since, nor have they now, any property which they conceal.

7. That at no time, prior to the issuance of said writ of attachment, at said time, nor since, nor have they now, any rights in action which they conceal.

8. That at the time of filing said affidavit for attachment, and no time prior thereto, nor at any time since, have they been, nor are they now, about to assign, remove, and dispose of any part of their property with intent to hinder, delay, and defraud their creditors or any of them.

9. That at no time prior to the issuance of said writ of attachment, nor at any time since, have they assigned, removed, and disposed of any part of their property with intent to hinder, delay, and defraud their creditors or any of them.

10. That all of the grounds set forth in the affidavit for attachment are, and were at the time of the making and filing thereof, false and wholly untrue.

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Wherefore said defendants move the court to dissolve the attachment levied in said above entitled action, and to discharge the property in said action attached from the lien and levy of attachment, and that they have their costs in this behalf, and such other and further relief as may seem to the court just and equitable.

X. Y., Attorney for Defendants.

(Verification.)

§ 1819. Grounds—In general

Failure to state a cause of action,²⁹ falsity of allegations,³⁰ pendency of another attachment action between the same parties for the same cause,³¹ and the like, are grounds for discharging an attachment.

§ 1820. — Irregular proceedings

An affidavit and publication notice which are void are ground for discharge of an attachment.³²

While an affidavit for publication should be filed separately from the affidavit for attachment, the supreme court will not hold it error for the trial court to refuse to dissolve an attachment where the affidavit for attachment may be held good also as an affidavit for publication.³³

²⁹ If the petition in an action by attachment does not state a cause of action against defendant, the court, in the absence of amendment of the petition, or if it is incapable of amendment, is justified in dissolving an attachment before a final hearing on the merits. *Carnahan v. Gustine*, 37 P. 594, 2 Okl. 399.

³⁰ Upon a motion to dissolve an attachment, the judge may inquire concerning the facts alleged as grounds for the attachment; and, if it be established that such allegations are not true, the attachment will be dissolved. *Doggett v. Bell*, 4 P. 292, 32 Kan. 298.

³¹ Where there is another action pending between the same parties for the same cause, in which an order of attachment has been issued, and the property of defendant levied on, such pending action and attachment proceedings are sufficient grounds for a district judge to discharge the attachment. *Smith-Frazier Boot & Shoe Co. v. Derse*, 21 P. 167, 41 Kan. 150.

³² In suit against a nonresident, in which attachment issued at time of filing petition, an affidavit for service by publication was also filed on the same date, and the first publication made within 60 days from such filing, but the affidavit and publication notice were so defective as to be void. Held, that a motion to discharge the attachment and dismiss, made more than eight months after such filing and return of the attachment, was properly sustained, as suit had not been commenced. *Ballew v. Young*, 103 P. 623, 24 Okl. 182, 23 L. R. A. (N. S.) 1084.

³³ *Raymond v. Nix*, 49 P. 1110, 5 Okl. 656.

Where a bond is irregular, and leave is given to file a new bond, it is error to discharge the attachment.³⁴

§ 1821. Jurisdiction

A judge has power at chambers to discharge attached property from the lien of the attachment.³⁵

§ 1822. Persons who may move

A mortgagor in possession of personalty may move to discharge an attachment.³⁶

An agreement after attachment that the sheriff shall sell summarily, and retain or deposit the proceeds to abide final judgment, precludes defendant from insisting on a dissolution of the writ.³⁷

§ 1823. Proceedings on motion

A motion to discharge an attachment, which contains an explicit denial of the allegations in plaintiff's affidavit for attachment, is sufficient to raise an issue as to the truth of the grounds laid for attachment, and a verification of the motion or of the allegations of denial is not essential.³⁸

Defendant, on the hearing of his motion, may not strike out the

³⁴ Where a bond is conditioned as provided by Wilson's Rev. & Ann. St. 1903, § 4367, instead of as required by Act March 15, 1905 (Laws 1905, p. 325, c. 28), amendatory thereof, it was error to discharge the attachment after giving leave to file a new bond, such as required. *Wells v. McCrady*, 108 P. 605, 24 Okl. 295.

³⁵ *Moffett v. Boydston*, 46 P. 24, 4 Kan. App. 406.

A motion to dissolve an attachment and to have the property restored to the defendant may be heard and disposed of by a judge at chambers, Wilson's Rev. & Ann. St. 1903, § 3307, granting such power, not being violative of the organic act of the Territory of Oklahoma (Act Cong. May 2, 1890, c. 182, § 9, 26 Stat. 85), relating to the judicial power. *Bash v. Howald*, 112 P. 1125, 27 Okl. 462; Rev. Laws 1910, § 5318.

³⁶ The fact that a debtor has mortgaged his property, which is subsequently attached, will not preclude him from moving for a discharge of the attachment or of the garnishees. *P. Cox Mfg. Co. v. August*, 32 P. 636, 51 Kan. 59.

A mortgagor of personalty, who retains possession of it, has such an interest in the property as will enable him to move for the dissolution of an attachment levied upon the property by a third person in an action against the mortgagor. *Hosea v. McClure*, 22 P. 317, 42 Kan. 403; *Id.*, 22 P. 319, 42 Kan. 408; *Henry v. Same*, 42 Kan. 408, 22 P. 319; *Symms Grocer Co. v. Lee*, 9 Kan. App. 574, 58 P. 237.

³⁷ *Collier v. Gannon*, 137 P. 1179, 40 Okl. 275.

³⁸ *Wm. W. Kendall Boot & Shoe Co. v. August*, 32 P. 635, 51 Kan. 53.

statement from the motion, verified by him, that he did not own the attached property, which was sufficient to defeat the motion.³⁹

Where defendant enters a general appearance and no irregularity in the issue and service is insisted upon, such irregularities are waived and cannot be raised in a subsequent motion to dissolve for want of jurisdiction.⁴⁰

§ 1824. Affidavits of defendant

Where a motion is not supported by an affidavit, the court, when such motion is called for trial, may allow defendant to file an affidavit denying the allegations in the attachment affidavit.⁴¹

The defendant need not state in his notice that affidavits will be used in support of the motion, but it is better practice to do so.⁴²

The sufficiency of a traversing affidavit should be tested by motion or by demurrer and not by mere objection to evidence.⁴³

§ 1825. Affidavits of plaintiff

"If the motion be made upon affidavits, on the part of the defendant, or papers and evidence in the case, but not otherwise, the

³⁹ *People's Nat. Bank v. Morris*, 80 P. 586, 71 Kan. 849.

⁴⁰ In an action on an account not due, defendants made a general appearance, and filed a motion to dissolve the attachment for the reason that the grounds set forth in the affidavit were false. This motion was overruled, and the facts necessary to give jurisdiction established. In the motion to dissolve, no irregularity in the issue and service of the order of attachment was stated or insisted upon. Held, that all questions of irregularity were waived and could not be raised on a subsequent motion to dissolve for want of jurisdiction. *Hillyer v. Biglow*, 28 P. 150, 47 Kan. 473. Where a motion by the statutory assignee of a defendant in attachment to dissolve the attachment has been overruled, a similar motion made without leave of court by his successor is properly stricken from the files. *Id.*

⁴¹ *Dunn v. Claunch*, 76 P. 143, 13 Okl. 577.

⁴² Defendant in attachment moved to dissolve because the grounds laid for the same were untrue, and at the same time filed an affidavit to that effect, but he did not state in his notice to plaintiff that affidavits would be used on the hearing of the motion, as required by Civ. Code, § 534. At the time set for the hearing plaintiff asked and obtained a continuance, to enable him to procure evidence to resist the motion and affidavit. At the final hearing the affidavit was admitted in evidence over the objection of plaintiff. Held, that defendant's failure to state in his notice that affidavits would be used on the hearing did not render the reception of the affidavit prejudicial error. *Meyer Bros. Drug Co. v. Malm*, 47 Kan. 762, 28 P. 1011.

⁴³ *First Bank of Texola v. Terrell*, 44 Okl. 719, 145 P. 1140, Ann. Cas. 1917A, 681.

plaintiff may oppose the same by affidavits or other evidence, in addition to that on which the order of attachment was made.”⁴⁴

§ 1826. Hearing

On a motion to dissolve an attachment, the burden is on plaintiff to justify the attachment and to produce any evidence in his possession tending to justify it.⁴⁵

The issues made by defendant's motion to discharge an attachment traversing the existence of the grounds alleged in the affidavit are triable to the court, but a defendant who does not insist upon a decision by the judge, after judgment is entered on a verdict sustaining the attachment, will be deemed to have waived the determination thereof by the judge instead of by a jury. On a motion to discharge an attachment traversing the existence of alleged grounds therefor, it is error to submit the issue to a jury for general verdict, instead of for special advisory findings of fact, and to base a judgment upon such general verdict.⁴⁶

A judge can continue the hearing of a motion, even after announcing his decision, upon the application of the party against whom the decision was made.⁴⁷

Only the truth of the affidavit on which the writ issued should be tried, and, for that purpose, evidence, either oral or by affidavit, may be introduced.⁴⁸

Depositions may be used in evidence, though taken upon insufficient notice. They are the written declarations of the witnesses, and fulfill the statutory definition of affidavits, irrespective of any question of notice.⁴⁹

Where an attachment is procured on the ground that defendant is a nonresident, and a motion to dissolve, supported by affidavit, is filed, the question presented is purely one of fact, dependent on the evidence introduced on the motion to dissolve.⁵⁰

⁴⁴ Rev. Laws 1910, § 4863.

⁴⁵ *Brown v. Williams*, 57 Okl. 699, 157 P. 311.

⁴⁶ *Millus v. Lowrey Bros.*, 63 Okl. 261, 184 P. 663, L. R. A. 1918B, 336.

⁴⁷ *Hanna v. Barrett*, 18 P. 497, 39 Kan. 446.

⁴⁸ *Carnahan v. Gustine*, 37 P. 594, 2 Okl. 399.

⁴⁹ Evidence on a motion to discharge from attachment the proceeds of a homestead, held not to show a purpose, formed and adhered to, to devote such proceeds to the purchase of a new home. *Milberger v. Veselsky*, 155 P. 957, 97 Kan. 433.

⁵⁰ *Hanna v. Barrett*, 18 P. 497, 39 Kan. 446.

⁵⁰ *Williams v. Farmers' Gin & Grain Co.*, 73 P. 269, 13 Okl. 5.

On the trial of the issue presented by a motion to discharge an attachment, the court need not inquire into the merits of the action;⁵¹ but, if the grounds of attachment set forth in the affidavit incidentally refer to allegations of the petition, that does not compel it to refuse consideration of the motion.⁵²

An objection to evidence on a motion to dissolve an attachment, because the motion, not previously objected to, does not traverse the grounds laid in the attachment affidavit, will be overruled, unless the traversing affidavit is wholly insufficient.⁵³

§ 1827. — Evidence

Where an affidavit for attachment is in the language of the statute, and unaccompanied by any facts showing it to be true, and defendant by affidavit positively denies the existence of the facts stated, the burden is on plaintiff to establish the same.⁵⁴ If defendant, notwithstanding his affidavit denying the existence of any grounds of attachment, introduces his evidence without objection, he waives any error of the court in not dismissing the attachment for want of evidence by plaintiff.⁵⁵

§ 1828. — Burden of proof

On a motion to dissolve, controverting the truthfulness of the grounds alleged, supported by an affidavit of the defendant, an issue is joined on the question of attachment, and the burden of proof is on the plaintiff to support his affidavit by the preponderance of the evidence.⁵⁶

⁵¹ McComb v. Watt, 39 Okl. 412, 135 P. 361.

Where the ground of an attachment, that the defendant has made a general assignment of his property with intent to defraud, is denied, and a motion made to dissolve, the validity of the assignment cannot be questioned, but only the fraudulent intent with which it was made. McPike v. Atwell, 8 P. 118, 34 Kan. 142.

⁵² Carnahan v. Gustine, 37 P. 594, 2 Okl. 399.

⁵³ First Bank of Texola v. Terrell, 44 Okl. 719, 145 P. 1140, Ann. Cas. 1917A, 681.

⁵⁴ Dunn v. Claunch, 76 P. 143, 13 Okl. 577.

⁵⁵ Dunn v. Claunch, 76 P. 143, 13 Okl. 577.

Where in an action an attachment was issued on an affidavit charging that defendant was about to remove and dispose of his property to defraud his creditors, an order dissolving the attachment for insufficiency of the evidence to sustain the affidavit held proper. Board of Com'rs of Morton County v. Wilson, 128 P. 179, 88 Kan. 309.

⁵⁶ Williams v. Farmers' Gin & Grain Co., 73 P. 269, 13 Okl. 5; Becker v. Langford, 17 P. 648, 39 Kan. 35.

On the hearing of a motion to dissolve an attachment, which is supported

§ 1829. Dissolution—In general

An attachment remains valid as against intervening attaching creditors, notwithstanding the subsequent amendment of the petition increasing the amount claimed, and the taking out of a second summons and order of attachment.⁵⁷

Where a judgment for defendant in attachment is reversed, and later a judgment is rendered for plaintiff, the discharge of the attachment by the first judgment is provisional, and a sale of the attached property under the second judgment is proper.⁵⁸

§ 1830. — Death of defendant

"From the time of the issuing of the order of attachment, the court shall be deemed to have acquired jurisdiction and to have control of all subsequent proceedings under the attachment; and if, after the issuing of the order, the defendant, being a person, should die, or a corporation, and its charter should expire by limitation, forfeiture or otherwise, the proceedings shall be carried on; but in all such cases, other than where the defendant was a

by an affidavit of defendant denying the grounds for the attachment, the burden of proof is on plaintiff, and where he refuses to offer evidence the attachment should be at once dissolved. Though this is not done, but defendant is permitted to introduce evidence, and introduces testimony to which no credit can be given, it is still the duty of the court to sustain the motion to dissolve. *Mitchell v. Carney*, 21 P. 158, 41 Kan. 139.

The burden is on the attaching creditor to prove intent to defraud, where the ground of attachment is that defendant has disposed of his property with such intent. *First State Bank of Durant v. Smith*, 140 P. 150, 43 Okl. 320.

Where defendants deny the grounds alleged for attachment, and move to discharge the same, the burden is on plaintiff to prove the charges of dishonesty and fraud alleged against defendants. *Champion Mach. Co. v. Updyke*, 29 P. 573, 48 Kan. 404.

On a motion to discharge plaintiff's attachment, plaintiff has the burden of proving the fraud on which he relies as ground for the attachment. *McPike v. Atwell*, 8 P. 118, 34 Kan. 142.

A motion was made by the assignee of defendant to discharge an attachment on the ground that plaintiff's affidavit was untrue. The motion was supported by the affidavit of the assignee, sworn to upon information and belief. At the hearing of the motion an affidavit of defendant, specifically denying the affidavit of plaintiff for attachment, was introduced in evidence. Held, that the burden of proof was on plaintiff. *Wichita Wholesale Grocery Co. v. Records*, 19 P. 346, 40 Kan. 119; *Cahn v. Same*, 19 P. 349, 40 Kan. 123.

⁵⁷ *Standard Implement Co. v. Lansing Wagon Works*, 48 P. 638, 58 Kan. 125.

⁵⁸ *McLain v. Parker*, 141 P. 243, 92 Kan. 561.

foreign corporation, his legal representatives shall be made parties to the action.”⁵⁹

§ 1831. — Security to discharge

“If the defendant, or other person on his behalf, at any time before judgment, cause an undertaking to be executed to the plaintiff, by one or more sureties, resident in the county, to be approved by the court, in double the amount of the plaintiff’s claim as stated in his affidavit, to the effect that the defendant shall perform the judgment of the court, the attachment in such action shall be discharged, and restitution made of any property taken under it or the proceeds thereof. Such undertaking shall, also, discharge the liability of a garnishee in such action, for any property of the defendant in his hands.”⁶⁰

“The undertaking mentioned in the last section may, in vacation, be executed in the presence of the sheriff having the order of attachment in his hands, or after the return of the order, before the clerk, with the same effect as if executed in court, the sureties in either case to be approved by the officer before whom the undertaking is executed.”⁶¹

§ 1832. Effect of dissolution

The judgment of a court vacating an attachment is not an adjudication of the merits of the action.⁶²

Where an attachment on a note not due is dissolved because the grounds therefor are not true, the action is properly dismissed.⁶³

Where attaching creditors dismiss their attachment as to the mortgagee of the property after the latter has replevied the same, they cannot assert that replevin was not maintainable by him, because begun before the attachment proceedings were determined.⁶⁴

⁵⁹ Rev. Laws 1910, § 4860.

⁶⁰ Rev. Laws 1910, § 4851.

A dissolving bond given and approved pursuant to Mansf. Dig. § 337, in proceeding under section 4453 et seq., discharged the attachment and rendered unnecessary proofs of the grounds for attachment. *Lee v. Fulsom*, 44 Okl. 589, 145 P. 808.

⁶¹ Rev. Laws 1910, § 4852.

⁶² *Stapleton v. Orr*, 23 P. 109, 43 Kan. 170.

⁶³ *Voorhis v. Michaelis*, 25 P. 592, 45 Kan. 255.

⁶⁴ *Hasle v. Connor*, 37 P. 128, 53 Kan. 713.

§ 1833. Judgment—Damages

In an action on a bond given to secure the release of attached property, the condition of which is that the defendant will perform the judgment of the court in said action, the amount of the judgment and costs, with interest, is *prima facie* the measure of damages.⁶⁵

"If judgment be rendered in the action for the defendant the attachment shall be discharged and the property attached, or its proceeds, shall be returned to him. If the attachment or garnishment shall be discharged on motion prior to final judgment, the defendant may, upon proper supplemental answer, recover his damages, as in other cases for such wrongful attachment or garnishment."⁶⁶

After making an order for the discharge of an attachment, a judge of a district court, at chambers, on application of the plaintiff, and a showing that such order was obtained by perjury and fraud, may, after notice to the adverse party, grant a rehearing on such motion, to ascertain whether the former ruling was induced by such unlawful means; and, if he shall so determine, he may rescind the order dissolving the attachment, and overrule the motion therefor.⁶⁷

An order made by a judge at chambers discharging an attachment levied by one assuming to act as an officer, but not qualified to make such levy, which order is made after the plaintiff has filed a release of the attachment, and is made in the absence of counsel for plaintiff, and without contest, is not an adjudication against the right of the plaintiff to cause the property to be seized under a subsequent order of attachment based on the original affidavit in attachment filed at the commencement of the action.⁶⁸

Where a journal entry on a motion to dissolve an attachment is to the effect that, after hearing the allegations of the pleading, the attachment is dissolved, the contention of defendant in attachment that the court heard evidence, and did not discharge the property because of insufficiency of the petition, cannot be maintained.⁶⁹

⁶⁵ *Winton v. Myers*, 58 P. 634, 8 Okl. 421.

⁶⁶ Rev. Laws 1910, § 4855.

⁶⁷ *Guernsey v. First Nat. Bank*, 65 P. 250, 63 Kan. 203.

⁶⁸ *J. V. Brinkman Co. Bank v. Gustin*, 66 P. 990, 63 Kan. 753.

⁶⁹ *Brown v. Cairns*, 65 P. 231, 63 Kan. 882.

§ 1834. Liability on bond

Where defendant in attachment gave a bond to secure the property conditioned that he would perform the judgment, his failure to pay the judgment rendered constitutes a breach of the bond;⁷⁰ and the obligor is absolutely liable thereon for the amount recovered, whether the attachment was rightfully or wrongfully issued.⁷¹

DIVISION VII.—CLAIMS BY THIRD PERSONS**§ 1835. Ownership—Liens**

Where property has been levied upon under an order of attachment, any person claiming to be the owner thereof, and interested in discharging the property attached, although he is not a party to the original action, may move the court to discharge the attachment.⁷²

Where the rights of a mortgagee to personal property have been interfered with by attachment proceedings, such mortgagee has a right to interplead.⁷³

Where real estate is attached, the holder of a mortgage thereon may interplead.⁷⁴

⁷⁰ *Winton v. Myers*, 58 P. 634, 8 Okl. 421.

⁷¹ *Moffitt v. Garrett*, 100 P. 533, 23 Okl. 398, 32 L. R. A. (N. S.) 401, 138 Am. St. Rep. 818.

⁷² *Harding v. Guaranty Loan & Trust Co. of Kansas City*, 43 P. 835, 3 Kan. App. 519; *Miller v. Campbell Commission Co.*, 74 Pac. 507, 13 Okl. 75.

Where land has been levied on under an attachment, any person claiming to be the owner thereof may move the court to discharge the attachment, though he is not a party to the original action. *Dearborn v. Vaughan*, 26 P. 1038, 46 Kan. 506.

An attachment having been levied on certain property, A. claimed the same, and a bank intervened, claiming the property on a mortgage. Held, that the claimant was not entitled to have the attachment quashed, because the debt to the bank had not been paid or tendered before attachment, under Comp. Laws 1909, § 4432; such right belonging to the bank alone. *State v. Parks*, 126 P. 242, 34 Okl. 335.

⁷³ *Miller v. Campbell Commission Co.*, 74 P. 507, 13 Okl. 75.

⁷⁴ *Bodwell v. Heaton*, 18 P. 901, 40 Kan. 36.

Where property is attached, a mortgagee, claiming to be in possession of the goods at the time the levy is made, may move to discharge the attached property. *Symms Grocer Co. v. Lee*, 58 P. 237, 9 Kan. App. 574.

Where land is attached, and the owner makes default, a mortgagee may interplead and ask that the mortgage purporting to be a lien on a different piece of land be reformed, on the ground of mutual mistake in the description,

Persons who are not parties to an action in which a wrongful attachment is issued, but who, in other actions, have procured an attachment of the same property, are entitled to come into court and move to discharge the property from the wrongful attachment.⁷⁵

Where goods sold are actually delivered to the purchaser, notice by him that he will not accept them, does not reinvest the seller with the title, as against the purchaser's creditors, in the absence of any steps by the seller to reclaim them until after their seizure on attachment as the property of the purchaser.⁷⁶

Where an insolvent debtor has made an assignment for the benefit of creditors generally, and before the expiration of the 20 days limited for filing the inventory the property is attached in actions by certain of the creditors, and sold by the sheriff, and, after judgment in the attachment proceedings, the proceeds of the sale are in the hands of the court awaiting distribution, the general creditors of the assignor may interplead in said attachment action, asking the court to decree such proceeds a trust fund to be administered in equity, and distributed pro rata among all the creditors of the assignor, and for the appointment of a receiver to administer such trust.⁷⁷

so as to be a lien on the property attached, as intended by both parties. *Bodwell v. Heaton*, 18 P. 901, 40 Kan. 36.

That a forthcoming bond was given by defendant in attachment, to whom the property was delivered, which bond was not signed nor procured to be given by a mortgagee of the property, will not defeat his right to intervene in the attachment proceedings. *Meegan v. Pettibone-Gentry Co.*, 118 P. 64, 85 Kan. 536. The fact that a mortgagee of attached property obtained peaceable possession from one of the defendants, after a forthcoming bond was given by such defendant, will not prevent a hearing on his interplea, filed about the same time possession was obtained. *Id.*

⁷⁵ *Dolan v. Topping*, 32 P. 1120, 51 Kan. 321.

Where a judgment creditor has levied on personal property subject to the attachment of another party, he is entitled to move to discharge the property from the attachment, if the writ was improperly obtained. *Bank of Santa Fe v. Haskell County Bank*, 38 P. 485, 54 Kan. 375.

⁷⁶ *Colcord v. Dryfus*, 1 Okl. 228, 32 P. 329.

⁷⁷ *Hockaday v. Drye*, 54 P. 475, 7 Okl. 288.

(1706)

FORM OF INTERPLEA

(Caption.)

Comes now A. B., by his attorney, X. Y., leave of court having first been obtained, and interpleads herein, and for cause of action alleges and states:

1. That certain property in the hands of M. N. has been attached by the plaintiff in the above action as the property of the defendant; that this interpleader claims all of the property so attached, being described as follows: (Describing same.)

2. That interpleader's claim to said property arises as follows: (Setting forth fully facts upon which claim to property is based.)

Wherefore, this interpleader prays that said attachment proceedings be dismissed, and that said above described property be released from said attachment, and that this interpleader have judgment therefor, for its costs in this action, and for such other relief as may be proper.

X. Y., Attorney for Interpleader.

(Verification.)

§ 1836. Grounds for contest

A party who intervenes and claims the property, can attack the proceedings for only such irregularities as would render the same subject to attack in an independent collateral action.⁷⁸

§ 1837. Estoppel—Mistake

Where personalty in the possession of a third person is attached as the property of defendant, and such third person procures its return by giving a forthcoming bond, he is afterwards, as between himself and the officer or plaintiff in the action, estopped from asserting paramount title in himself, or that the property did not belong to defendant;⁷⁹ but as between the attachment debtor and

⁷⁸ Ballew v. Young, 103 P. 623, 24 Okl. 182, 23 L. R. A. (N. S.) 1084; Rev. Laws 1910, § 4701.

A plea whereby an interpleader attempted to set up a landlord's lien under Rev. Laws 1910, §§ 3809, 3810, on attached property held insufficient to show that the interpleader was entitled to the property. Lee v. Lowery, 140 P. 1175, 42 Okl. 148.

⁷⁹ Case v. Steele, 8 P. 242, 34 Kan. 90.

Where personal property in the possession of a third person is attached as the property of another, and such third person procures a return of the property to him by giving to the officer a forthcoming bond for the redelivery of the property or its appraised value to the officer, such third person is after-

intervener, the intervener's bond for its own benefit conditioned that property or its appraised value in money be forthcoming to answer judgment does not estop it from demanding an adjudication of ownership.⁸⁰

Where no evidence is offered to the contrary, the trial court is justified in sustaining a motion made by a stranger to the action to discharge land from an attachment on the ground that he is the real owner where the motion is supported by affidavits of the claimant and defendant that prior to the levy defendant sold the land and executed deeds to claimant which by mistake described the wrong property.⁸¹

§ 1838. Proceedings

Where one who is not a party to an action filed a motion to discharge the attachment therein, on the ground that the property attached belonged to movant, the admission of evidence, on the hearing of the motion, which relates solely to the merits of the main action, is harmless, since it could not have influenced the judge in his decision as to the ownership of the property.⁸²

While it was proper to entertain a motion for the immediate discharge of property, seized in attachment proceedings as that of defendant, when it was claimed by another, who interpleaded, if the showing upon the motion disclosed a substantial question as to ownership between defendant and interpleader, the motion should be overruled, as that question should be determined upon a fuller hearing than is possible upon an ex parte hearing upon affidavits.⁸³

wards, as between himself and the officer, or the attachment plaintiff, estopped from asserting paramount title in himself. *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 60 P. 249, 9 Okl. 353.

⁸⁰ *Smith v. Eby*, 104 Kan. 178, 178 P. 405.

Where goods attached as the property of defendant are released and returned on a forthcoming bond executed by defendant and a third person, such third person is thereafter estopped from asserting a lien paramount to that of the attachment. *Case v. Schultz*, 31 Kan. 96, 1 P. 269. Where property is attached, and defendant and the mortgagee thereof give a forthcoming bond to plaintiff for the property, under Civ. Code, § 199, they are not estopped from setting forth a claim to the property paramount to the attachment lien, when the property has not been returned under such bond. *Id.*

⁸¹ *O'Malley v. Townsley*, 117 P. 1022, 85 Kan. 489.

⁸² *Moffett v. Boydston*, 46 P. 24, 4 Kan. App. 406.

⁸³ *Western Grocer Co. v. Alleman*, 106 P. 997, 81 Kan. 900, 27 L. R. A. (N. S.) 620, 135 Am. St. Rep. 398, denying rehearing, 106 P. 460, 81 Kan. 543, 27 L. R. A. 620, 135 Am. St. Rep. 398.

Where plaintiff brings attachment and levies on personalty, and other parties intervene adversely to each other, the purchase of the claim of plaintiff by one interpleader does not dispose of the claim of the other interpleader, and the case should proceed as to him.⁸⁴

No bond is by statute required to be given by an interpleader before filing his interplea setting up his claim to property attached.⁸⁵

Where a third party files a denominated "interplea in attachment" claiming title and right to possession of attached property, he asserts a right in the nature of a petition in replevin and not a motion for discharge of attachment.⁸⁶

One claiming to be the owner of property which has been attached, although not a party to the proceeding, may move the court to discharge the attachment; and the fact that after the motion to discharge was filed he began an action of replevin, and obtained the possession of the attached property under the writ issued in that action, will not prevent the hearing and decision of the motion to discharge.⁸⁷

Where, in an action to recover money, attachment has been levied on land, and after judgment the land is sold, the district court has jurisdiction to entertain a motion by a stranger to the suit holding title to such land to release the land from the levy and to set aside the sale.⁸⁸

§ 1839. Trial

The issues made by the interpleader in attachment should be tried and determined as like issues between plaintiff and defendant.⁸⁹

The burden of proof is generally on a purchaser who bought of

⁸⁴ *Miller v. Campbell Commission Co.*, 74 P. 507, 13 Okl. 75.

⁸⁵ *Willson's Rev. & Ann. St.* §§ 4244, 4387, providing for an interpleader in attachment, do not require the giving of a bond. *Miller v. Campbell Commission Co.*, 74 P. 507, 13 Okl. 75.

⁸⁶ *Millus v. Lowrey-Bros.*, 63 Okl. 261, 164 P. 663, L. R. A. 1918B, 336; *Rev. Laws* 1910, §§ 4701, 5310.

⁸⁷ *Wm. W. Kendall Boot & Shoe Co. v. August*, 32 P. 635, 51 Kan. 53.

⁸⁸ *Knight v. Rhoades*, 61 P. 869, 10 Kan. App. 38.

⁸⁹ Where there are several claiming liens against attached property, the issues raised between interpleaders should be tried and determined, and the property awarded to the rightful claimant. *Miller v. Campbell Commission Co.*, 74 P. 507, 13 Okl. 75.

a defendant before the levy and who institutes an independent action for property, but, if an attaching creditor admits purchase and charges fraud, he has the burden.⁹⁰

DIVISION VIII.—WRONGFUL ATTACHMENT

§ 1840. Grounds of liability

In an action on an attachment bond, the order discharging the attachment is conclusive that the attachment was wrongfully obtained,⁹¹ if such attachment was discharged on motion prior to final judgment,⁹² and actual damages may be recovered, though the writ was not sued out maliciously or without probable cause.⁹³

A seizure of property by an officer under a void attachment is a naked trespass as against a stranger who is in rightful possession thereof.⁹⁴

§ 1841. Wrongful levy

The plaintiff in an action wherein a writ of attachment is issued which is wrongfully levied on the goods of another is equally liable with the officer who levies if he directed the levy, ratified, or knowingly received the benefits thereof.⁹⁵

⁹⁰ Wells v. Guaranty State Bank, 56 Okl. 688, 156 P. 896.

⁹¹ Bash v. Howald, 59 Okl. 116, 157 P. 1154; Schwartzberg v. Central Ave. State Bank, 115 P. 110, 84 Kan. 581.

⁹² Under Rev. Laws 1910, § 4855, damages may be recovered for a wrongful attachment only when it has been discharged on motion prior to final judgment. Scott v. Waples-Painter Co. (Okl.) 176 P. 754.

⁹³ Overton v. Sigmon Furniture Mfg. Co., 50 Okl. 531, 151 P. 215; Rev. Laws 1910, § 4814.

⁹⁴ Hagar v. Haas, 71 P. 822, 66 Kan. 333.

⁹⁵ Stump v. Porter, 31 Okl. 157, 120 P. 639.

Where plaintiff in attachment directs a levy on property not belonging to the defendant, he is liable in trespass to the owner. Frick-Reid Supply Co. v. Hunter, 47 Okl. 151, 148 P. 83.

If a sheriff in serving attachment papers on a person, walked into his store, asked him for his key, which such person surrendered, and then told him to take his cash and get out, and followed him out and locked the door, such act constituted a taking of everything in the store, and rendered the plaintiff in attachment responsible for anything unlawfully taken. Schwartzberg v. Central Ave. State Bank, 115 P. 110, 84 Kan. 581.

It is no defense to an action for entering a building used as a hotel, ejecting plaintiff, destroying his business and converting his goods, that defendant was acting under an attachment against plaintiff to recover a debt where the attachment was dissolved. Wellington v. Spencer, 132 P. 675, 37 Okl. 461, 46 L. R. A. (N. S.) 469.

Where defendant notifies the plaintiff and the attaching officer that he claims the property as exempt, but makes no defense in the proceedings, and allows judgment to be entered, and the property sold without further protest, he has no right of action for wrongful attachment.⁹⁶

§ 1842. Actions—Defenses

That other attachments were levied on plaintiff's property at the time of defendant's wrongful levy was not available as a defense.⁹⁷

Where the sheriff stated to the owner that he intended to attach certain personalty, and the owner gave a forthcoming bond reciting an attachment, there was a sufficiently valid levy to render unavailable, in a subsequent action on the attachment bond, the defense that there was no valid levy.⁹⁸

The purchase by plaintiff of attached property, which because of its perishable nature the court ordered to be sold does not estop plaintiff from further asserting title and right of possession.⁹⁹

§ 1843. Pleading

In a petition for wrongful attachment, it is not necessary to aver want of probable cause or a determination of the action in which the attachment was issued.¹

An allegation that the attachment was abandoned and waived, and that the cause was fully disposed of, sufficiently shows dissolution of the attachment to warrant an action for damages.²

As against general demurrer, a petition seeking recovery for wrongful attachment held to sufficiently describe the attached property by alleging plaintiff's stock of merchandise was attached.³

⁹⁶ *Williamson v. Kansas & T. Coal Co.*, 50 P. 106, 6 Kan. App. 443.

⁹⁷ *Gregory Grocery Co. v. Beaton*, 62 P. 732, 10 Kan. App. 256.

⁹⁸ *Parish v. Van Arsdale-Osborne Brokerage Co.*, 140 P. 835, 92 Kan. 286, Ann. Cas. 1916B, 981.

⁹⁹ In a controversy as to the ownership and right of possession of attached property, the court, during the pendency of an action to recover the same from the attaching officer, ordered the sale of the property, because it was of a perishable nature, and plaintiff purchased at such sale. Held not to estop plaintiff from further asserting title and right of possession to the property. *Hagar v. Haas*, 71 P. 822, 66 Kan. 333.

¹ *Reliable Mut. Hall Ins. Co. v. Rogers*, 61 Okl. 226, 160 P. 914, L. R. A. 1917B, 350.

² *Overton v. Sigmon Furniture Mfg. Co.*, 50 Okl. 531, 151 P. 215.

³ *Overton v. Sigmon Furniture Mfg. Co.*, 50 Okl. 531, 151 P. 215.

Special damages for loss of profits on merchandise by wrongful attachment, not alleged in the petition, cannot be recovered.⁴

§ 1844. Set-off—Cross-action

In an action on a bond to procure an attachment for wrongfully suing out such writ, plaintiff in attachment may offset his judgment obtained in the action in which the attachment issued against the damages sustained by the wrongful attachment.⁵

A cross-action by defendant for wrongful attachment may be maintained in the same proceeding, where the attachment is discharged on motion prior to final judgment.⁶

§ 1845. Evidence

That plaintiff took a personal judgment for the debt does not impliedly negative the dismissal, dissolution, or abandonment of a wrongful attachment.⁷

Where one procures an order dissolving a wrongful attachment and for return of the property, and then permits it to be taken on execution by the plaintiff in attachment, the latter can show, in mitigation of damages for wrongful attachment, the sale on execution and application of the proceeds on the judgment.⁸

The inventory and appraisement made under the statute by the officer levying the attachment is competent evidence of the value of the goods, as against plaintiff in the attachment.⁹

The loss to one's business is one of the elements of damages, and evidence is admissible to show that a party could not resume business because of the attachment.¹⁰

Where the plaintiff owed defendant rent on a building occupied

⁴ *Bradley v. Borin*, 86 P. 977, 53 Kan. 628.

⁵ *Gerson v. Hanson*, 9 P. 230, 34 Kan. 590.

⁶ Prior to Rev. Laws 1910, § 4855, becoming effective, May 16, 1913, cross-action by defendant for wrongful attachment could not be maintained in same proceedings. *Selsor v. Arnbrecht*, 57 Okl. 732, 157 P. 908.

⁷ *Overton v. Sigmon Furniture Mfg. Co.*, 50 Okl. 531, 151 P. 215.

⁸ *Wade v. Ray* (Okl.) 168 P. 447, L. R. A. 1918B, 796.

⁹ *Green v. McCracken*, 67 P. 857, 64 Kan. 330.

¹⁰ In an action for wrongful attachment, where plaintiff testified that he could not resume business until the October following the attachment, the exclusion of his testimony as to why he could not resume business before that time, offered to show that the attachment broke him up in business and deprived him of his means of doing business, was error, since, if the attachment was wrongfully obtained, the loss to his business was one of the elements of

as a hotel and defendant sued him therefor, brought attachment, took possession of the personalty, and ejected plaintiff, and the attachment was dissolved in an action for damages, evidence that plaintiff was illegally selling liquor, of which defendant knew before he demanded rent, but of which he made no complaint, was properly excluded.¹¹

§ 1846. Dismissal

In an action on an attachment bond by the assignee of defendant in the attachment for damages against the sureties, where the principal on the undertaking, who is not made a party, has an unpaid judgment against defendant, obtained in the attachment action, greatly in excess of the alleged damages, and defendant in the attachment is insolvent, the principal may become a party and defend, and, after the principal has been made a party, and has filed a verified answer setting forth all the foregoing facts, the court commits no error in refusing to allow plaintiff to dismiss his action against the principal, so that he may proceed against the sureties alone.¹²

§ 1847. Damages

Damages recoverable on an attachment bond are compensatory, such as loss or depreciation of attached property, interest, costs, and expenses, including under the statute reasonable attorney's fees which are the proximate result of the attachment when order therefor has been wrongfully obtained.¹³ Punitive damages are not recoverable.¹⁴

his damages. *Schwartzberg v. Central Ave. State Bank*, 115 P. 110, 84 Kan. 581.

In a suit for damages for the wrongful retention of property levied on under an order of attachment after the order had been dissolved, evidence held sufficient to support a verdict and judgment for plaintiff. *James McCord Co. v. Johnson Grocery Co.* (Okl.) 172 P. 438.

¹¹ *Wellington v. Spencer*, 132 P. 675, 37 Okl. 461, 46 L. R. A. (N. S.) 469.

¹² *Gerson v. Hanson*, 9 P. 230, 34 Kan. 590.

¹³ *Van Sickle v. Franklin*, 62 Okl. 284, 162 P. 950.

An attorney's fee is recoverable as part of the damages in an action on an attachment bond, though it has not been previously paid by the obligee: he having incurred an obligation in good faith in a reasonable sum therefor. *Bash v. Howald*, 112 P. 1125, 27 Okl. 462.

Expenses necessarily incurred in procuring the dissolution of a wrongful

¹⁴ *Floyd v. Anderson*, 128 P. 249, 36 Okl. 308, 43 L. R. A. (N. S.) 788, Ann. Cas. 1915A, 348; *Rev. Laws 1910*, § 4814.

Only actual damages may be recovered against the attachment plaintiff, independent of an undertaking without allegation or proof of malice or want of probable cause.¹⁵

Where wrongful attachments have been dissolved, defendant therein is entitled to recover as damages any reasonable and necessary expenses in procuring dissolution, including reasonable attorney's fees, damages to merchandise seized, and any profits in his business if store had not been closed and goods removed under writs.¹⁶ Where property seized under an attachment wrongfully procured and later dissolved is stolen from the officer, the attaching plaintiff is liable for the damages.¹⁷

If exemplary or punitive damages are sought for wrongful attachment, both malice and want of probable cause must be alleged and proved.¹⁸

attachment and release of the property seized, including attorney's fees and costs of depositions, are recoverable by the owner in an action on the attachment bond. *Parish v. Van Arsdale-Osborne Brokerage Co.*, 140 P. 835, 92 Kan. 286, Ann. Cas. 1916B, 981. The depreciation in the value of the property and of the prices received, when they proximately result from an unlawful attachment, are recoverable in an action on the attachment bond. *Id.*

¹⁵ *Reliable Mut. Hall Ins. Co. v. Rogers*, 61 Okl. 226, 160 P. 914, L. R. A. 1917B, 350.

¹⁶ *Leasure v. Hughes* (Okl.) 178 P. 696.

Attorney fees paid to discharge an attachment wrongfully levied are a proper element of damage. *Gregory Grocery Co. v. Beaton*, 62 P. 732, 10 Kan. App. 256.

Where it appears, in an action brought by the plaintiff, as the owner of a stock of merchandise, to recover damages against a sheriff who has levied upon and taken possession of the stock in good faith as the property of the third party, that the plaintiff purchased back the goods from a stranger, who bid them off at the sheriff's sale, the measure of his damages is the sum thus paid (if not greater than the market value), and in addition such special damages as he has suffered from the unlawful taking. *Moxley v. Haskin*, 18 P. 820, 39 Kan. 653, following *Dodson v. Cooper*, 15 P. 200, 37 Kan. 346.

¹⁷ *Stonemetz v. Gallagher*, 60 Okl. 230, 158 P. 385.

¹⁸ *Reliable Mut. Hall Ins. Co. v. Rogers*, 61 Okl. 226, 160 P. 914, L. R. A. 1917B, 350.

Where it is alleged in a petition brought to recover damages therefor that an order of attachment was wrongfully, maliciously, and without just or probable cause, sued out; that a stock of goods was levied thereon and withheld from the owner for about two months, and that thereby his business was completely broken up,—it is not error on the part of the court, trying the case without a jury, to receive evidence showing the value of the stock on hand at the time of the attachment; that the owner was doing a business from \$6,000 to \$7,000 per annum, with a net profit of \$1,500 to \$1,600 a year; and that, on account of the attachment proceedings, his business was broken

§ 1848. Who liable

A corporation is liable for wrongfully, maliciously, and without just or probable cause, obtaining and levying an order of attachment upon personal property.¹⁹

An attaching creditor is liable for the act of a sheriff in levying on property not belonging to the debtor, when, after notice of the claim of a third person to the property, he causes it to be sold, and receives the proceeds of the sale.²⁰

Where plaintiff after an unlawful levy on a third person's property with knowledge of the facts, defends the wrongful act, he is liable as an original wrongdoer.²¹ If he wishes to avoid responsibility for a wrongful levy, he should, when the facts are brought to his attention, make known his disapprobation.²²

While an officer is not ordinarily to be treated as the agent of a person who causes the levy of an attachment, yet where the attachment is illegally issued and served, the officer is to be treated as acting for the person causing the levy, and the latter is liable for the wrongful levy.²³

up,—as in such a case vindictive or exemplary damages are allowable. *Western News Co. v. Wilmarth*, 6 P. 786, 33 Kan. 510, rehearing denied 8 P. 104, 34 Kan. 254.

¹⁹ *Western News Co. v. Wilmarth*, 6 P. 786, 33 Kan. 510, rehearing denied 8 P. 104, 34 Kan. 254.

²⁰ *H. D. Lee Mercantile Co. v. Chapman*, 58 P. 125, 9 Kan. App. 374.

²¹ *Frick-Reid Supply Co. v. Hunter*, 148 P. 83, 47 Okl. 151.

²² *Frick-Reid Supply Co. v. Hunter*, 148 P. 83, 47 Okl. 151.

²³ *Gregory Grocery Co. v. Beaton*, 62 P. 732, 10 Kan. App. 256.

(1715)

ARTICLE II

GARNISHMENT

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(1716)

DIVISION I.—NATURE AND GROUNDS

§ 1849. When authorized

"Any creditor shall be entitled to proceed by garnishment in the district court of the proper county against any person (excepting a municipal corporation) who shall be indebted to, or have any property, real or personal, in his possession, or under his control belonging to such creditor's debtor, in the cases, upon the conditions, and in the manner hereinafter described."²⁴

Where a defendant in garnishment proceeding has property in county, subject to execution, sufficient to satisfy plaintiff's demand, a garnishment proceeding is unauthorized.²⁵

§ 1850. Nature and purpose

Garnishment is attachment in the hands of a third person, and thereby is a species of seizure by notice.²⁶ It is a statutory remedy, and no effects in the hands of a garnishee can be reached thereby unless the statute so provides.²⁷ Such proceedings do not lie to enforce pre-existing equities or liens in favor of the plaintiff and against the intended garnishee or some third person who may file an interplea in the case, claiming the attached property, money, or credits.²⁸

Though one judgment may be set off against another in a proper proceeding therefor, if the judgments are in different courts, plaintiff may resort to garnishment proceedings to satisfy a judgment obtained by him.²⁹

§ 1851. After return of execution

"After the issuing or return of an execution against property of a judgment debtor, or of any one of several debtors in the same judgment, where it is made to appear by affidavit, or otherwise, to

²⁴ Rev. Laws 1910, § 4822; *Brenneke v. Dulgenan*, 49 P. 687, 6 Kan. App. 229.

Garnishment process will issue before judgment, in an action on a contract not sounding in damages. *Wallace v. Duke*, 44 Okl. 124, 142 P. 308.

²⁵ *Scott v. Waples-Painter Co.* (Okl.) 176 P. 754.

²⁶ *Beamer v. Winter*, 21 P. 1078, 41 Kan. 596.

²⁷ *Missouri, K. & T. Ry. Co. v. Houseley*, 132 P. 330, 37 Okl. 326.

²⁸ *Johnson v. Brant*, 17 P. 794, 38 Kan. 754.

²⁹ *Hillis v. First Nat. Bank*, 38 P. 565, 54 Kan. 421.

the satisfaction of the judge, that there is reason to believe that any person or corporation has property of such judgment debtor, or is indebted to him, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place within the county in which such person or corporation may be served with the order to answer, and answer the same. The judge may, also, in his discretion, require notice of such proceeding to be given to any party in the action, in such manner as may seem to him proper."⁸⁰

DIVISION II.—PERSONS AND PROPERTY SUBJECT

§ 1852. Nonliability of garnishee—Judgment

"No judgment shall be rendered upon a liability of the garnishee arising:

"First. By reason of his having drawn, accepted, made, indorsed or guaranteed any negotiable bill, draft, note, or other security.

"Second. By reason of any money or other thing received or collected by him as sheriff or other officer, by force of an execution or other legal process in favor of the defendant.

"Third. By reason of any money in his hands as a public officer, or for which he is accountable to the defendant merely as such officer.

"Fourth. By reason of any money or other thing owing from him to the defendant, unless before judgment against the defendant it shall become due absolutely and without depending on any future emergency.

"Judgment may be given for any money or other thing owing, although it has not become payable, in which case the garnishee shall not be required to pay or deliver it before the time appointed by the contract."⁸¹

Under the foregoing statute a check or draft cannot be made the subject of garnishment.⁸²

⁸⁰ Rev. Laws 1910, § 5195.

⁸¹ Rev. Laws 1910, § 4836.

⁸² First State Bank of Addington v. Lattimer, 48 Okl. 104, 149 P. 1099.

§ 1853. Exemption from garnishment

On grounds of public policy, a county is exempt from garnishment, and this exemption extends to equitable garnishment.³³ Cities are also exempt.³⁴ The United States and the several states, together with their officers and agents, are also exempt.³⁵

§ 1854. Contractual interest—Judgments—Plaintiff

The liability of an insurer to an insured for indemnity against liability for personal injuries is subject to garnishment.³⁶ Money due a beneficiary under a life insurance certificate of a fraternal association cannot be garnished until after it is paid over to the beneficiary.³⁷

The consideration of a separation agreement whereby a wife releases her claim on her husband's property and to his support is not exempt from garnishment as being "alimony," which is an allowance made by order of court.³⁸

Payments due a beneficiary are subject to garnishment in the hands of an executor or administrator after an order of final distribution.³⁹ Money due on the completion of a contract cannot be subject to garnishment until the work is completed.⁴⁰

Where the buyer agrees to pay the price to a third person who claims a lien under a chattel mortgage, the purchase money while in the buyer's hands is not subject to garnishment by another creditor of the seller, though the chattel mortgage is not in fact a lien

³³ *Clark v. Board of Com'rs of Osage County*, 62 Okl. 7, 161 P. 791, L. R. A. 1917B, 1269.

³⁴ *First Nat. Bank v. City of Ottawa*, 23 P. 485, 43 Kan. 294; *Switzer v. City of Wellington*, 19 P. 620, 40 Kan. 250, 10 Am. St. Rep. 196.

³⁵ *Manwell v. Grimes*, 48 Okl. 72, 149 P. 1182.

³⁶ *Maryland Casualty Co. v. Peppard*, 53 Okl. 515, 157 P. 106, L. R. A. 1916E, 597.

³⁷ *State v. Collins* (Okl.) 174 P. 568, 6 A. L. R. 603.

³⁸ *Farmers' & Merchants' Bank v. Dondelinger*, 103 Kan. 444, 175 P. 109.

³⁹ *Sherman v. Havens*, 146 P. 1030, 94 Kan. 654, Ann. Cas. 1917B, 394.

⁴⁰ Where a loan is made with which to erect a building on land, a portion of which is to be paid out as the work progresses, and the remainder after its completion, and there is an assignment of the fund by the borrower to a third person, who is to superintend the construction of the building and the application of the fund, no part of such fund is subject to garnishment for the ordinary debts of the borrower until the building is completed and paid for. *Rock Island Lumber & Mfg. Co. v. Equitable Trust & Investment Co.*, 37 P. 983, 54 Kan. 124.

upon the property; but the purchase money will be applied as agreed.⁴¹

A mortgagee of cotton, having given the mortgagor authority to sell it and deposit the proceeds in a bank, waived the lien of a mortgage which did not attach to the proceeds of the cotton, which thereupon became subject to garnishment at the instance of a creditor of the mortgagor.⁴²

Garnishment against a judgment debtor will lie in favor of a creditor holding a judgment against the judgment creditor of such debtor which has been recovered in same court.⁴³ Where a judgment in another state is satisfied without the debt having been fully paid, under an agreement to pay the balance, the remaining obligation is a contract debt subject to garnishment.⁴⁴

A plaintiff can neither summon nor charge himself as garnishee.⁴⁵

§ 1855. Possession and ownership

Where an insolvent oil and gas company leaves its tools, etc., and abandons work, the lessor, who had not declared a forfeiture of the lease, is in possession, for the purposes of garnishment in an action by the lessee's creditors, interpleaders, claiming liens on property.⁴⁶

Where the agent of a lottery company receives a check or draft from the company, the proceeds of which are intended to be applied to the payment of one of the certificate holders of the company, but which check or draft is deposited in the bank in the name of and to the credit of the agent, the certificate holder to whom the money was intended to be paid is not the owner of, and has no more claim upon, the money or interest therein than any other certificate holder connected with the company, and the money remains

⁴¹ *Mason v. Sanders*, 131 P. 562, 89 Kan. 300.

⁴² *Carr v. Brawley*, 125 P. 1131, 34 Okl. 500, 43 L. R. A. (N. S.) 302.

⁴³ *Priboth v. Chism*, 62 Okl. 300, 162 P. 1103.

⁴⁴ *Sutton v. Heinze*, 115 P. 560, 84 Kan. 756, 34 L. R. A. (N. S.) 238, rehearing denied 116 P. 614, 85 Kan. 332, 34 L. R. A. (N. S.) 239.

⁴⁵ Under Gen. St. 1897, c. 95, § 238, providing that proceedings against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant as parties defendant, and all the provisions for enforcing judgments shall be applicable thereto, plaintiff in an action can neither summon nor charge himself as garnishee therein. *First Nat. Bank v. Elliott*, 64 P. 623, 62 Kan. 764, 55 L. R. A. 353.

⁴⁶ *Hamilton-Collinson Hardware Co. v. Arkansas City Oil & Gas Co.*, 102 Kan. 144, 169 P. 190.

the money of the company and subject to garnishment by one holding a claim against the company.⁴⁷

§ 1856. Assignment

A garnishment only reaches the property which actually belongs to the debtor, and does not lawfully reach that which the debtor has already assigned in good faith to other creditors.⁴⁸

Where the mortgagor of chattel sold it, the sales money to be paid to the mortgagee, and before the money was paid it was garnished by a creditor of the mortgagor, the money, being assigned in good faith to the mortgagee, was not subject to the garnishment.⁴⁹

An assignee of the proceeds of a contract due and to become due for furnishing materials and labor to a building contractor is valid as against a garnishment of such proceeds in the contractor's hands.⁵⁰

§ 1857. Partnership

An indebtedness due to a copartnership cannot be garnished in the hands of the debtor to pay the separate debt of one of the partners.⁵¹

Defendant's interest in a debt owing to him and another, but not as partners, is subject to garnishment.⁵²

DIVISION III.—PROCEDURE

§ 1858. Pleadings—Proceedings—Affidavit and bond—Interrogatories—Forms

No pleadings are necessary in garnishment proceedings, other than plaintiff's affidavit and the garnishee's answer.⁵³

"Either at the time of the issuing of the summons, or at any time thereafter, before final judgment, in any action to recover damages founded upon contract, express or implied, or upon judgment or decree, or at any time after the issuing, in case of an execution

⁴⁷ *Fidelity Funding Co. v. Vaughn*, 90 P. 34, 18 Okl. 13, 10 L. R. A. (N. S.) 1123.

⁴⁸ *Rich v. Roberts*, 172 P. 996, 103 Kan. 116.

⁴⁹ *Eggers v. Ross*, 103 Kan. 812, 176 P. 655.

⁵⁰ *Hall v. Kansas City Terra Cotta Co.*, 154 P. 210, 97 Kan. 103, L. R. A. 1916D, 361, Ann. Cas. 1918D, 605.

⁵¹ *Trickett v. Moore*, 10 P. 147, 34 Kan. 755.

⁵² *Perry v. Blatch*, 43 P. 989, 2 Kan. App. 522.

⁵³ *Reese v. Platt*, 44 P. 31, 4 Kan. App. 801, judgment reversed on rehearing 46 P. 990, 4 Kan. App. 801.

against property, and before the time when it is returnable, the plaintiff or some person in his behalf may file with the clerk an affidavit stating the amount of the plaintiff's claim against the defendant or defendants over and above all offsets, and stating that he verily believes that some person, naming him, is indebted to or has property, real or personal in his possession or under his control belonging to the defendant (or either or any of the defendants) in the action or execution, naming him; and that such defendant has not property liable to execution sufficient to satisfy the plaintiff's demand, and that the indebtedness or property mentioned in such affidavit is, to the best of the knowledge and belief of the person making such affidavit, not by law exempt from seizure or sale upon execution. Any number of garnishees may be embraced in the same affidavit and the summons hereinafter provided for; but if a joint liability be claimed against any, it shall be so stated in such affidavit, and the garnishee named as jointly liable shall be deemed jointly proceeded against; otherwise the several garnishees shall be deemed severally proceeded against: Provided, that the order of garnishment shall not be issued by the clerk until an undertaking on the part of the plaintiff has been executed by one or more sufficient sureties, approved by the clerk and filed in his office, in a sum not less than double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of such garnishment together with a reasonable attorney's fee, if the order be wrongfully obtained; but no undertaking shall be required where the party or parties defendant are all non-residents of the state or a foreign corporation."⁵⁴

A garnishment affidavit without the bond required by statute does not confer jurisdiction to issue a garnishment summons.⁵⁵

"When an execution shall have been returned unsatisfied, the judgment creditor may file an affidavit of himself, his agent or attorney, in the office of the clerk, setting forth that he has good reasons to, and does, believe that any person or corporation, to be named, has property of the judgment debtor, or is indebted to him,

⁵⁴ Rev. Laws 1910, § 4823.

⁵⁵ *House v. Scanlan*, 127 P. 481, 34 Okl. 796; *Charles P. Kellogg & Co. v. Hazlett*, 43 P. 987, 2 Kan. App. 525,

and thereupon the clerk shall issue an order, requiring such person or corporation to answer, on or before a day to be named in the order, not less than ten nor more than twenty days from the date of issuing the same, all interrogatories that may be propounded by the judgment creditor, concerning such indebtedness or property."⁵⁶

"The judgment creditor, or his attorney, shall prepare interrogatories concerning such indebtedness or property, a copy of which shall be served on the garnishee at the time of the service of the order, or within three days thereafter. And the garnishee shall, on or before the day required in the order, file with the clerk full and true answers to all such interrogatories, verified by his affidavit.

"All subsequent proceedings against the garnishee shall be the same as in cases of attachment, as far as applicable."⁵⁷

No bond need be given in a garnishment proceeding instituted in aid of judgment."⁵⁸

Inasmuch as the statute does not require that an affidavit for a writ of garnishment, where an execution against the principal debtor has been returned unsatisfied, shall aver that the execution was returned unsatisfied, the absence of such an averment from the affidavit is immaterial.⁵⁹ Likewise, when the affidavit does not state that the defendant has not sufficient property liable to execution, and the defendant voluntarily appears and gives bond releasing the property attached, he cannot question validity of affidavit.⁶⁰

"The judgment creditor, or his attorney, shall prepare interrogatories concerning such indebtedness or property, a copy of which shall be served on the garnishee at the time of the service of the order, or within three days thereafter. And the garnishee shall, on or before the day required in the order, file with the clerk full and true answers to all such interrogatories, verified by his affidavit."⁶¹

"All subsequent proceedings against the garnishee shall be the same as in cases of attachment, as far as applicable."⁶²

⁵⁶ Rev. Laws 1910, § 5211.

⁵⁷ Rev. Laws 1910, §§ 5212, 5213.

⁵⁸ *Mason v. Miller*, 54 Okl. 46, 153 P. 187.

⁵⁹ *Walker v. Columbus State Bank*, 67 P. 552, 64 Kan. 884.

⁶⁰ *Bennett v. St. Marys Grain Co.*, 164 P. 259, 100 Kan. 289.

⁶¹ Rev. Laws 1910, § 5212.

⁶² Rev. Laws 1910, § 5213.

GARNISHMENT AFFIDAVIT

(Caption.)

_____, being duly sworn, says he is the plaintiff in the above entitled cause; that the above named defendant, _____, is justly and truly indebted to the said plaintiff in the sum of _____ dollars, over and above all offsets; that he verily believes that _____ is indebted to and has property, real and personal, in his possession and under his control belonging to the above named defendant, _____; and that said defendant has no property liable to execution sufficient to satisfy plaintiff's demands and said indebtedness, and the property herein mentioned is to the best of the knowledge and belief of affiant not exempt by law from seizure and sale upon execution.

Subscribed and sworn to before me, this _____ day of _____, 19—.

_____, Court Clerk.

By _____, Deputy.

GARNISHMENT BOND

(Caption.)

Whereas, plaintiff in the above entitled action has commenced an action in the district court of said county against _____, defendant, to recover the sum of _____ dollars, and has filed the necessary affidavit to obtain an order of garnishment against said defendant:

Now, therefore, we, _____, _____, _____, _____, and _____, do hereby undertake to said defendant, _____, in the penal sum of \$_____, that the plaintiff will pay defendant all damages, not exceeding the above amount, which the defendant may sustain by reason of the garnishment in this action, if the order thereof be wrongfully obtained.

Witness our hands, this _____ day of _____, 19—.

(Qualification of sureties.)

(1724)

§ 1859. Garnishee summons—Forms

"Upon the filing of such affidavit a garnishee summons shall be issued by the clerk and served upon the defendant or his attorney of record, and each of the garnishees, in the manner provided for service of summons, and shall be returned with proof of service in five days. The garnishee summons may be served by the sheriff, or any other person not a party to the action, and shall be substantially in the following form:

"—— Court, —— County.—A. B., Plaintiff, v. C. D., Defendant, E. F., Garnishee.—The state of Oklahoma to Said Garnishee: You are hereby summoned, pursuant to the affidavit filed herein, as garnishee of the defendant, C. D., and required on or before date of return day, to answer according to law whether you are indebted to, or have in your possession or under your control, any property, real or personal, belonging to such defendant, and file your answer with the clerk of this court; and in case of your failure so to do you will be liable to further proceedings according to law. Of which the said defendant will also take notice.

"——, Court Clerk, —— County, State of Oklahoma." ⁶³

SHERIFF'S RETURN

Received the within writ on the —— day of ——, 19——, at —— o'clock —— m., and executed on the —— day of ——, 19——, at —— o'clock —— m., by ——.

Dated this —— day of ——, 19——.

——, Sheriff of —— County,
By ——, Undersheriff, Deputy.

§ 1860. Service—Appearance

"The copy of the order and notice shall be served upon the garnishee as follows: If he be a person, they shall be served upon him personally, or left at his usual place of residence; if a corporation, they shall be left with the president or other head of the same, or the secretary, cashier or managing agent thereof." ⁶⁴

A garnishee summons, not substantially conforming to the statute, is void, and service thereof gives no jurisdiction.⁶⁵

⁶³ Rev. Laws 1910, § 4824.

⁶⁴ Rev. Laws 1910, § 4841.

⁶⁵ State Nat. Bank v. Lowenstein, 52 Okl. 259, 155 P. 1127.

A service not void is not subject to a collateral attack.⁶⁶

Under the statutes providing that the garnishee summons shall be served in the manner provided for service of summons, service by delivering a copy thereof to the defendant in person, or by leaving one at his usual place of residence, at any time before the return day, is a good and sufficient service.⁶⁷

A failure to serve the garnishee summons on the principal defendant is fatal to the court's jurisdiction.⁶⁸

Before service can be had on a nonresident of the state, by publication, where one is served with attachment and garnishee process, it must appear that the party garnished has property of defendant in his control, or is indebted to him.⁶⁹

A judgment against a defendant in garnishment on publication notice, naming another defendant in a different action, is a nullity.⁷⁰

An order on defendant's motion, setting aside service by publication on the grounds that the garnishee is not indebted to him, is erroneous, where the question of such indebtedness is pending.⁷¹

An appearance and answer by a garnishee waives all defects and irregularities in the writ which do not go to the jurisdiction of the court.⁷²

An appearance by the principal defendant in garnishment proceedings to have his money adjudged exempt is general, and gives the court jurisdiction of both his person and the subject-matter of the garnishment.⁷³

⁶⁶ Service on a garnishee of a copy of the writ of attachment and notice not to pay over any money in his hands to defendant was attacked by defendant, and was by the trial court held sufficient to require the garnishee to answer, and the garnishee answered under the order of the court. Such service, not being void, could not be attacked in a collateral proceeding. *Axman v. Dueker*, 25 P. 582, 45 Kan. 179, judgment affirmed 28 P. 946, 45 Kan. 745.

⁶⁷ *Theison v. Brown*, 65 P. 925, 11 Okl. 118; Rev. Laws 1910, § 4711.

⁶⁸ *State Nat. Bank v. Lowenstein*, 52 Okl. 259, 155 P. 1127.

The principal defendant is a necessary party to a garnishment proceeding. *Powell v. First State Bank of Clinton*, 56 Okl. 44, 155 P. 500.

⁶⁹ *Searing v. Benton*, 21 P. 800, 41 Kan. 758.

⁷⁰ *Missouri, K. & T. Ry. Co. v. Bradshaw*, 132 P. 325, 37 Okl. 313.

⁷¹ *Chambers v. Bane*, 136 P. 923, 91 Kan. 88.

⁷² *Phoenix Bridge Co. v. Street*, 60 P. 221, 9 Okl. 422.

⁷³ *Kansas City, Ft. S. & M. Ry. Co. v. Cunningham*, 51 P. 972, 7 Kan. App. 47, judgment reversed *Cunningham v. Kansas City, Ft. S. & M. Ry. Co.*, 56 P. 502, 60 Kan. 268.

§ 1861. Subsequent affidavits and summons

"The plaintiff may in like manner subsequently proceed within the period limited against other garnishees, or against the same garnishees after they shall have once been discharged, upon a new affidavit, if he shall have reason to believe they have subsequently become liable; and he may proceed against garnishees resident in other counties than that in which the action is pending; but if an issue for trial shall be joined between the plaintiff and such garnishee, the court may, on motion, change the place of trial of such issue to the county of the garnishee's residence."⁷⁴

§ 1862. Answer or affidavit of garnishee—Form

"Within twenty days from the service of such garnishee summons the garnishee may, if the truth warrant, file with the clerk of the court in which the action is pending his affidavit, substantially in the following form:

"—— Court, —— County.—A. B., Plaintiff, v. C. D., Defendant, and E. F., Garnishee, —— County, —— ss.—E. F., being first duly sworn, says that on the —— day of ——, A. D. 19——, he was served with a garnishee summons in the above-entitled action; that he was then and is now in no manner and upon no account indebted or under liability of the defendant (naming him), and that he then had and now has in his possession or under his control no real estate and no personal property, effects or credits, of any description, belonging to said defendant or in which he has any interest; and is in no manner liable as garnishee in this action. Subscribed and sworn to, before me, this —— day of ——, A. D. 19——.

"Thereby the proceedings against such garnishee shall be deemed discontinued, and the plaintiff shall pay the garnishee two dollars for his costs unless within twenty days thereafter the plaintiff serve notice on such garnishee that he elects to take issue on his answer as garnishee, and will maintain him to be liable as garnishee."⁷⁵

A garnishee should set forth specifically his relations to defendant's moneys in his hands,⁷⁶ and should disclose in his answer all the facts necessary to an understanding of the indebtedness, and

⁷⁴ Rev. Laws 1910, § 4825.

⁷⁵ Rev. Laws 1910, § 4826.

⁷⁶ Atchison, T. & S. F. Ry. Co. v. Bowman, 147 P. 818, 95 Kan. 5.

where the answer shows an indebtedness on a note, and does not show that such note is negotiable, a judgment against the garnishee is not void."

"Unless the garnishee shall make the affidavit provided for in section 4826 he shall, within twenty days from the service of the garnishee's summons, file an affidavit in which he shall state:

"First. Whether he was at the time of the service of the garnishee summons or has since become indebted or under any liability to the defendant named in the notice in any manner or upon any account, specifying, if indebted or liable, the amount, the interest thereon, the manner in which evidenced, when payable, whether an absolute or contingent liability, and all the facts and circumstances necessary to a complete understanding of such indebtedness or liability. When the garnishee shall be in doubt respecting any such liability or indebtedness he may set forth all the facts and circumstances concerning the same, and submit the question to the court.

"Second. Whether he held at the time aforesaid or now holds the title or possession of any real estate, or any interest in land of any description, or of any personal property, effects or credits, or any instruments or papers relating to any such belonging to the defendants, or in which he is in any wise interested; and if he shall admit any such, or be in doubt respecting the same, he shall set forth a description of such property, and all the facts and circumstances concerning the same, and the title, interest, or claim of the defendant in or to the same.

"Third. If he shall claim any set-off or defense or any other indebtedness or liability, or any lien or claim to such property, he shall set forth the facts and circumstances thereof fully.

"Fourth. He may state any claim of exemption from execution on the part of the defendant, or other objection known to him against the right of the plaintiff to apply upon his demand the indebtedness or property disclosed.

"Fifth. If he shall disclose any indebtedness or the possession of any property to which the defendant, or any other person as well, makes claim, he may set forth the names and residences of

¹⁷ A. J. Harwi Hardware Co. v. Klippert, 74 P. 254, 67 Kan. 743.
(1728)

such other claimants, and so far as known, the nature of their claims.”⁷⁸

Plaintiff has a right to demand an answer under oath, but, if he does not require it, an unverified answer is sufficient.⁷⁹

Where a garnishee files an affidavit of nonliability the court may properly proceed to the trial of the issue without requiring the garnishee to file an answering affidavit.⁸⁰

Where a garnishee claimed that money in his hands belonged to a third person, he should have made the nonliability affidavit.⁸¹

The garnishee's answer is filed when deposited with the clerk, rather than when it is marked “filed”; the “filing” being actual delivery to the clerk, without regard to any action he may take thereon.⁸²

Though garnishment proceedings must be conducted in substantial conformity to the statute, an order of court, made by agreement of the parties, indefinitely extending the statutory time allowed the garnishee for filing answers, does not deprive the court of jurisdiction.⁸³

§ 1863. — By whom made

“The answer of a corporation summoned as a garnishee may be made by any officer thereof; and of any other garnishee, by any agent or attorney, in his behalf, who shall be acquainted with the facts.”⁸⁴

§ 1864. — Time of corporation to answer

“When any corporation shall be notified to appear and answer as garnishee of any defendant, the answer required to be made by such garnishee shall not be required in any case in less than fifteen days from the service of the order and notice, and interrogatories, if any, and when neither the president or other head of such corporation, nor the secretary, cashier, or managing agent thereof, shall reside or live, or keep his office or place of business in the

⁷⁸ Rev. Laws 1910, § 4828.

⁷⁹ Brooks v. Fields, 106 P. 828, 25 Okl. 427.

⁸⁰ First Nat. Bank of Beloit v. Mathes, 103 Kan. 868, 176 P. 657.

⁸¹ Atchison, T. & S. F. Ry. Co. v. Bowman, 147 P. 813, 95 Kan. 5.

⁸² State Nat. Bank v. Lowenstein, 52 Okl. 259, 155 P. 1127.

⁸³ Potter v. Northrup Banking Co., 53 P. 520, 59 Kan. 455.

⁸⁴ Rev. Laws 1910, § 4830.

county where the action is pending, the answer of such garnishee shall not be required in less than thirty days from the service of the order and notice, and interrogatories, if any." ⁸⁵

§ 1865. Issues and trial

"The answer of the garnishee shall in all cases be conclusive of the truth of the facts therein stated, with reference to his liability to the defendant, unless the plaintiff shall, within twenty days, serve upon the garnishee a notice in writing that he elects to take issue on his answer; in which case the issue shall stand for trial as a civil action, in which the affidavit on the part of the plaintiff shall be deemed the petition, and the garnishee's affidavit the answer thereto. The plaintiff may in all cases move the court, upon the answer of the garnishee, and of the defendant, if he shall also answer, for such judgment as he shall be entitled to thereon, but any such judgment shall be no bar beyond the facts stated in such answer." ⁸⁶

Where the plaintiff fails to give this notice, the facts therein stated cannot be questioned in any subsequent hearing in the garnishment proceedings. ⁸⁷

⁸⁵ Rev. Laws 1910, § 4853.

⁸⁶ Rev. Laws 1910, § 4827.

The answer of a garnishee is therefore conclusive, unless plaintiff within 20 days serves on the garnishee a notice that he elects to take issue. *Davis v. Lilly*, 87 P. 302, 17 Okl. 579.

⁸⁷ *Mason v. Miller*, 54 Okl. 46, 153 P. 187.

Where an answer in garnishment under oath is waived, an unverified answer that the garnishee has \$5.20 in his hands due defendant and a notice that plaintiff elects to take issue on such answer, as provided by Wilson's Rev. & Ann. St. 1903, § 4382, state facts sufficient to join an issue of fact as between the plaintiff and the garnishee, and it is error to render judgment against the garnishee without a trial. *Brooks v. Fields*, 106 P. 828, 25 Okl. 427.

In garnishment, not in aid of execution, garnishee answered, and plaintiffs moved for judgment on the pleadings. Pending said motion, plaintiffs served notice on the garnishee pursuant to Wilson's Rev. & Ann. St. 1903, § 4382, that they elected to take issue on the answer. Held a waiver of said motion, and that the court erred in subsequently sustaining it and rendering judgment against the garnishee without a trial of the issues of fact arising between the plaintiffs and the garnishee on such pleadings. *First Nat. Bank of Elk City v. Huff*, 118 P. 582, 29 Okl. 547.

Garnishee's prompt application to vacate order, showing that after answer admitting his indebtedness for balance of purchase price and after order to pay money into court he learned that defendant had mortgaged and disposed

Where a garnishee has answered that he is not indebted to defendant, and plaintiff fails to give the statutory notice that he elects to take issue, it is error to render judgment against the garnishee.⁸⁸

A garnishee's liability must be made affirmatively to appear, and his uncontradicted answer or disclosure upon which no issue has been taken is presumed absolutely true, and, when showing no liability, entitles him to discharge.⁸⁹

"The defendant may in all cases, by answer duly verified, to be served within twenty days from the service of the garnishee summons on him, defend the proceedings against any garnishee, upon the ground that the indebtedness of the garnishee, or any property held by him, is exempt from execution against such defendant, or for any other reason is not liable to garnishment; or upon any ground upon which a garnishee might defend the same; and may participate in the trial of any issue between the plaintiff and garnishee for the protection of his interests. The garnishee may at his option, defend the principal action for the defendant, if the latter does not, but shall be under no obligations so to do."⁹⁰

In an action against a nonresident served by publication, a garnishee should notify such defendant of the garnishment if able to do so and interpose for him any defense of which he knows and which he is able to make.⁹¹

"The proceedings against a garnishee shall be deemed an action by the plaintiff against the garnishee and defendant, as parties defendant, and all the provisions for enforcing judgments shall be

of property and that plaintiff had procured mortgage and so knew garnishee was not liable, and induce him to believe that defendant might sell property. warranted correction of answer so as to state actual facts. *Jewell v. Schell*, 103 Kan. 604, 175 P. 970.

⁸⁸ *Davis v. Lilly*, 87 P. 302, 17 Okl. 579.

Judgment on answer of garnishee bank, stating that defendant, at the time of making the deposit, stated that it belonged to her little girl, held not error; such statement being insufficient to overcome the presumption that defendant was the owner of the fund deposited by her in her own name. *Lowman v. Blaine County Bank*, 139 P. 952, 40 Okl. 519.

⁸⁹ *House v. Scanlan*, 127 P. 481, 34 Okl. 796.

⁹⁰ Rev. Laws 1910, § 4831.

A defendant may participate in the trial of any issue between plaintiff and garnishee for the protection of his interests. *Mason v. Miller*, 54 Okl. 46, 153 P. 187.

⁹¹ *St. Louis & S. F. R. Co. v. Crews*, 51 Okl. 144, 151 P. 879, Ann. Cas. 1918C, 823.

(1731)

applicable thereto; but when the garnishment is not in aid of an execution, no trial shall be had of the garnishee action until the plaintiff shall have judgment in the principal action, and if the defendant have judgment, the garnishee action shall be dismissed with costs. * * * The court shall render such judgment in all cases as shall be just to all the parties, and properly protect their respective interests, and may adjudge the recovery of any indebtedness, the conveyance, transfer, or delivery to the sheriff, or any officer appointed by the judgment, of any real estate or personal property disclosed or found to be liable to be applied to the plaintiff's demand, or by the judgment pass the title thereto; and may therein, or by its order when proper, direct the manner of making sale and of disposing of the proceeds thereof, or of any money or other thing paid over or delivered to the clerk or officer. The judgment against a garnishee shall acquit and discharge him from all demands by the defendant or his representatives for all money, goods, effects or audits paid, delivered, or accounted for by the garnishee by force of such judgment: Provided, it shall be no defense to proceedings against a garnishee that the debt owing by him to the defendant was not due or unliquidated nor that the indebtedness to mature in the future consists of renewal commissions or annuities not otherwise exempt by law."²

Where a garnishee answers and plaintiff elects to take issue thereon, the proceeding is an action by plaintiff against the garnishee, and, when the garnishment is not in aid of an execution, no trial can be had of the garnishee action until plaintiff has obtained judgment in the principal action."³

"The examination of the garnishee may be taken out of court, by deposition, at any time after the filing of the affidavit by him in answer to the garnishee summons before the determination of such garnishee's liability. If the garnishee be a corporation any principal officer thereof may be so examined. Such deposition may be taken before the county judge, or before a notary public, to be designated by the judge of the court in which the action is pending, on application by the plaintiff upon five days' previous notice to the defendant, stating the time and place of such application, or it

² Rev. Laws 1910, § 4832, as amended by Sess. Laws 1913, p. 232, § 1.

³ Brooks v. Fields, 106 P. 828, 25 Okl. 427.

may be taken without the State, in the same manner provided for taking other depositions. The attendance of the garnishee to be examined may be compelled upon subpoena and the payment of witness fees, if demanded; and such examination shall be subject to the same rules as that of any other witness, but he shall not be compelled to disclose anything not relevant to the controversy. Such examination shall not be compelled in any other county than that in which the party to be examined resides."⁶⁴

Where the answers to interrogatories have been duly verified and filed, subsequent proceedings against the garnishee and proceedings in aid of judgment shall be the same, so far as practicable, as in cases of attachment.⁶⁵

The creditor may show any fact tending to prove that the property in the hands of the garnishee belongs to the debtor.⁶⁶

Where a garnishee's answer alleges the admitted fact that he is a federal officer, and the claim that he holds, as such, the funds sought is questioned, the burden of proof is on plaintiff to establish the contrary.⁶⁷

§ 1866. Payment into court

"A garnishee may pay the money owing to the defendant by him to the sheriff having the order of attachment, or into court. He shall be discharged from liability to the defendant for any money so paid, not exceeding the plaintiff's claim. He shall not be subject to costs, beyond those caused by his resistance of the claim against

⁶⁴ Rev. Laws 1910, § 4833.

⁶⁵ *Mason v. Miller*, 54 Okl. 46, 153 P. 187.

In an action against a garnishee, the court did not err in sustaining a demurrer to the evidence filed by plaintiff, in the absence of proof that it had obtained judgment against its debtor in the principal action. *Levis-Zukoski Mercantile Co. v. Exchange Nat. Bank*, 66 P. 638, 63 Kan. 550.

Code Civ. Proc. § 213, provides that, from the time of the service of the summons on the garnishee, he shall stand liable to plaintiff to the amount of property in his possession, and under his control belonging to defendant or in which he is interested, to the extent of his right and interest therein. In a garnishment proceeding there was evidence that the garnishee had shares of stock in his hands, transferred to him by a sale claimed to be fraudulent. There was no evidence tending to show any debt. Held, that the jury could not return a money verdict. *Williamson v. Oklahoma Nat. Bank*, 56 P. 1064, 7 Okl. 621.

⁶⁶ *Reese v. Platt*, 44 P. 31, 4 Kan. App. 801, judgment reversed on rehearing 46 P. 990, 4 Kan. App. 801.

⁶⁷ *Manwell v. Grimes*, 48 Okl. 72, 149 P. 1182.

him; and if he discloses the property in his hands, or the true amount owing by him, and deliver and pay the same, according to the order of the court, he shall be allowed his costs."⁹⁸

Where the debtor's interest in a debt owed to him and another, but not as partners, was garnished, and the garnishee paid the amount thereof into court, and all parties in interest appeared, the court should determine the interest of the debtor and hold it subject to the garnishment proceedings.⁹⁹

§ 1867. Default of garnishee—Judgment—Contempt

"If any garnishee, having been duly summoned, shall fail to file his affidavit as required in the preceding sections, the court may render judgment against him for the amount of the judgment which the plaintiff shall recover against the defendant in the action and for damages and costs, together with the costs of such garnishment. Such garnishee may also be proceeded against as for contempt."¹

§ 1868. Judgment

A judgment against a garnishee that he pay money into court, to be applied on a judgment held by plaintiff against the principal defendant, can be set aside only as other judgments are set aside.²

A judgment rendered on a void garnishee summons in an action

⁹⁸ Rev. Laws 1910, § 4854.

⁹⁹ Perry v. Blatch, 43 P. 989, 2 Kan. App. 522.

¹ Rev. Laws 1910, § 4829.

Under Rev. Laws 1910, § 4829, where a duly summoned garnishee fails to answer in time, the court may render judgment against him for the amount of plaintiff's judgment and for damages and costs, including costs of garnishment, without further proof of the garnishee's liability. State Nat. Bank v. Lowenstein, 52 Okl. 259, 155 P. 1127.

Where after a garnishment served and answer filed the garnishee paid the fund to another claimant, and other garnishee summons were then served by other creditors, and the garnishee answered that he had paid the fund to the claimant, who was then garnished, the claimant should be held as garnishee, and the fund brought into court. Greenwood County Bank v. O. B. Walker Telephone Co., 128 P. 357, 88 Kan. 287.

² A. J. Harwi Hardware Co. v. Klippert, 74 P. 254, 67 Kan. 743.

Where counsel now appearing did not then represent any of the parties hereto, and trial court's announcement as to trial was not relied upon by defendant or garnishees, court did not err in overruling motion based on such announcement to set aside judgment against them. Arnold v. Burks, 63 Okl. 273, 164 P. 970.

against a nonresident, who has not been personally served or appeared, is a nullity.³

A judgment against a garnishee that he pay money into court, to be applied on a judgment held by plaintiff against the principal defendant, is enforceable like any other money judgment.⁴

In an action by a plaintiff against a garnishee, plaintiff may recover if he shows a valid judgment against debtor, garnishee summons, answer of garnishee order directing payment into court, a refusal, and liability to debtor by garnishee at time of service of garnishee summons.⁵

In a civil action against a garnishee, because his answer is not true and satisfactory as to the possession of money alleged to belong to the judgment debtors, in which action a personal judgment for money only is rendered against the garnishee, the jury should be allowed to render a general verdict.⁶

Where justice of the peace orders garnishee to pay money into court, an action by plaintiff to enforce the payment is an independent proceeding, in which the issues are defined by pleadings therein filed.⁷

³ *Phoenix Bridge Co. v. Street*, 60 P. 221, 9 Okl. 422.

An order was made directing the payment of money by a garnishee into court, and the money was paid to the clerk and by him applied in the satisfaction pro tanto of the judgment. Nearly two months afterwards defendant in the judgment moved to set it aside, and for an order directing the clerk to pay the money to him on the ground that it was exempt. The record did not purport to contain all the proceedings or testimony, or to show that defendant did not have actual notice of the garnishee proceedings while they were pending. Held, that an order overruling defendant's motion will not be reversed though the money was in fact exempt; defendant not having been prompt and vigilant in asserting his rights. *Iliff v. Arnott*, 3 P. 525, 31 Kan. 672.

⁴ *A. J. Harwl Hardware Co. v. Klippert*, 74 P. 254, 67 Kan. 743.

⁵ *Bell-Wayland Co. v. Nixon*, 57 Okl. 138, 156 P. 1195.

In an action by A. against B., C. is garnished, and answers that he is indebted to B. on certain conditions to be performed by B.; that on said answer C. was ordered to pay into court the amount found due from B. to A. C. refused to comply with the order. Held that, in an action by A. against C. on said answer and order in garnishment, C. is not estopped by said proceedings from showing that the conditions under which the indebtedness arose had not been complied with, and that he is therefore not indebted to B. *Linder v. Murdy*, 14 P. 447, 37 Kan. 152.

⁶ *Shahan v. Tallman*, 17 P. 823, 39 Kan. 185.

⁷ *Lamb v. Taylor*, 101 Kan. 642, 168 P. 673.

DIVISION IV.—OPERATION AND EFFECT

§ 1869. Liability of garnishee

"From the time of the service of the summons upon the garnishee he shall stand liable to the plaintiff to the amount of the property, moneys, credits and effects in his possession or under his control, belonging to the defendant or in which he shall be interested, to the extent of his right or interest therein, and of all debts due or to become due to the defendant, except such as may be by law exempt from execution. Any property, moneys, credits and effects held by a conveyance or title, void as to the creditors of the defendant, shall be embraced in such liability. In case such moneys, credits and effects in the possession or under the control of the garnishee shall exceed the amount of the plaintiff's claim, the garnishee shall stand liable to the plaintiff only for the amount of the plaintiff's claim as disclosed by the garnishment affidavit, together with such further amount as shall be equal to all costs and damages, which the plaintiff may recover in the action and garnishment proceedings."⁸

The plaintiff can have no greater rights than defendant has as against the garnishee, and, where the garnishee was not in fact indebted to defendant when process was served, the plaintiff can claim nothing from him.⁹

Where no valid judgment was rendered against the principal defendant in garnishment, no judgment could be rendered against his garnishee.¹⁰

§ 1870. Lien—Priority

Plaintiff can never obtain a garnishment lien upon more in the hands of the garnishee than the defendant owns, and, where the property or fund is exempt from judicial process, he cannot obtain a lien upon even that much.¹¹

Garnishment proceedings bind only such property, money, and credits, not exempt from attachment and garnishment, as belong to defendant, in the possession of the garnishee, or owing by him to defendant, at the time of the service of the process on the garnishee

⁸ Rev. Laws 1910, § 4835.

⁹ Jewell v. Schell, 108 Kan. 604, 175 P. 970.

¹⁰ Missouri, K. & T. Ry. Co. v. Bradshaw, 132 P. 325, 37 Okl. 313.

¹¹ Johnson v. Brant, 17 P. 794, 38 Kan. 754.

so that where, after the service of process, the garnishee acquires possession of property of the debtor, a subsequent garnishing creditor is entitled thereto, and not the previous garnishing creditor.¹² This follows from the fact that a garnishment attaches a lien on the property of the debtor in the hands of the garnishee from the time of the service.¹³

No rights can be obtained by subsequent attaching creditors in property previously garnished as against the garnishee.¹⁴

A written assignment of a debt owing to a defendant, when free from fraud and for a valuable consideration and made prior to service of writ of garnishment, gives the assignee a right to the amount of the debt, which is superior to the claim of the garnishing plaintiff.¹⁵

§ 1871. Defenses—Exemption—Judgments

The pendency of a prior action in another state by the principal defendant as plaintiff against the garnishee as defendant is a defense against the garnishment proceedings which should be interposed by the garnishee.¹⁶ Pendency of garnishment in another state is no defense in a creditor's suit against his debtor, the garnishee, on the indebtedness involved in the foreign garnishment proceedings.¹⁷

¹² *Gillette v. Cooper*, 30 P. 13, 48 Kan. 632.

Where, at the time of service of garnishee process, defendant is in the employ of the garnishee, and so continues, the proceedings bind only the amount due at the date of service. *Burlington & M. R. R. Co. v. Thompson*, 1 P. 622, 31 Kan. 180, 47 Am. Rep. 497.

¹³ *R. T. Davis Mill Co. v. Bangs*, 49 P. 628, 6 Kan. App. 38.

When plaintiff garnishes a bank he acquires a lien on only such property of defendant as the bank holds when the notice is served on the officers. *Johnson v. Brant*, 17 P. 794, 38 Kan. 754.

¹⁴ *Barton v. Spencer*, 41 P. 605, 3 Okl. 270.

¹⁵ *El Reno Foundry & Machine Co. v. Western Ice Co.*, 54 Okl. 116, 153 P. 1107.

A plaintiff who causes a garnishee summons to be served on defendant's debtor is not entitled to recover against a prior assignee of the debt for value. *Farmers' & Producers' Bank v. First Nat. Bank (Okl.)* 168 P. 1008; *Market Nat. Bank of Cincinnati, Ohio, v. Raspberry*, 124 P. 758, 34 Okl. 243, L. R. A. 1916E, 79.

¹⁶ *St. Louis & S. F. R. Co. v. Crews*, 51 Okl. 144, 151 P. 879, Ann. Cas. 1918C, 823.

¹⁷ *Missouri, K. & T. Ry. Co. v. Housley*, 46 Okl. 216, 148 P. 689.

A garnishee can interpose the claim of exemption in behalf of his creditor.¹⁸

When the purchasers of land agree as a condition precedent to such purchase, and as a part of the consideration thereof, that they will pay a debt of their grantor, it is no defense to an action by the holder of such debt that they have been served with notice of garnishment by other creditors of their grantor.¹⁹

A judgment against a garnishee and satisfaction thereof will afford the garnishee full protection against all third parties claiming the fund in the hands of the garnishee at the time of the service of summons in garnishment, of whose claim the garnishee had no knowledge, and will also afford protection against all third parties, who, knowing the property claimed by them has been arrested in the hands of the garnishee, fail to assert their rights thereto by interpleading in the garnishment proceedings. Where a judgment in garnishment proceeding is rendered against a bank on its denial of liability, without its disclosure that the property was claimed by a known third person, such judgment and satisfaction is no defense as against such claimant.²⁰

A garnishee, to be entitled to set up payment of judgment against him in a garnishment proceeding as a defense to an action by his creditor for the garnished debt, should plead and prove that he discharged his duty to the creditor by giving notice and defending in the garnishment proceedings. A judgment against a garnishee in a court not acquiring jurisdiction of the person of the principal defendant, which does not recite that the garnishee disclosed any defense, is not an adjudication of any issue as to whether the garnishee

¹⁸ Mull v. Jones, 5 P. 388, 33 Kan. 112.

To garnishee proceedings it is no sufficient answer that the debt of the garnishee to the defendant is by the laws of the state where both defendant and garnishee reside exempt from seizure under such process. Burlington & M. R. R. Co. v. Thompson, 1 P. 622, 31 Kan. 180, 47 Am. Rep. 497.

In an action to recover wages earned in, and exempt under the laws of, this state, the pendency of a garnishment against plaintiff in another state, wherein defendant was summoned as garnishee and service made on plaintiff only by publication, is no defense where such wages were also exempt by the laws of such other state. Missouri Pac. Ry. Co. v. Sharitt, 23 P. 430, 43 Kan. 375, 387, 19 Am. St. Rep. 143, 8 L. R. A. 385, 389.

¹⁹ Rickman v. Miller, 18 P. 304, 39 Kan. 362.

²⁰ Rock Island Lumber & Mfg. Co. v. Fourth Nat. Bank, 66 P. 1024, 63 P. 768.

discharged his duty to the principal defendant in respect to notice and defenses.²¹

Liability of principal and sureties upon a discharging bond in attachment may be satisfied by a payment under a judgment in garnishment brought by a creditor of the judgment plaintiff.²²

A garnishee paying money into court pursuant to an order of a court which has not acquired jurisdiction cannot plead such payment as a defense in an action by the defendant.²³

Where intervener, claiming funds in possession of garnishee, withdraws his petition, the garnishee need not serve notice of proceeding on claimant or interpose any defense in his behalf, and garnishee's payment of judgment is binding on such claimant.²⁴

A garnishee who, with full notice of a third person's claim, admits an indebtedness to the defendant, and tells the court nothing of such claim, cannot set up the judgment in the garnishment proceedings, and his payment into court thereunder, as a defense to a suit by the claimant.²⁵

An answer to a suit for debt, which pleads in bar a judgment in another state against defendant as garnishee, is demurrable, where it does not show that the demand sued for is identical with that adjudicated in the garnishee proceedings.²⁶

Where defendant set up a judgment of a justice in another state, wherein plaintiff was made defendant, and defendant in the pending action was garnishee, but the foreign judgment failed to show appearance or service of summons by publication or otherwise, it was void, and was no defense.²⁷

It is not a bar to an action for wages in a state where wages are

²¹ *St. Louis & S. F. R. Co. v. Crews*, 51 Okl. 144, 151 P. 879, Ann. Cas. 1918C, 823.

In action against E. in McC. county, with garnishment against a railroad which admitted an indebtedness to E., and where E.'s motion to set aside summons on ground that he resided in P. county was overruled, and judgment rendered for plaintiff, which garnishee paid, and where there was no appeal, judgment was not void on collateral attack. *Atchison, T. & S. F. Ry. Co. v. Edwards* (Okl.) 175 P. 938.

²² *Priboth v. Chism*, 62 Okl. 300, 162 P. 1103.

²³ *First State Bank of Addington v. Latimer*, 48 Okl. 104, 149 P. 1099.

²⁴ *Echenbeck v. First Nat. Bank* (Okl.) 169 P. 619, L. R. A. 1918B, 1066.

²⁵ *Muse, Spivey & Co., v. Lehman*, 1 P. 804, 30 Kan. 514.

²⁶ *Brown v. Stogsdale*, 140 P. 608, 42 Okl. 131.

²⁷ *Missouri, K. & T. Ry. Co. v. Bradshaw*, 132 P. 325, 37 Okl. 313.

exempt that judgment for such wages had been rendered against defendant, as garnishee of plaintiff, in a state where wages are not exempt.²⁸

Refusal of an Oklahoma court to give a Kansas judgment against garnishee effect as an adjudication of whether the garnishee discharged his duty to the principal defendant as to notice and defenses is not a denial of the full faith and credit to which a judgment is entitled.²⁹

An order to the garnishee to pay money into justice court not being a judgment, it was no defense to an action against the garnishee by a claimant of the money that the money was paid out in pursuance of such an order.³⁰

§ 1872. Action by defendant against garnishee

"No action shall be commenced by the defendant or his assignee against a garnishee upon any claim or demand liable to garnishment, or to recover any property garnished, or execution be issued upon a judgment in favor of defendant against such garnishee subsequent to the service of the garnishee summons upon him, until the termination of the garnishee action; and if an action shall have been commenced or an execution issued, it shall be stayed by the

²⁸ Chicago, R. I. & P. Ry. Co. v. Sturm, 49 P. 337, 5 Kan. App. 427. Contra, see Union Pac. Ry. Co. v. Baker, 47 P. 563, 5 Kan. App. 253.

Where, in an action for wages, defendant railroad company set up a judgment against plaintiff in a justice court in Missouri in which the company was garnished, at which time Rev. St. Mo. 1899, §§ 3447, 3448, provided that no garnishment should issue against any railroad where the sum demanded was not over \$200, and where the property garnished was wages due, until judgment against defendant in the action, no personal judgment having been obtained against defendant, the proceedings in Missouri were void and no defense to the action in the state. Missouri, K. & T. Ry. Co. v. Houseley, 132 P. 330, 37 Okl. 326.

Where an employé and resident of Kansas performs labor there for a railway company, a corporation of another state, but also doing business in Kansas, and the wages of such employé are exempt in both states, in an action by the employé to recover such wages in Kansas, the fact that the corporation has been garnished in such other state by a creditor of such employé before the bringing of this action in Kansas, and service of summons obtained on the employé only by publication, is no defense to such action. Missouri Pac. Ry. Co. v. Sharitt, 23 P. 430, 43 Kan. 375, 387, 8 L. R. A. 385, 389, 19 Am. St. Rep. 143.

²⁹ St. Louis & S. F. R. Co. v. Crews, 51 Okl. 144, 151 P. 879, Ann. Cas. 1918C, 823.

³⁰ Bank of Le Roy v. Harding, 41 P. 680, 1 Kan. App. 389.

court or a judge thereof, upon the garnishee's application; except that upon cause shown, the court or a judge may by order permit the commencement of such an action, or the issue of an execution, or the further prosecution of one stayed."³¹

§ 1873. Costs

"In case of the trial of any issue between the plaintiff and any garnishee, costs shall be awarded to the plaintiff and against the garnishee, in addition to his liability, if the plaintiff recovered more than the garnishee admitted by his answer; and if he do not the garnishee shall recover costs of the plaintiff. The costs shall include an attorney's fee of twenty-five dollars, to be taxed in favor of the prevailing party. In all other cases under this article, not expressly provided for, the court may award costs in favor of or against any party, in its discretion. When there is no issue for trial, and any liability on the part of the garnishee is disclosed, the costs of the garnishment proceedings shall be taxed for the plaintiff, if he recovers as disbursements in the principal action."³²

§ 1874. Injunction

Where plaintiff has an ample remedy by garnishment proceedings, which he has already instituted in the district court against defendant, who has fraudulently and collusively attached the property of plaintiff's debtor, he is not entitled, for his further protection, to a temporary injunction either in the district or supreme court to restrain defendant from disposing of the goods so attached.³³

DIVISION V.—DISCHARGE OF GARNISHMENT

§ 1875. Grounds—Motion—Form

The court can dissolve a garnishment and discharge the garnishee on motion of the defendant, by showing that the allegations in the

³¹ Rev. Laws 1910, § 4837.

³² Rev. Laws 1910, § 4840.

Where intervener successfully maintains his claim to property garnished, he cannot recover from the garnishing plaintiff damages for attorney's fees, hotel and traveling expenses incurred in intervening; Laws 1913, c. 121, not applying. *Squires v. Polley*, 55 Okl. 224, 154 P. 1166.

³³ *Van Natta-Lynds Drug Co. v. Gerson*, 23 P. 1071, 43 Kan. 660.

affidavit that defendant has no property liable to execution sufficient to satisfy plaintiff's demand is untrue.³⁴

Where bond is required, the failure to make bond is ground for quashing a garnishment.³⁵

Where, on a motion to discharge a garnishment, it is made to appear that the defendant has property subject to execution sufficient to satisfy plaintiff's claim, the garnishment must be discharged; ³⁶ also where it appears that the garnishee has no property or funds subject to garnishment.³⁷

MOTION TO DISCHARGE GARNISHMENT

(Caption.)

Comes now the above named defendant and moves the court to discharge the garnishment herein, and to release the garnishee from further liability thereunder, for the following reasons, to wit:

1. That the grounds alleged in plaintiff's affidavit for garnishment are each and every one untrue.

2. That this defendant has more than sufficient property liable to execution sufficient to satisfy plaintiff's demands and the indebtedness alleged in his petition, consisting, among other such property, of the following: (Describing same.)

3. That no bond for costs or security therefor, or poverty affidavit, was filed in this court, at the commencement of said action, as provided by law.

4. That no garnishment bond was filed herein prior to the issuance of the garnishment summons, as required by law.

X. Y., Attorney for Defendant.

(Verification.)

³⁴ Ed Hockaday & Co. v. King, 31 Okl. 127, 120 P. 565.

³⁵ Where in suits in attachment writs of garnishment were issued not only an affidavit, but also a bond, was required, and failure to make either would on motion cause the writ of garnishment to be quashed and the garnishee to be discharged. Arnold v. McLellan, 112 P. 1018, 27 Okl. 598.

Garnishee's prompt application to vacate order, showing that after answer admitting his indebtedness for balance of purchase price and after order to pay money into court he learned that defendant had mortgaged and disposed of property and that plaintiff had procured mortgage, and so knew garnishee was not liable, and induced him to believe that defendant might sell property, warranted vacation of order, and correction of answer so as to state actual facts. Jewell v. Schel, 103 Kan. 604, 175 P. 970.

³⁶ Scott v. Waples-Painter Co. (Okl.) 176 P. 754.

³⁷ In moving to dissolve garnishment process and to discharge garnishees

§ 1876. Bond releasing garnishment—Form—Exceptions

"The defendant may, at any time after the garnishment affidavit is filed, and before judgment, file with the clerk of the court an undertaking, executed by at least two sureties, resident freeholders of the state, to the effect that they will, on demand, pay to the plaintiff the amount of the judgment that may be recovered against such defendant in the action, with all costs not exceeding a sum specified, which sum shall not be less than double the amount demanded by the complaint on file, or in such less sum as the court shall, upon application, direct. The sureties shall justify their responsibility by affidavit annexed stating a sum which each is worth, in property within this state, over and above all his debts and liabilities and property exempt from execution, the aggregate of which sums shall be double the amount specified in the undertaking. The defendant shall serve a copy of such undertaking, with a notice where and when the same was filed, on the plaintiff. Within three days after the receipt thereof the plaintiff shall give notice to the defendant that he excepts to the sufficiency of the sureties, or he shall be deemed to have waived all objections to them."³⁸

Where an undertaking is executed by defendant and garnishment proceeding is thereby discontinued, defendant is estopped from questioning the regularity of the garnishment proceedings.³⁹

A bond releasing garnishment proceedings, and binding the obligors "to pay any judgment which may be rendered against the defendant on final hearing of the case," binds them to pay a final judgment rendered against defendant in the district court on appeal by plaintiff; and the fact that after judgment for defendant in the justice's court the garnishment proceedings could, but for the bond,

one of the grounds was a denial of the truth of the allegations in the affidavit for "attachment," where manifestly the word "garnishment" was intended. Following the making of the motion testimony was received and considered by the court on an agreement of the parties, as if an issue had been formed on the truth of the allegations in plaintiff's affidavit for garnishment, and the court, having found that the garnishees had no property or funds subject to garnishment process, discharged the garnishees. Held not error. *P. Cox Mfg. Co. v. August*, 32 P. 636, 51 Kan. 59; *Lewis v. Same, Id.*; *Barton v. Same, Id.*

³⁸ Rev. Laws 1910, § 4838.

³⁹ *Munson v. First Nat. Bank of Okmulgee*, 58 Okl. 284, 150 P. 486; *St. Louis Cordage Mills v. Western Supply Co.*, 54 Okl. 757, 154 P. 646.

be revived by appeal or error, constitutes sufficient consideration for the continuing obligation of the bond after such judgment for defendant.⁴⁰

"When the plaintiff excepts, the sureties shall appear for justification before the judge of the district court or the county judge of the county in which the action is brought, at a time and place to be mentioned in the notice given by the plaintiff and may be examined on oath on the part of the plaintiff touching their sufficiency, in such manner as the judge in his discretion may think proper. The examination shall be reduced to writing and subscribed by the sureties, if required by the plaintiff. If the judge find the sureties sufficient he shall annex the examination to the undertaking, indorse his allowance thereon, and cause them to be filed with the clerk of the district court. Thereafter all the garnishees shall be discharged, and the garnishment proceedings shall be deemed discontinued, and any money or property paid or delivered to any officer shall be surrendered to the person entitled thereto, and the costs shall be taxable as disbursements of the plaintiff in the action if he recovers. The judge may in his discretion require the costs of the justification before him, including fees to the sureties as witnesses, to be forthwith paid by the party requiring justification."⁴¹

UNDERTAKING FOR GARNISHEE'S DISCHARGE

(Caption.)

Know all men by these presents, that we, the undersigned, are held and firmly bound unto ———, the plaintiff in the above entitled action, in the penal sum of ——— dollars, lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally by these presents.

The condition of the above obligation is such that, whereas, the above named defendant has been sued in the above entitled court, by the above named plaintiff, to recover the sum of ——— dollars, and his property has been seized in garnishment therein:

Now, therefore, if the said defendant shall pay to the plaintiff on

⁴⁰ *Washer v. Campbell*, 21 P. 671, 40 Kan. 747.

⁴¹ Rev. Laws 1910, § 4839.

demand the amount of any judgment and all costs that may be rendered against said defendant in said action, not exceeding the sum of the penalty hereof, then this objection to be void; otherwise, to remain in full force and effect.

Witness our hands this _____ day of _____, 19—.

(Qualification of sureties.)

DIVISION VI.—CLAIMS BY THIRD PERSONS

§ 1877. Disclosure by garnishee—Order—Notice—Default

"When the answer of the garnishee shall disclose that any other person than the defendant claims the indebtedness or property in his hands, and the name and residence of such claimant, the court may, on motion, order that such claimant be interpleaded, as a defendant to the garnishee action; and that notice thereof, setting forth the facts, with a copy of such order, in such form as the court shall direct, be served upon him; and that after such service shall have been made, the garnishee may pay or deliver to the officer or the clerk such indebtedness or property, and have a receipt therefor, which shall be a complete discharge from all liability to any party for the amount paid or property so delivered. Such notice shall be served in the manner required for service of a summons in a civil action, and may be made without the state or by publication thereof, if the order shall so direct. Upon such service being made, such claimant shall be deemed a defendant to the garnishee action, and within twenty days shall answer, setting forth his claim or any defense which the garnishee might have made. In case of default, judgment may be rendered, which shall conclude any claim upon the part of such defendant."⁴²

It is the duty of one summoned in garnishment, holding property in the name of, or apparently that of, the defendant debtor, having notice of the claim of a third party to the property, to disclose, by its answer, the name and post-office address of such claimant, the fact that such claim is made, and the nature of such claim so

⁴² Rev. Laws 1910, § 4834.

far as known to the garnishee, that such claimant may be interpleaded, and the garnishee may be relieved from liability by delivery of the property to the officers of the court, as provided by statute.⁴³

• MOTION

(Caption.)

Comes now the K. G. Company, a corporation, interpleader herein, by its attorney, M. H., and respectfully represents and shows to the court:

1. That the W. S. Company is a corporation duly organized and existing under and by virtue of the laws of the state of ———, and that it now is and was at all times hereinafter mentioned doing business in this state.

2. That the answer of the garnishee herein, the P. O. Company, a corporation, filed in the above entitled cause on the ——— day of ———, 19—, discloses that at the time of the service of the summons in garnishment herein said garnishee had on its books to the credit of the defendant, N. L., the sum of \$——, which funds are now being held in the hands of said garnishee; that said answer further discloses that demand has been made upon said garnishee by the W. S. Company, claiming to be the owner of said funds, and that said garnishee is not advised as to the interests of said parties therein; that said answer further asks the court to protect said garnishee in any order made relative to said funds.

⁴³ *Rock Island Lumber & Mfg. Co. v. Fourth Nat. Bank*, 66 P. 1024, 63 Kan. 768.

In a suit by the state on a note given to an insolvent bank, with garnishment upon a national bank and upon maker's partnership, which answered that it owed certain sum to the maker and against the bank which admitted the copartnership's deposit thereafter garnisheed by maker, a plea in intervention by another bank alleging its payment of a draft against the maker and his assignment thereof to it, states a cause of action. *City Nat. Bank of Hobart v. State (Okla.)* 176 P. 232.

When a bank summoned as garnishee has on deposit money deposited by the defendant debtor, and has notice of the claim of a third party thereto, and files its answer denying all liability as garnishee, without making disclosure of the facts, and the plaintiff elects to take issue on such answer, if it is disclosed on the trial that the garnishee had such money on deposit at the time of the service of the summons in garnishment, the garnishee will not be permitted to defend or escape liability on the ground that some third party is entitled to the property. *Rock Island Lumber & Mfg. Co. v. Fourth Nat. Bank*, 66 P. 1024, 63 Kan. 768.

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3. That on the ——— day of ———, 19—, this interpleader, K. G. Company, filed its interplea herein, claiming all of the moneys so garnished in the hands of the P. O. Company, being the said sum of \$——; that said claim is made by reason of (setting forth fully facts upon which claim is based).

4. That in his answer filed herein on the ——— day of ———, 19—, the defendant in the above entitled action, N. L., denies that there now is, or at the time of the commencement of this action was, any personal property or any other property, real or personal or mixed, of any description whatsoever, of him within the state of Oklahoma; that by such denial said defendant disclaims any interest in any of the funds so garnished in the hands of the P. O. Company.

Wherefore, this interpleader, K. G. Company, moves the court for an order that the said W. S. Company be interpleaded herein, as a defendant to the garnishee action, and that notice thereof, setting forth the facts, with a copy of such order, in such form as the court shall direct, be served upon said W. S. Company, to the end that the rights of all parties and claimants to the funds so garnisheed may be determined, and that, after such service shall have been made, the court make an order directing the said garnishee, the P. O. Company, to pay and deliver to the clerk of this court the said funds so garnisheed, being the sum of \$——, and that, upon final determination of said garnishment proceedings, this interpleader, K. G. Company, have judgment therefor, and that all other parties and claimants be concluded from any and all claim to any part thereof.

X. Y., Attorney for Interpleader, K. G. Company.

ORDER

(Caption.)

Now, on this ——— day of ———, 19—, this cause comes on for hearing on the motion of the K. G. Company, a corporation, interpleader herein, for an order of this court that the W. S. Company, a corporation, be interpleaded herein as a defendant to the garnishee action, and it appearing to the court from said motion and from the answer of the garnishee filed herein that the said W. S. Company claims some interest in the funds held by the P. O. Company, a corporation, garnishee herein, to wit, the sum of \$——, and it further appearing to the court that said motion should be granted:

It is therefore by the court ordered that the W. S. Company, a cor-

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poration, be and is hereby interpleaded herein as a defendant to the garnishee action in the above entitled cause, and that notice thereof, setting forth the facts, together with a copy of this order, be served upon said interpleader, W. S. Company, a corporation, in the manner required by law for service of a summons in a civil action, and that, upon such service being made, said interpleader; W. S. Company, shall be deemed a defendant to the garnishee action herein, and within twenty (20) days shall answer, setting forth its claim to the funds so garnished, or any defense which the garnishee might have made.

It is further ordered that, after such service shall have been made, the garnishee herein, the P. O. Company, a corporation, shall pay and deliver to the clerk of this court the said funds so garnished, being the sum of \$——, and have a receipt therefor, which shall be a complete discharge from all liability to any party for the amount so paid and delivered, and that a copy of this order be served on said garnishee, the P. O. Company, a corporation.

——, Judge.

NOTICE

(Caption.)

The State of Oklahoma, to the Said W. S. Company, a Corporation—
Greeting:

You are hereby notified that on the —— day of ——, 19——, the plaintiffs above named filed in this cause an affidavit for garnishment, alleging, among other things, that the P. O. Company, a corporation, garnishee above named, was indebted to or had property real or personal in their possession or under their control belonging to the above named defendant; that the answer of said garnishee filed in said cause on the —— day of ——, 19——, discloses that at the time of the service of the summons in garnishment herein, said garnishee had on its books to the credit of N. L., defendant, the sum of \$——, which funds are now being held in the hands of said garnishee; that said answer further discloses that demand has been made upon said garnishee by the W. S. Company, a corporation, claiming to be the owner of said funds, and that said garnishee is not advised as to the interests of said parties therein; that said answer further asks the court to protect said garnishee in any order made relative to said funds; that on the —— day of ——, 19——, the K. G. Company, a corporation, filed its interplea in said action, claiming all of the moneys so garnished in the hands of the P. O. Company, by reason of (setting forth

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facts on which said claim is based); that in his answer filed herein on the — day of —, 19—, the defendant above named denied that there now is, or at the time of the commencement of this action was, any personal property or any other property, real or personal, of any description whatsoever, of his within the state of Oklahoma; that on the — day of —, 19—, the said interpleader, K. G. Company, filed herein its motion, setting forth the above facts, and asking that said W. S. Company be interpleaded herein as a defendant to the garnishee action, to the end that the rights of all parties and claimants to the funds so garnisheed might be determined; and that on the — day of —, 19—, this court, upon hearing said motion, made and entered an order that said W. S. Company be interpleaded as a defendant to said garnishee action, a copy of said order being attached to this notice.

You are further notified that you must answer in the garnishee action herein, within twenty (20) days from the service of this notice upon you, setting forth your claim to the funds so garnished or any defense you may have which the garnishee might have made, or judgment by default will be entered against you, which shall conclude any claim on your part to said funds.

Of which the said garnishee, the P. O. Company, a corporation, will also take notice.

Witness my hand and the seal of said court this — day of —, 19—.

—, Court Clerk.

§ 1878. Action by claimant

Trial of the issue whether an intervener owns the property garnisheed may be had prior to the trial of the cause in which the garnishment issued.⁴⁴ The burden of establishing the superior right is on claimant.⁴⁵

It is error to sustain an objection to the introduction in evidence of an assignment, regular on its face, under which a third party claims title to a fund.⁴⁶

⁴⁴ Squires v. Pooley, 55 Okl. 224, 154 P. 1166.

⁴⁵ Terry v. Parnell, 119 P. 629, 29 Okl. 846.

In action on note with garnishment against a bank which interpleaded defendant's assignees of money representing a commission which defendant and one of assignees was to receive for effecting sale of a lease, evidence held insufficient to impeach assignment for fraud. *Farmers' & Producers' Bank v. First Nat. Bank (Okl.)* 168 P. 1008.

⁴⁶ Terry v. Parnell, 119 P. 629, 29 Okl. 846.

Where money paid into court by a garnishee is on appeal ordered to be paid to an intervener, a personal judgment for the amount of the garnished fund may not be entered against plaintiff.⁴⁷

The question of the ownership of a fund garnished having once been determined against the interpleading claimant is *res adjudicata* as to those who took part in the adjudication and cannot be retried at the instance of a garnishee who asserts that the fund in hand belongs to such interpleading claimant.⁴⁸

DIVISION VII.—WRONGFUL GARNISHMENT

§ 1879. Grounds of liability

Damages may be recovered for a wrongful garnishment only when it has been discharged on motion prior to final judgment.⁴⁹

§ 1880. Measure of damages

In an action to recover for wrongful attachment of money and notes by way of garnishment, where there is no malice nor ground for exemplary damages, the measure of damages is interest on the money and notes while held under garnishment and the necessary expenses in regaining possession; but the loss of prospective profits because a part of plaintiff's property was garnished and injury to his credit are not elements of damage.⁵⁰

⁴⁷ *Stacher v. Rockhill*, 54 P. 286, 7 Kan. App. 491.

⁴⁸ *City of Wichita v. Rock Island Lumber & Mfg. Co.*, 75 P. 468, 68 Kan. 445.

⁴⁹ *Scott v. Waples-Painter Co. (Okla.)* 176 P. 754; Rev. Laws 1910, § 4855.

⁵⁰ *Dody v. State Bank of Commerce*, 108 P. 804, 82 Kan. 406.

ARTICLE III

RECEIVERS

Sections

- 1881. Grounds and occasion for receivership.
- 1882. Particular instances.
- 1883. Corporations—Involuntary dissolution.
- 1884. Petition—Form.
- 1885. Parties.
- 1886. Jurisdiction.
- 1887. Notice—Order—Forms.
- 1888. Eligibility.
- 1889. Oath and bond—Forms.
- 1890. Liability on bond.
- 1891. Objections—Waiver—Collateral attack.
- 1892. Contempt—Interference with receiver.
- 1893. Vacation of order—Supreme Court—Form.
- 1894. Powers.
- 1895. Title and custody of property.
- 1896. Liens.
- 1897. Disposition of litigated property—Order—Form.
- 1898. Existing contracts.
- 1899. Investment of funds—Application—Order—Forms.
- 1900. Receiver's sales.
- 1901. Distribution and disposition.
- 1902. Receivership expenses.
- 1903. Taxes.
- 1904. Compensation.
- 1905. Appeals.
- 1906. Actions by and against receivers.
- 1907. Liability of plaintiff and third persons.
- 1908. Additional forms.

§ 1881. Grounds and occasion for receivership

"A receiver may be appointed by the Supreme Court, the district or superior court, or any judge of either, or, in the absence of said judges from the county, by the county judge:

"First. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured."

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"Second. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt.

"Third. After judgment, to carry the judgment into effect.

"Fourth. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceeding in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

"Fifth. In the cases provided in this code, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

"Sixth. In all other cases where receivers have heretofore been appointed by the usages of the courts of equity."⁵¹

It is not in accordance with the usages of courts of equity to appoint a receiver, unless there is a suit pending.⁵²

Where the record of a case shows that a receiver was appointed on the same day on which the action was commenced therefor, it will be presumed that each was done in its proper order.⁵³

⁵¹ Rev. Laws 1910, § 4979.

With few exceptions, the appointment of a receiver is an ancillary remedy which can only be obtained in an action in which other substantial equitable relief is sought and is not made when that is the ultimate object of the action. *City of Parsons v. Parsons Water Supply & Power Co.*, 104 Kan. 294, 178 P. 438.

Where a full-blood Creek, after descent cast by his son, delivered a quitclaim deed of his interest in his son's allotment, which before delivery was duly approved by judge of county court in which son's administration was pending, the judge did not abuse his discretion in denying father's application to appoint a receiver pendente lite. *Cowokochee v. Chapman* (Okl.) 171 P. 50.

⁵² *Martin v. Harnage*, 110 P. 781, 28 Okl. 790, 38 L. R. A. (N. S.) 228.

⁵³ *Elwood v. First Nat. Bank*, 21 P. 673, 41 Kan. 475.

§ 1882. — Particular instances

A receiver may be appointed, although the interested parties are merely cotenants,⁵⁴ and without reference to insolvency.⁵⁵

A mortgagee in possession may be divested of possession by appointment of a receiver when the mortgagee is irresponsible or the rents and profits will be lost or be in danger of loss, or the mortgagee is committing waste on the property.⁵⁶ On proper showing a receiver may be appointed in foreclosure proceedings.

Where, on foreclosure of a mortgage secured on land and by a lien on the oil produced on said land, the evidence showed that \$27,000 of the \$35,000 secured was unpaid, that the mortgagor was removing the oil and appropriating the proceeds other than to the payment of the mortgage debt, it was not error to appoint a receiver.⁵⁷

The appointment of a receiver for property not embraced in a chattel mortgage on which plaintiff relies is an abuse of discretion.⁵⁸

In an action by the vendor for the price of a stock of merchandise which the purchaser had refused to accept, it is proper to appoint a receiver to sell the goods, the proceeds to be applied on plaintiff's claim.⁵⁹

⁵⁴ On petition praying for dissolution of partnership, an accounting, and the appointment of a receiver, held, that a receiver was properly appointed for an oil and gas lease, although the interested parties were merely cotenants, where they could not agree upon their rights or management of property. *Huston v. Cox*, 172 P. 992, 103 Kan. 73.

In an action by a tenant in common to recover from a cotenant an undivided interest in land, the court has no power to appoint a receiver over other lands of the defendant, not involved in the suit. Such other lands do not become involved in the suit, so as to empower the court to appoint a receiver therefor after judgment, by reason of an execution being issued on the judgment for rents, and being levied on the other lands, and such other lands being sold thereunder to the plaintiff. *Branner v. Webb*, 83 P. 274, 10 Kan. App. 217.

⁵⁵ Where the rents and profits of land in litigation are being removed, a receiver should be appointed without reference to the probable insolvency of the party against whom the proceedings are brought. *Hughes v. Garrelts*, 129 P. 43, 35 Okl. 321.

⁵⁶ *Harding v. Garber*, 93 P. 539, 20 Okl. 11.

⁵⁷ *Meridian Oil Co. v. Randolph*, 110 P. 722, 26 Okl. 634.

⁵⁸ *Thomas v. Armstrong*, 51 Okl. 203, 151 P. 689, L. R. A. 1916B, 1182.

⁵⁹ *Swisher v. Dunn*, 131 P. 571, 89 Kan. 412, 45 L. R. A. (N. S.) 810, rehearing denied 132 P. 832, 89 Kan. 787, 45 L. R. A. (N. S.) 813.

§ 1883. Corporations—Involuntary dissolution

When a judgment in involuntary dissolution proceedings "shall be rendered against a corporation the court has power to restrain the corporation, to appoint a receiver of its property, and to take an account and make distribution thereof among its creditors; and the county attorney must, immediately after the rendition of such judgment, institute proceedings for that purpose."⁶⁰

Where the property of a corporation is being mismanaged or is in danger of being lost to the stockholders and creditors through mismanagement or fraud of its officers, equity has power to appoint a receiver to its property and to require the officers to make an accounting on the petition of a minority stockholder.⁶¹

§ 1884. Petition—Form

For the purpose of appointing a provisional receiver it is not necessary that all the grounds therefor should be set forth in detail in the plaintiff's application.⁶²

PETITION FOR APPOINTMENT OF RECEIVER

(Caption.)

Comes now the plaintiff, A. B., and for cause of action against the defendant, C. D., alleges and states:

1. That on the ——— day of ———, 19—, he entered into a partnership with said defendant by a contract for an indefinite period of time under the name of A. B. & C. D., in the city of ——— for the purpose of conducting the business of wholesale dealers in boots and shoes, on consignment and on commission, and also for the purpose of conducting in their own right the business of selling boots and shoes at retail in said city.

2. That he and the defendant, C. D., under said contract did conduct a partnership business, and are still conducting such a part-

⁶⁰ Rev. Laws 1910, § 1276.

⁶¹ Exchange Bank of Wewoka v Bailey, 29 Okl. 246, 116 P. 812, 39 L. R. A. (N. S.) 892.

Where corporation's property is in danger of being lost to stockholders through mismanagement, etc., of its officers and directors, court of equity can appoint a receiver of its property until minority stockholders' rights could be determined and accounting by officers had. Union State Bank v. Mueller (Okl.) 172 P. 650.

⁶² Elwood v. First Nat. Bank of Greenleaf, 41 Kan. 475, 21 P. 673.

nership business at the places hereinafter mentioned in said city of _____.

3. That the said business now carried on by A. B. & C. D. consists of a wholesale establishment at No. _____, _____ street, in said city of _____, for the sale of boots and shoes on commission, which merchandise has been consigned to said partnership by manufacturers and dealers located in Massachusetts and other Eastern states, and elsewhere, and that said partnership has a stock of goods and merchandise now on hand belonging to said consignors, and also certain outstanding accounts representing sales from such consigned goods, which may belong to consignors.

4. That the other businesses conducted by said partnership are two retail stores in the city of _____, one at _____ street, and the other at _____ street, which stores contain goods and merchandise sold to said firm absolutely, and from which stores the said partnership are prosecuting sales of boots and shoes at retail.

5. That the said partnership doing business at all the places as above alleged is insolvent and is unable to meet its obligations, either for the goods held on consignment or for the goods purchased for said retail stores; that some of the debts owing by said partnership are past due, and they are unable to pay the same; that mortgages have been executed by said firm to various creditors to secure their claims against said partnership upon the stock in said retail stores, and that the said mortgagees are now in possession thereof, with power to sell; that there is a large equity in said property covered by said mortgages, which should be preserved for the benefit of the creditors of said partnership, and which may be seized by legal process and may be jeopardized unless a receiver be appointed to take charge of and possession thereof for the benefit of creditors, and the property in said wholesale store and accounts arising therefrom belonging to consignors will be jeopardized unless the same be preserved by a receiver to be appointed by the court who shall take possession thereof for whom it may concern.

6. That suits are threatened against said partnership, and there is a conflict between said mortgagees as to their priorities, and said mortgagees threaten to sell said property, and the same will

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thus be sacrificed unless sold by a receiver to be appointed by this court.

7. Plaintiff states that he heretofore demanded of the defendant, a dissolution of said partnership, which the defendant refused and now refuses, and plaintiff now demands as of right a dissolution hereof; that he has never been able upon his demands for dissolution to agree with him thereon; that he has heretofore demanded of the defendant to join with him in an assignment for the benefit of creditors by said partnership of all the property, which he refused and still refuses.

8. That the rights and interests of the plaintiff and of all the creditors of said firm, and the right of the consignors and owners of the goods and accounts in said wholesale store will be endangered and sacrificed unless all the property belonging to said firm be placed in the possession of a receiver to be appointed by this court.

9. That the plaintiff is entitled to have said firm dissolved and its property appropriated to the payment of its debts.

Wherefore plaintiff prays that said partnership be dissolved by the order of this court, and that a receiver be appointed by this court to take charge and possession of all the property, rights, and credits of said partnership, and to sell the same under the orders of this court, and apply the proceeds as the court may order, and for all other and proper relief to which he is entitled in equity.

_____, Attorney for Plaintiff.

State of _____, County of _____, ss.:

A. B., being first duly sworn, says that he is the plaintiff in the above entitled action and the facts set forth in the above petition are true.

Sworn to and subscribed before me this _____ day of _____, 19____.

(Seal.) Notary Public, _____ County, State of _____.

§ 1885. Parties

In an action against a railroad company for personal injuries, receivers appointed for the company, after the filing of a petition in error by plaintiff, are not necessary parties to such petition.⁶⁸

⁶⁸ Kelley v. Union Pac. Ry. Co., 48 P. 843, 58 Kan. 161, (1756)

§ 1886. Jurisdiction

Under the statute authorizing the appointment of receivers, a district judge may hear an application for the appointment of a receiver at chambers at any point in the judicial district, though it be outside the county wherein the action is pending.⁶⁴

A receiver may be appointed by the district court for an oil and gas lease beyond the jurisdiction, where the lease creates only an incorporeal hereditament, and in any event where the court has jurisdiction of the persons of interested parties.⁶⁵

The district court has no power to appoint a receiver to take possession of property attached in actions wherein the court had acquired no jurisdiction.⁶⁶

§ 1887. Notice—Order—Forms

A receiver should not be appointed to take possession and control of a business and property from its owners, without notice to the persons to be affected, and before they have had an opportunity to be heard in relation to their rights, except in cases of the greatest emergency.⁶⁷

Where the petition for a receiver fails to state facts sufficient to show that delay resulting from giving notice of the application to the adverse party would defeat or injure the petitioner's rights, the appointment of receiver without notice is error;⁶⁸ but the error is waived when the defendant moves to vacate the appointment, answers to the merits, and tries the issues.⁶⁹

NOTICE OF APPLICATION

To J. D., R. H., F. E., and F. C.

You and each of you are hereby and by this instrument notified that on ——— day of ———, 19—, at the hour of nine o'clock in the

⁶⁴ *Glass v. Gould*, 138 P. 796, 41 Okl. 424; Rev. Laws 1910, § 4979.

The district judge at chambers has jurisdiction to appoint a receiver in a cause pending in another county within his district. *Pyeatt v. Prudential Ins. Co.*, 38 Okl. 15, 131 P. 914, Ann. Cas. 1915C, 894.

⁶⁵ *Huston v. Cox*, 172 P. 992, 108 Kan. 73.

⁶⁶ *Barton v. Hanauer*, 44 P. 1011, 4 Kan. App. 543.

⁶⁷ *Feess v. Mechanics' State Bank*, 115 P. 563, 84 Kan. 823, L. R. A. 1915A, 606.

⁶⁸ *Union State Bank v. Mueller* (Okl.) 172 P. 650; *Pyeatt v. Prudential Ins. Co.*, 38 Okl. 15, 131 P. 914, Ann. Cas. 1915C, 894.

⁶⁹ *Union State Bank v. Mueller* (Okl.) 172 P. 650.

forenoon, or as soon thereafter as counsel can be heard, this plaintiff will make application to have the court appoint a receiver to take charge of the royalty claimed by said defendants under the deed and contract from A. M. and B. M. to J. D. of date of —, 19—, and the deeds and conveyances from said J. D. to said R. H. and F. E., and any other property or interest claimed by said defendants under said instruments.

Of this the said defendants will take due notice and be governed accordingly.

Dated this — day of —, 19—, at —, Oklahoma.
—, Attorneys for Plaintiffs.

SHERIFF'S RETURN

State of Oklahoma, }
— County. } ss.:

Received this writ —, 19—, at — o'clock — m., and served the same upon the following persons, defendants within named, at the times following, to wit: J. D., F. E., and F. C. — 19—, by delivering to each of said defendants, personally, in said county, a true and certified copy of the within writ, with all the indorsements thereon, and upon R. H. —, 19—, by leaving for said defendant at his usual place of residence in said county, with a member of the family over fifteen years of age a true and certified copy of the within writ with all the indorsements thereon, to wit: Mrs. R. H.

—, Sheriff,
By —, Deputy.

Sheriff's Fees:

Service and return, first person.....	\$—
Serving three additional persons.....	—
Copies four summons.....	—
Total	—

ORDER APPOINTING RECEIVER

(Caption.)

Now, on this the — day of —, 19—, this above entitled cause came on for hearing on the application of plaintiff for the appointment of a receiver to take charge of and receive and collect the rentals and royalty claimed by said J. D., R. H., and F. E., from

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the A. M. allotment, described as the ———, in ——— county, Oklahoma.

Plaintiffs appearing by their attorney, and the defendants, J. D., R. H., and F. E., appearing by their attorneys, and it further appearing to the court that the defendants have been given due and legal notice of such hearing, and the court having heard the testimony introduced by the plaintiffs in support of said application, and defendants J. D., R. H., and F. E. thereupon demur to the testimony introduced by the plaintiffs, for the reason and upon the grounds that the same is insufficient to authorize the court to appoint a receiver herein, and upon the same grounds move the court to deny the application for the appointment of a receiver herein, which demurrer and which motion were each by the court denied, to which action of the court the defendants above named and each of them except.

After being fully advised in the premises the court finds that a receiver should be appointed in the above named cause.

It is therefore ordered and adjudged that H. H. be and is hereby appointed receiver to receive and collect the rentals and royalty from the A. M. allotment in ———, in ——— county, Oklahoma, and claimed by said J. D., R. H., and F. E., or either of them. That said H. H. enter into a bond in the sum of ——— dollars, with sureties to be approved by the clerk of this court, conditioned for the faithful performance of his duties as such receiver, and that he will be answerable for what he shall receive of such money, rentals, and royalty from said A. M. allotment.

It is further ordered that said receiver hold said money, rentals, and royalty so received until further order of this court. And said receiver is further ordered and authorized to receive and collect all money, rentals and royalty from the said A. M. allotment which may be claimed by said J. D., R. H., and F. E., or either of them, or which is or has been payable to the said J. D., R. H., and F. E., or either one of them, from the A. M. allotment, and it is further ordered that said receiver take such steps to protect and care for same as may be necessary.

And it is further ordered that said receiver from time to time at least once every quarter, make a report to this court of his proceedings in this behalf, and that he be at liberty to apply to this

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court for further directions as he may deem necessary upon proper notice. To all of which the defendants J. D., R. H., and F. E. except.

Signed this _____ day of _____, 19—, at _____, Oklahoma.
_____, Judge.

CERTIFICATE

State of Oklahoma, }
County of _____, } ss.:

I, _____, court clerk in and for _____ county, state of Oklahoma, hereby certify the within to be a true copy of the order in case No. _____, A. M. et al. v. J. D. et al., in the district court, as the same appears on file and record in my office.

Dated this _____ day of _____, 19—.

(Seal.)

_____, Court Clerk,

By _____, Deputy.

I received this writ _____, 19—, and executed same by delivering a true copy to the _____, a corporation, by leaving a true copy to _____, vice president.

This _____ day of _____, 19—.

_____, Sheriff,

By _____, Deputy.

Fees\$1.00

1 copy.... .25

1.25

§ 1888. Eligibility

"No party, or attorney, or person interested in an action, shall be appointed receiver therein, except by consent of all parties thereto." ⁷⁰

§ 1889. Oath and bond—Forms

"Before entering upon his duties, the receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the court or judge, execute an undertaking to such person, and in such sum as the court or judge shall direct to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein." ⁷¹

⁷⁰ Rev. Laws 1910, § 4980.

⁷¹ Rev. Laws 1910, § 4981.

BOND OF RECEIVER

(Caption.)

Know all men by these presents, that we, ——— as principal, and ———, ———, and ———, as sureties, are held and firmly bound unto ——— in the penal sum of ——— dollars, for the payment of which sum, well and truly to be made, we do bind ourselves and each of us, our heirs, executors and administrators, jointly and severally by these presents.

The condition of the above obligation is such that whereas, the above named principal, ———, was on the ——— day of ———, 19—, appointed receiver in the above entitled cause, wherein ——— was plaintiff and ——— was defendant, and required by said order of appointment to execute an undertaking in the sum aforesaid, to the effect that he would faithfully discharge the duties of receiver in said action and obey the orders of the court therein:

Now, therefore, if the said ——— shall faithfully discharge the duties of receiver in said action and obey the orders of the court therein, then this obligation shall be void; otherwise, to remain in full force and effect.

In witness whereof, we have hereunto subscribed our names this ——— day of ———, 19—.

(Qualification of sureties.)

OATH OF RECEIVER

(Caption.)

State of Oklahoma, }
——— County. } ss.:

I, ———, appointed receiver in the within entitled cause, do solemnly swear that I will faithfully perform the duties of such receiver and obey the orders of the court therein, to the best of my knowledge and ability. So held me God. _____

Subscribed and sworn to before me this ——— day of ———, 19—.

_____, Court Clerk,
By _____, Deputy.

§ 1890. — Liability on bond

Where a receiver's bond provided that he should perform the trust imposed and make due report of his trust to the court as ordered and make true account of all moneys and properties which should come into his hands, there was a breach of the bond when he failed to pay over money in his hands as directed by the court for which the receiver and his surety were liable.⁷²

In an action on a receiver's bond, the finding and judgment of the court as to payment and distribution of the fund in the action in which the receiver was appointed is competent evidence to show the receiver's default and breach of the bond.⁷³

§ 1891. Objections—Waiver—Collateral attack

Where the plaintiff has filed a petition in a court of competent jurisdiction against certain defendants asking to have a receiver appointed, and such receiver is appointed without objection, and a sale is made by said receiver or by some agent appointed by the court for him, and at such sale the plaintiff is a bidder and the property is sold to him under his bid, such plaintiff is presumed to take notice of all proceedings and orders taken or made in the case, and is estopped from questioning, in a collateral proceeding, the appointment of the receiver or the agent to sell said real estate.⁷⁴

One who, with full knowledge of all the steps taken in placing a bank in liquidation, receives and retains a dividend paid by the officers in control of the liquidating bank, cannot deny the validity of the liquidation.⁷⁵

Stockholders who recognize a corporation's receiver by intervening and asking that he be directed to sell part, instead of all, of the assets are estopped to contend that his appointment was unauthorized.⁷⁶

An order appointing a receiver to take custody of property involved in litigation, which was unwarranted and erroneous, but not absolutely void, is not open to collateral attack. On the other hand, the orders of a court purporting to vest a receiver with the author-

⁷² Northrup Nat. Bank v. Varner, 109 P. 394, 82 Kan. 691.

⁷³ Northrup Nat. Bank v. Varner, 109 P. 394, 82 Kan. 691.

⁷⁴ Threadgill v. Colcord, 85 P. 703, 16 Okl. 447.

⁷⁵ Watkins v. National Bank of Lawrence, 32 P. 914, 51 Kan. 254.

⁷⁶ Kreitzer v. Monarch Portland Cement Co., 141 P. 1004, 92 Kan. 835.

ity and control of property and funds not involved in the litigation in which the receiver was appointed, are absolutely void, and can be collaterally attacked at any time, by any one, in any proceeding where their validity is in issue.⁷⁷

§ 1892. Contempt—Interference with receiver

"Whenever, in the exercise of its authority, a court shall have ordered the deposit or delivery of money or other thing, and the order is disobeyed, the court, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money, or thing, and deposit or deliver it, in conformity with the direction of the court."⁷⁸

A seizure of, or unauthorized interference with, assets in the custody of a receiver, cannot be justified on the ground that his appointment is irregular or invalid. Questions of invalidity or irregularity in his appointment should be presented to the court appointing the receiver.⁷⁹

§ 1893. Vacation of order—Supreme Court—Form

"In all cases in the Supreme Court, in which a receiver has been appointed, or refused, by any justice of the Supreme Court, the party aggrieved may, within ten days thereafter, have the right to file a motion to vacate the order refusing or appointing such receiver, and hearing on such motion may be had before the Supreme Court, if the same be in session, or before a quorum of the justices of said court in vacation, at such time and place as the said court or the justices thereof may determine, and pending the final determination of the cause, if the order was one of the appointment of a receiver, the moving party shall have the right to give bond with good and sufficient sureties, and in such amount as may be fixed by order of the court or a justice thereof, conditioned for the due prosecution of such cause, and the payment of all costs and damages that may accrue to the state, or any officer or person by reason thereof, and the authority of any such receiver shall be suspended pending a final determination of such cause, and if such receiver

⁷⁷ *Bowman v. Hazen*, 77 P. 589, 69 Kan. 682.

The appointment and retention of a receiver cannot be collaterally attacked. *Greenawalt v. Wilson*, 84 P. 403, 52 Kan. 109.

⁷⁸ Rev. Laws 1910, § 4985.

⁷⁹ *Missouri Pac. Ry. Co. v. Love*, 59 P. 1072, 61 Kan. 433.

shall have taken possession of any property in controversy in said action, the same shall be surrendered to the rightful owner thereof, upon the filing and approval of said bond."⁸⁰

MOTION TO VACATE ORDER APPOINTING RECEIVER

In the Supreme Court of the State of Oklahoma.

(Caption.)

Comes now the said defendant, C. D., and moves this honorable court to vacate the order heretofore made herein on the ——— day of ———, 19—, appointing E. F. as receiver herein, said order being made by ———, one of the justices of said court, and for grounds of such motion, says:

1. (Set forth grounds, as, lack of jurisdiction to appoint, no necessity for appointment, etc.)

Defendant further moves the court to fix the amount of bond to be given by this defendant, and that upon the giving and approval of such bond that the authority of such receiver be suspended pending the final determination of this cause, and that all property of which said receiver has taken possession be surrendered to the rightful owner.

X. Y., Attorney for Defendant.

(Verification.)

BOND

(Caption.)

Know all men by these presents, that ———, as principal, and ——— and ———, as sureties, are held and firmly bound unto ——— in the penal sum of ——— dollars, for the payment of which sum, well and truly to be made, we do bind ourselves and each of us, our heirs, executors, and administrators, jointly and severally by these presents.

The conditions of the above obligation are such that, whereas, on the ——— day of ———, 19—, one E. F. was appointed receiver in the above entitled cause by the order of ———, one of the justices of the Supreme Court of the state of Oklahoma; and whereas, on the ——— day of ———, the above named defendant, principal herein, filed in said cause his motion to vacate said order appointing such receiver:

⁸⁰ Rev. Laws 1910, § 4987.

Now, therefore, if the above named defendant, principal herein, shall duly prosecute said cause to a final determination, and shall pay all costs and damages that may accrue to the state of Oklahoma, or to any officer thereof, or to said ———, plaintiff, then this obligation to be void; otherwise, to remain in full force and effect.

Witness our hands this ——— day of ———, 19—.

(Qualification of sureties.)

§ 1894. Powers

"The receiver has, under the control of the court, power to bring and defend actions in his own name, as receiver; to take and keep possession of the property, to receive rents, to collect debts, to compound for and compromise the same, to make transfers, and generally to do such acts respecting the property as the courts may authorize."⁸¹

§ 1895. Title and custody of property

A receiver holds the property coming into his hands by the same right as the person for whose property he is the receiver.⁸²

Courts of equity may appoint receivers to take possession of property in controversy and enjoin interference with the possession of the receiver, whether the property is in the immediate possession of the defendant or his agent, and may order the agent or employes of defendant, though not parties to the record, to deliver the specified property to the receiver.⁸³

§ 1896. — Liens

The receiver of an insolvent corporation takes its property for the creditors subject to the equities, liens, or incumbrances, whether created by operation of law or by act of the corporation, existing against the property at his appointment.⁸⁴

⁸¹ Rev. Laws 1910, § 4982.

⁸² *Lawson v. Warren*, 124 P. 46, 34 Okl. 94, 42 L. R. A. (N. S.) 183, Ann. Cas. 1914C, 139.

⁸³ *Severns v. English*, 101 P. 750, 19 Okl. 567.

⁸⁴ *Ardmore Nat. Bank v. Briggs Machinery & Supply Co.*, 94 P. 533, 20 (1765)

After property passes into the exclusive jurisdiction and control of the court, no liens against it can be obtained, nor preferences acquired by any action that claimants may take; and it is not subject to execution or interference without the permission of the court appointing the receiver.⁸⁵

The receiver's title and right to possession of the property of an insolvent nongoing corporation vest from the original order for the appointment, and are superior to those of a judgment creditor who levies on the property after the order of appointment, but before the perfecting thereof.⁸⁶

Okl. 427, 23 L. R. A. (N. S.) 1074, 129 Am. St. Rep. 747, 16 Ann. Cas. 133; *Smith & Furbush Mach. Co. v. Huycke* (Okl.) 177 P. 919.

A receiver is merely a ministerial agent of the court, who holds the property or fund intact until the relative rights of claimants thereto can be determined; and, although his possession is exclusive, he takes the property subject to all valid liens existing against it when he is appointed. *Cramer v. Iler*, 66 P. 617, 63 Kan. 579.

Where a vendor, after the appointment of a receiver to take charge of the property and affairs of an insolvent, nongoing corporation, files its plea of intervention, setting up all the facts in relation to certain reservation of title notes taken by the vendor, for sales of machinery to the insolvent corporation, and further alleges that the reservation notes are liens on the property, and prays for their foreclosure, and also prays for general relief, this is not such an election as will preclude the vendor from afterwards amending its plea of intervention, and asserting title and right to possession of the property described in the reservation notes as against one who claims to have a lien thereon subsequent in time to the reservation notes, where such lien, if it attached to the property at all, came into existence after the property fell into the hands of the receiver, notwithstanding the reservation notes were not filed as chattel mortgages. *Ardmore Nat. Bank v. Briggs Machinery & Supply Co.*, 94 P. 533, 20 Okl. 427, 23 L. R. A. (N. S.) 1074, 129 Am. St. Rep. 747, 16 Ann. Cas. 133.

⁸⁵ *Cramer v. Iler*, 66 P. 617, 63 Kan. 579.

A lien cannot be obtained on the assets of an insolvent partnership in the hands of a receiver appointed in an action for dissolution of the partnership, superior to the claims of creditors who have intervened in such action, where the assets in the hands of the receiver have been ordered to be preserved for distribution among the creditors by taking judgment and filing a creditor's bill. *Foster v. Field*, 74 P. 190, 13 Okl. 230.

Property and assets brought within the control of a court of competent jurisdiction by the appointment of a receiver are in custodia legis, and not subject to seizure by attachment or garnishment process by other courts. *Missouri Pac. Ry. Co. v. Love*, 59 P. 1072, 61 Kan. 433.

⁸⁶ *Ardmore Nat. Bank v. Briggs Machinery & Supply Co.*, 94 P. 533, 20 Okl. 427, 23 L. R. A. (N. S.) 1074, 129 Am. St. Rep. 747, 16 Ann. Cas. 133.

(1766)

§ 1897. Disposition of litigated property—Order—Form

"When it is admitted, by the pleading or oral examination of a party, that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court or delivered to such party, with or without security, subject to the further direction of the court." ⁸⁷

ORDER DISPOSING OF LITIGATED PROPERTY

(Caption.)

It appearing to the satisfaction of the court that E. F. has in his possession and under his control the following described personal property, to wit: (Describing same), which property is the subject of litigation in this action, that the same is held by him as trustee for one G. H., and that he, the said E. F., trustee, disclaims any interest therein:

It is ordered that said E. F. deliver the said property to J. K., who is hereby authorized to receive the same under the following conditions: (Setting forth conditions), the said receiver thereof, J. K., to hold the same subject to the further direction and orders of this court.

———, Judge.

§ 1898. Existing contracts

The appointment of a receiver to take charge of the property belonging to a person does not have the effect in law of changing or annulling contracts made by such party before the receiver's appointment.⁸⁸

§ 1899. Investment of funds—Application—Order—Forms

"Funds in the hands of a receiver may be invested upon interest, by order of the court; but no such order shall be made, except upon the consent of all the parties to the action." ⁸⁹

⁸⁷ Rev. Laws 1910, § 4984.

⁸⁸ St. Louis & S. F. R. Co. v. Ravia Granite Ballast Co. (Okla.) 174 P. 252. A receiver appointed for a lessee can do no act in operating the lessee's business which will impair the obligations of contracts previously entered into between the lessor and lessee, and the lessor may maintain an action against the lessee for a violation of such contracts. *Id.*

⁸⁹ Rev. Laws 1910, § 4983.

ORDER FOR INVESTMENT OF FUNDS

(Caption.)

It appearing to the court that the receiver herein, G. H., has in his hands the sum of \$—— over and above all amounts necessary for the conduct of said receivership, and that it would be for the best interests of the estate and of all parties concerned, and all parties to this action having filed herein their written consent and request that said funds should be invested in government bonds:

It is by the court ordered that said receiver be and he is hereby authorized and directed to invest the said sum of \$—— out of the funds now in his hands as such receiver in government Liberty Bonds.

Dated ———, 19——.

———, Judge.

§ 1900. Receiver's sales

The statute in relation to the notice to be given in case of sales under execution does not govern in case of receiver's sales. If the court in the decree authorizing the sale orders that notice be given, a compliance with such order is all that is required.⁹⁰

There being no statute directing the manner of sale of property by a receiver, the court in the order of sale issued on a decree of foreclosure may direct the method.⁹¹

Where a receiver at the time fixed for the sale is necessarily absent, the court may appoint an agent to conduct the sale; and such agent will not be required to take oath or give bond, unless so directed by the order appointing him.⁹²

A court of equity in a foreclosure has jurisdiction to order its receiver to sell property before a decree determining the rights of parties, when a sale will benefit all parties whose rights are involved.⁹³

⁹⁰ Threadgill v. Colcord, 85 P. 703, 16 Okl. 447.

⁹¹ First Nat. Bank v. Colonial Trust Co. (Okl.) 167 P. 985.

The court may direct how a receiver's sale of realty shall be conducted and what notice shall be given to interested parties, no provision being made therefor by statute. Farmers' Hardware & Implement Co. v. Thacker, 54 Okl. 425, 153 P. 1144.

⁹² Threadgill v. Colcord, 85 P. 703, 16 Okl. 447.

⁹³ Lawton Mill & Elevator Co. v. Farmers' & Merchants' Bank of Cincinnati, Iowa (Okl.) 164 P. 670.

An order of the court overruling a motion to set aside a sale and ordering the bidder to pay into court the amount of his bid, and that the receiver execute to the bidder a deed conveying the property purchased, legally amounts to a confirmation of the sale;⁹⁴ and, if no appeal is taken therefrom, the matter becomes *res adjudicata* as to movant.⁹⁵

Where certain irregularities in executing an order of sale are shown by the receiver's return, the court has power to approve them, and may do so by its order confirming the return.⁹⁶

Where a receiver sold mortgaged chattels pursuant to the court's order, it was error, on trial of the foreclosure suit, to peremptorily discharge the receiver and set aside his acts.⁹⁷

Though a case in which a receiver was appointed was reversed on appeal, such reversal did not affect the sale if the court had jurisdiction to render the decree, and the fact that plaintiff in the suit in which the receiver was appointed was himself the purchaser at the receiver's sale would not alter the case. The general rule is that a purchase at a decretal sale made by a court of competent ju-

⁹⁴ Where a report of the sale is made and filed in the court from which the decree issued, and a motion is made to set aside the sale, and the court, after hearing argument of counsel and considering the motion to set aside the sale, overruled the motion, and thereupon entered an order that the bidder pay into the hands of the clerk of the court the amount of his bid, and that the receiver make, execute, and deliver to the bidder a deed conveying the real estate purchased, this amounts in law to a confirmation of said sale, although the court does not say in express language, "I hereby confirm the sale." The order made by the court amounts legally to the same thing, and recognizes the validity of the sale. *Threadgill v. Colcord*, 85 P. 703, 16 Okl. 447.

The overruling of a motion to set aside a receiver's sale amounts to a confirmation of the sale. *Farmers' Hardware & Implement Co. v. Thacker*, 54 Okl. 425, 153 P. 1144.

⁹⁵ *Farmers' Hardware & Implement Co. v. Thacker*, 54 Okl. 425, 153 P. 1144.

⁹⁶ *First National Bank v. Colonial Trust Co.* (Okl.) 187 P. 985. It is not a valid objection to confirmation of a receiver's return of sale that part of the property sold was real estate, and that the order of sale should have been directed to the sheriff and not to the receiver. A motion to confirm notwithstanding irregularities of its receiver in executing order of foreclosure sale was addressed to trial court's discretion. *Id.*

Under Rev. Laws 1910, § 5201, held, that where a receiver's sale of realty had been confirmed and the receiver directed to make deed therefor, no further action by the court was necessary to the validity of the deed. *Farmers' Hardware & Implement Co. v. Thacker*, 54 Okl. 425, 153 P. 1144.

⁹⁷ *J. I. Case Threshing Mach. Co. v. Barney*, 54 Okl. 686, 154 P. 674.

isdiction is valid, unless the decree be void, although it may be reversed.⁹⁸

§ 1901. Distribution and disposition

Where a corporation was in the hands of a receiver, who had received funds in that capacity, which funds had been paid into the registry of the court by its order upon vacation of the receivership, and two parties demanded the fund as officers of the corporation, it is error to order payment to one of them without hearing any evidence, but the proper officer under the by-laws of the corporation to receive the fund should be determined before paying it over.⁹⁹

A party upon whose application a receiver is appointed in a civil case has no greater interest in the proceeds of such receivership than he would have had if the receiver had been appointed upon the application of any one of the other litigants in the action.¹

Where the plaintiff has recovered judgment in an action against her cotenant for her undivided interest in the land and for her share of the rents, and her interest has been discharged from the custody of the receiver, and she put in possession thereof, and execution has been levied on other property of the defendant sufficient to satisfy the judgment, it is error for the court to refuse to discharge the defendant's share of the property on his motion.²

§ 1902. Receivership expenses

Crediting a receiver with expenditures for repairs made during his possession of real property is not error.³

Where a receiver has been appointed in an action to foreclose a chattel mortgage, and there exists any irregularity in such appointment, if, on the application of defendant to set aside the appointment, the court orders the receiver to be discharged if defendant will execute a bond to pay the judgment and costs of the case, and defendant voluntarily executes the bond, and has restored from the receiver all of the property in controversy, such defendant cannot

⁹⁸ Threadgill v. Colcord, 85 P. 703, 16 Okl. 447.

⁹⁹ Bellamy v. Washita Val. Tel. Co., 108 P. 389, 25 Okl. 792.

¹ Jackson v. King, 58 P. 1013, 9 Kan. App. 160, judgment reversed 62 P. 655, 62 Kan. 850.

² Branner v. Webb, 63 P. 274, 10 Kan. App. 217.

³ Pickering v. Howard, 173 P. 296, 103 Kan. 263.

contest the legal costs of the receiver for any irregularity in his appointment.⁴

A receiver is not chargeable with the use of an opera house on occasions when he had donated it for charitable and social purposes, where he received nothing for its use, and it is not shown that he would have received anything, or that the property would have been used on such occasions by other persons, had he required compensation therefor, and where it is customary for ordinarily prudent owners of like property to occasionally donate the use of the same for like purposes.⁵

§ 1903. Taxes

A receiver carrying on the business of a corporation as a going concern is liable for payment of the corporation tax imposed on it.⁶

§ 1904. Compensation

It is largely within the discretion of the court appointing a receiver to determine the compensation to be paid for his services,⁷ time of payment,⁸ and from what funds payment shall be made.⁹

Receivers of insolvent institutions should only be allowed adequate compensation for the services performed by them for the trust estates placed in their charge, and useless and extravagant expenditures should be disallowed.¹⁰

In making an order for compensation of a receiver, the court is

⁴ *State Journal Co. v. Commonwealth Co.*, 22 P. 982, 43 Kan. 93.

⁵ *McKennon v. Pentecost*, 56 P. 958, 8 Okl. 117.

⁶ *State v. Sessions*, 147 P. 789, 95 Kan. 272.

Under Act Cong. June 3, 1864, c. 106, 13 Stat. 99, authorizing the creation of national banks, and providing that nothing in the act is to exempt the real estate of such banks from either state, county, or municipal taxes, the interest and penalties accrued on delinquent taxes are as much a legal claim of the state as are the taxes, and orders for the distribution of assets in the hands of a receiver should be made in subordination to the paramount right of the state to such taxes, penalties, and interest. *Gray v. Logan County*, 54 P. 485, 7 Okl. 321, modifying judgment *United States Nat. Bank v. Logan Co. (Okl.)* 51 P. 97.

⁷ *Northrup Nat. Bank v. Varner*, 109 P. 394, 82 Kan. 691.

⁸ *Northrup Nat. Bank v. Varner*, 109 P. 394, 82 Kan. 691.

⁹ From what funds payment of compensation of a receiver shall be made is also largely within the discretion of the court appointing him. *Northrup Nat. Bank v. Varner*, 109 P. 394, 82 Kan. 691.

¹⁰ *United States Nat. Bank v. National Bank of Guthrie*, 51 P. 119, 6 Okl. 163; *Cunningham v. Gray*, Id.

not bound by any oral order which may have been made by a preceding judge of the same court, the orders never having been incorporated in writing and signed by the judge, and it having been made to appear that the judge who appointed the receiver, and whose orders are attempted to be shown, was interested in the trust estate as a debtor.¹¹

§ 1905. Appeals

"In all cases in the district or superior court, in which a receiver may be appointed, or refused, the party aggrieved, may, within ten days thereafter, appeal from the order of the court, or a judge thereof, refusing to appoint, or refusing to vacate the appointment of a receiver, to the supreme court, without awaiting the final determination of such cause, and in cases where a receiver shall be, or has been, appointed, upon the appellant filing an appeal bond, with sufficient surety, in such sum as may have been required of such receiver by a court or the judge thereof, conditioned for the due prosecution of such appeal and the payment of all costs or damages that may accrue to the state, or any officer or person by reason thereof, the authority of such receiver shall be suspended until the final determination of such appeal, and if such receiver shall have taken possession of any property, real or personal, the same shall be returned and surrendered over to the appellant, upon the filing and approval of said bonds. The right of appeal herein provided for shall obtain in and be applicable to any and all actions now pending or which may hereafter be instituted pursuant to any statutory provision, general or special."¹²

§ 1906. Actions by and against receivers

A receiver appointed by the court being an officer of the court, it is discretionary with the court whether his application to be made a party defendant to a mortgage foreclosure proceeding should be granted.¹³

A plaintiff can prosecute his action for injuries received by a locomotive, against both the railway company and receivers appointed to take charge of its property, and may in one action establish his

¹¹ United States Nat. Bank v. National Bank of Guthrie, 51 P. 119, 6 Okl. 163; Cunningham v. Gray, Id.

¹² Rev. Laws 1910, § 4986.

¹³ Patrick v. Eells, 2 P. 116, 30 Kan. 680.

demand against whichever is legally liable; but, where the receivers are in exclusive control, a joint judgment against both the receivers and the railway company is erroneous so far as it imposes liability on the railway company.¹⁴

In an action against a railroad company and its receivers, where a verdict is rendered in favor of the plaintiff, without naming either of the defendants, it will be construed as a verdict against the receivers alone; and a judgment entered on such verdict against both the receivers and the company will be modified by vacating the judgment against the company.¹⁵

Denial of the petition of a secured creditor for leave to bring an independent foreclosure proceeding against a receiver in possession of the lien property, is not necessarily an abuse of discretion.¹⁶

Whether a claimant shall be permitted to replevin property in the hands of a receiver, or required to seek a remedy in the proceeding in which the receiver is appointed, is within the discretion of the court. Where leave to sue a receiver is granted *ex parte*, and replevin is brought for property in his official custody, the court may, in its discretion, withdraw such leave and dismiss the action. Where a replevin action brought against a receiver by leave of court is dismissed on motion of the receiver while therein asking a withdrawal of the leave to sue and a dismissal, the dismissal will not be reversed because no evidence was introduced or no formal order made withdrawing leave to sue.¹⁷

¹⁴ Union Pac. Ry. Co. v. Smith, 52 P. 102, 59 Kan. 80.

In an action jointly against a railway corporation in the hands of receivers and the receivers to recover for personal injuries sustained by an employé, where it is determined that the receivers were in exclusive possession, the action may be dismissed as to the corporation, or judgment against it set aside, without affecting the right to recover against the receivers. St. Louis & S. F. Ry. Co. v. Bricker, 69 P. 328, 65 Kan. 321.

¹⁵ Union Pac. Ry. Co. v. Smith, 52 P. 102, 59 Kan. 80.

¹⁶ Holmes & Hibbard Mortg. Co. v. Ardmore Nat. Bank, 48 Okl. 319, 150 P. 105.

¹⁷ McNeal Machinery Co. v. Empire Brick & Gas Co., 116 P. 501, 85 Kan. 277.

In a suit against a mortgagor, a receiver was appointed without notice to a mortgagee in possession of a stock of goods. The mortgagee obtained leave to sue the receiver in replevin, and complied with all the conditions of the order, but the court afterwards revoked such permission, and dismissed the action of replevin, refusing to hear evidence that the mortgagee held a valid first mortgage on the goods. Such action would be an abuse of discretion. Conwell v. Lowrance, 26 P. 461, 46 Kan. 83.

A notice that all persons having claims or demands against the receiver to present them to a special master within a given time will not preclude the prosecution of a pending action to final judgment in the state court.¹⁸

Though the liability of a receiver is official, and not personal, when it does not appear that the receivership is terminated, a mere averment that the property and funds have passed out of his possession and beyond his control will not constitute a good defense in an action against him for personal injuries alleged to have been negligently inflicted.¹⁹

Damages sustained are recoverable and injury to possession is properly considered.²⁰

§ 1907. Liability of plaintiff and third persons

Where a receiver was legally in possession of property after its sale on execution and before expiration of the redemption period, the holder of the equity of redemption had no action against the person causing the receiver's appointment for the rents and profits during that period.²¹

A receiver who takes control of property and funds not involved in the litigation in which he was appointed, under void orders purporting to clothe him with authority and control of such property and funds, without the consent and contrary to the wishes of the owner, and those who procure the orders to be made and co-operate with the receiver in the original seizure and appropriation, are all trespassers, liable for the property and funds so wrongfully taken, with interest.²²

¹⁸ Erb v. Popritz, 52 P. 871, 59 Kan. 264, 68 Am. St. Rep. 362.

Under sections 2 and 3 of the Act of Congress of August 13, 1888 (25 Stat. 436), amendatory of the federal judiciary act, receivers over property, appointed by the United States courts, are required to manage or operate the trust property according to the laws of the state in which it is situated, and may be sued, in respect to its management or operation, in the courts of such state, without the previous leave of the court appointing them; and in such cases a judgment rendered in the state court is conclusive upon the federal court as to the existence and amount of the plaintiff's claim, but the time and manner of its payment are to be controlled by the court under whose orders the receiver acts. Reinhart v. Sutton, 51 P. 221, 58 Kan. 728.

¹⁹ Erb v. Popritz, 52 P. 871, 59 Kan. 264, 68 Am. St. Rep. 362.

²⁰ K. C. Oil Co. v. Harvest Oil & Gas Co., 80 Okl. 61, 194 P. 228.

²¹ Pickering v. Howard, 173 P. 296, 103 Kan. 263.

²² Bowman v. Hazen, 77 P. 589, 69 Kan. 682.

§ 1908. Additional forms

ORDER OF SALE OF REAL ESTATE

(Caption.)

Now on this —— day of ——, 19—, this cause came on to be heard upon the application of E. F., receiver herein, for an order confirming the appraisal of the real estate of the C. D. Company heretofore filed, and on consideration thereof the court finds that the said appraisal has been made and returned in conformity to law and the former orders of this court, and it is further ordered that the said appraisal be and the same is hereby approved and confirmed.

This cause coming further to be heard upon the application of said receiver for instructions as to the sale of said real estate of the said A. B. Company described and enumerated in said appraisal, and on consideration thereof, the court having found that it will be necessary to sell all of said real estate of said defendant company in order to procure funds with which to pay the claims due and owing by the said defendant company, the court further finds that it will be for the best interests of the parties interested that said property be offered at public sale.

It is therefore ordered by the court that said receiver, E. F., proceed to advertise said real estate described and enumerated in said appraisal for sale, by publication in a newspaper of general circulation in —— county, once a week for four consecutive weeks, commencing on ——, 19—, and that he then proceed to sell said property at public auction at the office and factory of said defendant company at ——, —— county, ——, on ——, 19—, at eight o'clock a. m., at not less than two-thirds of the appraised value thereof, and for cash, to wit: (Describing same.)

And said property shall be sold free from any lien or incumbrance whatsoever by or of the M. N. Company, a party to this suit.

Said receiver, E. F., is further directed to report his proceedings in the premises to this court for confirmation and for further orders.

———, Judge.

ORDER CONFIRMING SALE OF REAL ESTATE

(Caption.)

Now on this —— day of ——, 19—, this cause came on to be heard upon the report of E. F., receiver of the A. B. Company

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herein, of the sale made by him on —, 19—, at eight o'clock a. m., on the premises of the A. B. Company in —, — county, —, at which he, as said receiver, publicly sold, in pursuance of an order of this court made and entered on —, 19—, that part of said real estate belonging to the A. B. Company ordered by this court in said order to be offered for sale, and described as follows: (Describing same), to F. G., who bid for the same the sum of \$—, which was more than two-thirds of the appraised value of said real estate.

And on motion of said receiver to confirm the same, the court having carefully examined said report and being satisfied that said sale has in all respects been made in conformance to law and said orders of this court, it is ordered by the court that same be and it is hereby approved and confirmed, and said receiver is hereby ordered, upon receipt by him of the purchase money from said F. G., to convey said respective parcels of real estate to said respective purchasers, and also, upon cancellation of the claims and mortgage lien set up by the M. N. Company, defendant in this cause, and the payment of said defendant's portion of the costs of sale in this suit, taxed at \$—, to convey said respective parcel of real estate to the said F. G.

It is further ordered by the court that said receiver hold said funds arising from the sale of said real estate subject to the further orders of this court. —, Judge.

MOTION TO DIRECT RECEIVER TO PAY OVER MONEY

(Caption.)

Come now the plaintiffs and move the court to make an order directing the receiver appointed in the above named cause to pay over to plaintiffs the one-half of the royalty the receiver has received in the above named cause, and for ground states:

That the instrument under which said defendants claim title and estate, specifies, and the said J. D. in his sworn testimony admitted, that one-half of the royalty so received from the A. M. allotment in controversy in the above entitled cause was due and payable to plaintiffs; that there is no dispute but what the one-half of the royalty now belongs to the plaintiffs.

Wherefore plaintiffs pray that this court make an order direct-

(1776)

ing the said receiver, appointed in the above named cause, to pay over to plaintiffs the one-half of the royalty as received from the A. M. allotment in controversy in the above named suit.

———, Attorneys for Plaintiffs.

ORDER DIRECTING RECEIVER TO PAY OVER MONEY

(Caption.)

Now on this —— day of ——, 19——, the same being one of the regular judicial court days of the district court, and the said court being in session, this cause came on for hearing upon the motion of plaintiffs for an order to require the receiver heretofore appointed in this cause to pay over to plaintiffs one-half of the royalty as received from the interest claimed by the defendants J. D., R. H., and F. E. in the A. M. allotment.

Plaintiffs and defendants appeared in court by their attorneys, except the defendant F. S., who appeared not.

The court, being fully advised in the premises, finds that said motion should be sustained in part.

It is therefore ordered and decreed that said receiver be and he is hereby ordered and directed to pay over to plaintiffs or their attorneys of record as collected 40 per cent. of the royalties and rents so collected from the royalty involved in this suit and heretofore run to and claimed by the defendants J. D., R. H., and F. E. in the A. M. allotment, described as ——, in —— county: Provided however, that the total amount payable to plaintiffs or their attorneys of record under this order shall not exceed the sum of forty-five hundred dollars (\$4,500.00).

Dated this —— day of ——, 19——, at ——, Oklahoma.

———, Judge.

ORDER FOR RECEIVER TO FILE FINAL ACCOUNT

(Caption.)

Now, on this —— day of ——, 19——, for good cause shown, it is by the court ordered and decreed that H. H., the receiver heretofore appointed herein, make and file a full and final account and report of all his acts done herein, and of all moneys received by him herein, on or before ——, 19——, and it is further ordered that said final account and report be and the same is set for hearing on ——, 19——, at —— o'clock —— m.

———, Judge of the District Court.

ORDER APPROVING FINAL ACCOUNT AND DISCHARGING RECEIVER
(Caption.)

Now, on this ——— day of ———, 19—, this cause came on to be heard on the motion to confirm the accounts of ———, receiver, heretofore filed herein, and the court finds said accounts correct, and that said receiver has fully obeyed the orders of the court to him issued, and has duly accounted for and paid over all moneys coming into his hands as such receiver.

It is now, therefore, ordered that all acts and things done by said receiver, as well as his accounts filed herein, be and they hereby are approved and confirmed, and the said ——— is discharged from further duties, liabilities, and responsibilities as receiver herein, and his bond heretofore given in this cause is released and discharged from further liability herein.

———, Judge.

ARTICLE IV

REFERENCE

Sections

1909. Reference by consent—Stipulation—Form.

1910. Upon application or court's motion—Order—Form.

1911. Reference in vacation.

1912. Referee—Appointment, qualification, and compensation—Order—Oath—Forms.

1913. Trial—Reports—Exceptions—Forms.

1914. Review by court.

1915. New trial.

§ 1909. Reference by consent—Stipulation—Form

"All or any of the issues in the action, whether of fact or of law, or both, may be referred, upon the written consent of the parties, or upon their oral consent in court, entered upon the journal." ²²

²² Rev. Laws 1910, § 5018.

Litigants may stipulate that the referee shall settle the issues in a case referred to him. *Kelly v. West*, 48 Okl. 274, 149 P. 902. Where a litigant joins in a motion asking for a reference and that a particular person be appointed referee and empowered to settle the issues, and later files supplemental pleadings, he will be deemed to have stipulated that the power shall be exercised. *Id.*

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STIPULATION TO REFER ISSUES

(Caption.)

It is hereby stipulated and agreed by and between the parties hereto that all of the issues in the above entitled cause between plaintiff, A. B., and defendant, C. D., both of law and of fact, may be referred to the Honorable M. N., and that said referee may hear and report to this court upon all of the issues herein.

Dated ———, 19—.

G. H., Attorney for Plaintiff.

X. Y., Attorney for Defendant.

§ 1910. — Upon application or court's motion—Order—Form

"When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in either of the following cases: Where the trial of an issue of fact shall require the examination of mutual accounts, or when the account is on one side only, and it shall be made to appear to the court that it is necessary that the party on the other side should be examined as a witness to prove the account; in which case the referees may be directed to hear and report upon the whole issue, or upon any specific question of fact involved therein; or where the taking of an account shall be necessary for the information of the court before judgment, in cases which may be determined by the court, or for carrying a judgment into effect, or where a question of fact other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of an action."²⁴

²⁴ Rev. Laws 1910, § 5019.

Mutual accounts.—Where an action requires an examination of mutual accounts, the court may, over objection on request of either party, or on its own motion, direct a reference. *Hale v. Marshall*, 52 Okl. 688, 153 P. 167; *Hale v. Marshall*, 52 Okl. 688, 153 P. 167.

Where, in a contractor's action on a paving contract, the city pleaded as a set-off overpayments on a previous sewer contract, and the case involved the examination of a long and intricate account, the court properly directed a reference. *Ritchie v. City of Topeka*, 138 P. 618, 91 Kan. 615.

An action for an accounting of royalties, under a gas lease requiring the examination of a long account of the gas taken from several wells for a considerable time, was properly sent to a referee for trial. *Culbertson v. Iola Portland Cement Co.*, 125 P. 81, 87 Kan. 529, Ann. Cas. 1914A, 610.

That one of the parties to an account claims that a portion of the items embraced in it have been settled, which claim the other denies, will not pre-

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An action for a penalty for usury is referable.²⁵

On a motion to refer, the court looks to the pleadings to determine if a reference is authorized.²⁶ The matter of granting a reference is largely within the discretion of the trial court.²⁷

vent a reference and determination of all the dealings between the parties. *Smith v. Scully*, 71 P. 249, 66 Kan. 139. A case requiring an examination of mutual accounts is a subject of compulsory reference. *Id.*

A refusal to order a reference in an action on a long account is not erroneous, where only three items thereof are in controversy. *J. R. Watkins Medical Co. v. Hamm*, 130 P. 650, 89 Kan. 138.

Where, in a suit to foreclose a mortgage to a building association, the question whether the note had been paid involved an inquiry into a long account between the parties, consisting of items of payments, interest, etc., and fines, owing to default on the part of the borrower in payment of the assessments and dues, and it appeared that the mortgagee was insolvent, so that premiums should be credited to the mortgagor after the payment of the association's debts, it was proper to send the case to a referee for the taking of an account between the parties. *Abbott v. Arkansas City Building & Loan Ass'n*, 66 P. 1041, 63 Kan. 888.

In an action on several notes, the makers in their answer alleged that they delivered to plaintiff certain notes as collateral security to the indebtedness evidenced by the notes sued on, and that plaintiff had failed to use diligence in collecting said notes. They also sought to set off an open account against plaintiff, and asked damages for breach of contract. The reply alleged that some of the notes were incorrectly listed, and that others were given to plaintiff to secure other notes given by the makers, and denied generally all allegations of the answer not admitted or pleaded to. Held, that the issues raised by the pleadings were not within the provisions of the statute, authorizing a compulsory reference. *Alford v. Buford & George Implement Co.*, 53 P. 530, 7 Kan. App. 754.

Plaintiff alleged that he had given defendant a mortgage on farm implements, horses, and cattle; that a verbal agreement was entered into that the mortgagor might from time to time sell the property to apply on the mortgage debt; that the defendant, disregarding this agreement, took possession of the property, sold it at public sale, and bid it in in such manner that it brought much less than its value, and refused to credit plaintiff with its reasonable value. In the second count of the complaint it was alleged that defendant took possession of 20 head of plaintiff's cattle, and so treated them that their value was greatly decreased. The prayer was for an accounting, and a recovery of the difference between the selling price of the property and its real value, and for damages for the diminished value of the cattle. Held, that the matters alleged were proper subjects for reference. *Shore v. White City State Bank*, 59 P. 263, 61 Kan. 246.

Account on one side only.—Where, in an action against a township treas-

²⁵ *Grainola State Bank v. Shellenberger* (Okla.) 197 P. 436.

²⁶ *Lapham v. Kansas & Texas Oil, Gas & Pipe Line Co.*, 123 P. 863, 87 Kan. 65, Ann. Cas. 1913D, 813.

²⁷ *Johnson v. Jones*, 39 Okl. 323, 135 P. 12, 48 L. R. A. (N. S.) 547.

APPLICATION FOR APPOINTMENT OF REFEREE

(Caption.)

Comes now the above named plaintiff, A. B., by his attorney, G. H., and moves the court to make and enter an order herein appointing a referee, and referring the above entitled cause to said referee so appointed, for the purpose of taking an accounting between the plaintiff and the defendants herein of all receipts and disbursements had or made in connection with the acquisition and development of the following described property, to wit: (Describing same.)

In support of said motion this plaintiff shows to the court that heretofore, to wit, on or about the ——— day of ———, this court made and entered its order herein adjudging that this plaintiff is entitled to a ——— interest in ———, above described, and in the profits thereof accrued or to accrue, subject to the right of said defendant C. D. to hold title to said ——— until he shall have been paid his expenditures in full, and ordering that an accounting be had before a referee to be appointed by this court.

That thereafter the said defendant C. D. duly filed his motion for a new trial, which said motion was by this court on the ——— day

urer and his bondsmen, a jury would have had great difficulty in determining the amount of the indebtedness of the treasurer to the township, because of voluminous book accounts, it was proper to appoint a referee. *Weakley v. Cherry Tp.*, 63 P. 433, 62 Kan. 867.

A claim for services and a number of items of expenses, with proper credits of payments thereon, constitute one account only, and do not involve mutual accounts. *Lapham v. Kansas & Texas Oil, Gas & Pipe Line Co.*, 123 P. 863, 87 Kan. 65, Ann. Cas. 1913D, 813. That one party kept one side of the account and the other party the other side thereof is immaterial in determining whether there were mutual accounts. *Id.*

Where an issue of fact is joined upon an account pleaded on one side only, and it shall be made to appear that it is necessary that the party on the other side should be examined as a witness to prove the account, the court has the power to make a reference, without the consent of defendants; and defendants are not entitled, as a matter of right, to a trial by jury. *Van Trees v. Territory*, 54 P. 495, 7 Okl. 353.

Account necessary before judgment.—A cause was a proper one for reference where before any judgment could be rendered, it was necessary that the books of a corporation purchasing, selling, shipping, and handling grain, live stock, and other farm products, and hundreds of accounts with customers should be examined. *Hoffman v. Farmers' Co-op. Shipping Ass'n*, 97 P. 440, 78 Kan. 561.

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of ———, 19—, overruled, and the court having granted said defendant at that time an extension of sixty days' time within which to make and serve a case-made on appeal to the Supreme Court, and the time for appeal having expired, said defendant having failed to perfect his appeal, said order of the court, as above mentioned, has become and is now a final order and judgment by reason whereof the court should, in accordance with the terms and conditions of said order, make an order appointing a referee and referring this cause to said referee for the purpose of taking the account, as provided in the previous order of this court hereinbefore mentioned.

————, Attorneys for Plaintiff.

§ 1911. Reference in vacation

"A judge, in vacation, upon the written consent of the parties, may make any order of reference which the court of which he is a member could make in term time. In such case, the order of reference shall be made on the written agreement of the parties to refer, and shall be filed with the clerk of the court, with the other papers in the case."²⁸

§ 1912. Referee—Appointment, qualification, and compensation—Order—Oath—Forms

"In all cases of reference, the parties, except when an infant may be a party, may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly; and if the parties do not agree, the court shall appoint one or more referees, not exceeding three, who shall be free from exception."²⁹

A referee is an officer of the court, and under its supervision, for the purpose of the accomplishment of justice in the matter which has been referred to him.³⁰

A referee, sitting in the place of a court, is not disqualified because employed as an attorney in another cause involving substantially the same questions of fact and law as the cause referred to

²⁸ Rev. Laws 1910, § 5023.

²⁹ Rev. Laws 1910, § 5021.

In case where reference is proper, trial court, on request of either party unless one is a minor, should give the parties an opportunity to agree upon a referee or referees not exceeding three. *Swarts v. State* (OkL) 174 P. 255. On the failure of parties to agree upon a referee or referees, the court may make a proper appointment without their consent. *Id.*

³⁰ *State Bank of Stockton v. Showers*, 70 P. 332, 65 Kan. 431.

him.³¹ He cannot pass on a motion which presents the question of his own bias or prejudice, but such objection must be raised by a motion to the court to discharge the referee.³²

Where a reference is made to three, a majority may act.³³

"The referees shall be allowed such compensation for their services as the court may deem just and proper, which shall be taxed as part of the costs in the case."³⁴

"The referees must be sworn or affirmed well and faithfully to hear and examine the cause, and to make a just and true report therein, according to the best of their understanding. The oath may be administered by any person authorized to take depositions."³⁵

Although the oath required by statute should be taken, a substantial compliance therewith is sufficient,³⁶ and omission by a referee to take the oath as required is an irregularity only, which is waived by proceeding to trial without objection.³⁷

³¹ Holt v. Holt, 102 P. 187, 23 Okl. 639.

³² Brewer v. Asher, 56 P. 714, 8 Okl. 231.

³³ Under the statute providing that words giving joint authority to three or more persons are considered as giving such authority to a majority, unless otherwise expressed, a report of two of three referees, the other having failed to appear and qualify, is valid. Blevins v. Morledge, 47 P. 1068, 5 Okl. 141; Rev. Laws 1910, § 2950.

³⁴ Rev. Laws 1910, § 5025.

Allowance of \$2,550 to a referee for services for 30 days reduced to \$1,000. Jordon v. Western Union Tel. Co., 76 P. 396, 69 Kan. 140, judgment modified 85 P. 285, 70 Kan. 880.

The court cannot order the parties to an action to deposit the amount of the referee's costs before he reports who is the prevailing party, though the statute provides that a referee shall "receive such compensation as the court shall direct, to be paid by the prevailing party before the report is filed and recorded, as costs in the action." Cummins v. Robinson, 2 Okl. 494, 37 P. 1064.

³⁵ Rev. Laws 1910, § 5024.

³⁶ Kelly v. West, 48 Okl. 274, 149 P. 902. Failure of a referee to take the oath prescribed by Rev. Laws 1910, § 5024, will be deemed waived, where the parties proceed to trial and submit their case without objection on this point. Id.

³⁷ Logan v. Brown, 95 P. 441, 20 Okl. 334, 20 L. R. A. (N. S.) 298.

ORDER REFERRING ISSUES AND APPOINTING REFEREE

(Caption.)

Now, on this —— day of ——, 19——, the above entitled matter coming on for hearing upon the motion and application of the plaintiff for the appointment of a referee, and all parties being present by their attorneys, and it appearing to the court that a referee should be appointed herein, in accordance with the order of this court heretofore made and entered on the —— day of ——, 19——, for the purpose of taking an account between the plaintiff and defendants herein of all receipts and disbursements had or made in connection with the acquisition and development of the following described property, to wit: (Describing same); and it further appearing to the court that X. Y. is a suitable person to act as said referee:

It is therefore by the court considered, ordered, and decreed that X. Y. be, and he hereby is, appointed referee for the purpose of taking an account as aforesaid, and said referee is hereby ordered and directed to take such testimony as is necessary, and report his findings of facts and conclusions of law herein, within 60 days from this date.

——, District Judge.

OATH OF REFEREE

(Caption.)

State of ——, }
County of ——, } ss.:

I, X. Y., the heretofore duly appointed referee in the above entitled cause, being first duly sworn, upon oath do hereby solemnly swear that I will well and faithfully hear and examine the above entitled cause, and make a just and true report therein, according to the best of my understanding and ability.

So help me God.

(Signature.)

Subscribed and sworn to before me this —— day of ——, 19——.

(Seal.)

——, Notary Public.

My commission expires ——.

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§ 1913. Trial—Reports—Exceptions—Forms

"A trial before referees is conducted in the same manner as a trial by the court. They have the same power as the court to summon and enforce the attendance of witnesses, to administer all necessary oaths in the trial of the case, and to grant adjournments upon such trial. They must state the facts found and the conclusions of law separately, and their decisions must be given, and may be excepted to and reviewed in like manner. The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the referee is to report the facts, the report has the effect of a special verdict."³⁸

Where a case is sent to a referee to find the facts and the law, and there are several important matters in controversy between the parties, it is the duty of the referee to find specifically as to each of them, so that, if it is desired, exceptions may be properly taken, and a review had thereon by the court;³⁹ however, a referee who makes general findings of every material fact in issue is not required to answer numerous questions about minute details,⁴⁰ nor is he required to answer a list of interrogatories, to be answered "Yes" or "No."⁴¹

A referee may reserve his decision on objections made to evidence

³⁸ Rev. Laws 1910, § 5020; *Eberle v. Drennan*, 136 P. 162, 40 Okl. 59, 51 L. R. A. (N. S.) 68.

The report of a referee determining the whole issue by findings of fact and conclusions of law, separately stated, stands as the decision of the court, and judgment may be entered thereon as if the action had been tried by the court. *Kelley & Lysle Milling Co. v. Schreiber*, 102 Kan. 172, 169 P. 222.

³⁹ *Walker v. Hosack*, 43 P. 781, 56 Kan. 468.

⁴⁰ *School Dist. No. 3 of Republic County v. Howell*, 44 Kan. 285, 24 P. 365.

In an action for an accounting between principal and agent, that is referred to a referee to hear and determine all the issues, both of law and fact, it is the referee's duty to state the facts and conclusions of law separately; and a general finding that there is a balance due on account, without special findings as to the facts concerning the principal items about which there has been much controversy, is so indefinite and insufficient that it ought not to be confirmed, as the complaining party cannot assign errors as to the insufficiency of evidence to sustain the finding. *McMullen v. Schermerhorn*, 30 P. 188, 48 Kan. 739.

⁴¹ In a trial before a referee, a submission of a list of interrogatories, to be answered "Yes" or "No," by the referee, was properly refused. *Breitkreutz v. National Bank of Holton*, 79 P. 686, 70 Kan. 698.

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until his final decision of the case.⁴² He should announce his findings and conclusions to the interested party a sufficient length of time before making his report to enable him to prepare and present his exceptions and preserve his record for review.⁴³

If the report is silent as to a material fact, the presumption arises that the fact has not been proved.⁴⁴

Where the findings of the referee are defective in not stating the facts fully and explicitly, the party complaining thereof should apply for further and more specific findings.⁴⁵

Where a referee fails to report in time, an objection by either party should be sustained, and a new trial ordered, but if either party consents, he waives the irregularity.⁴⁶

Where a cause was referred by agreement, and the report was filed after the time prescribed by court, and a motion of the losing party to set it aside did not raise the question of delay in filing, it was a waiver of such objection.⁴⁷

It is not error for the court, upon a sufficient showing, to extend the time for making such report, the referee being an officer of the court.⁴⁸

⁴² *Bernhard v. City of Wyandotte*, 6 P. 617, 33 Kan. 465.

⁴³ *Iralson v. Stang*, 90 P. 446, 18 Okl. 423.

⁴⁴ *Brooks v. Garner*, 97 P. 995, 20 Okl. 236, denying rehearing 94 P. 694. 20 Okl. 236.

⁴⁵ *Foster v. Voigtlander*, 13 P. 777, 36 Kan. 572.

⁴⁶ *Hale v. Marshall*, 52 Okl. 688, 153 P. 167.

⁴⁷ *Bentley v. Ramsey*, 123 P. 1064, 31 Okl. 765.

Where the report of a referee appointed to report the law and the facts is filed after the time set in the order, and the party against whom judgment is rendered appears and excepts to the confirmation thereof, the next day moved to set aside the order of confirmation, which is overruled, and who does not question the filing of the report out of time until after judgment, the objection is waived. *Herring & Young v. West*, 108 P. 372, 25 Okl. 788.

Where a report of a referee on the law and facts is filed after the time designated, and the party against whom judgment is rendered appears at the filing, and moves for new trial, and raises no question as to the time of filing of the report, it will be presumed that the objection was waived. *Bradford v. Cline*, 72 P. 369, 12 Okl. 339.

⁴⁸ *Norton v. Huntoon*, 22 P. 565, 43 Kan. 275; *Clark v. Bank of Hennessey*, 79 P. 217, 14 Okl. 572, 2 Ann. Cas. 219.

Where a stipulation is filed by the parties that the referee shall submit his report to the district court for confirmation before the close of the November term of the court for 1884, and the said term of court is adjourned from a day in November until January 5, 1885, and continues in session until January 30, 1885, and the report of the referee is filed December 20, 1884, such

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It was not misconduct for a referee, who was appointed to determine the amount of an indebtedness, to look over bank books and checks received in evidence, and talk with the banker who had them in custody, after the hearing, where beyond what was contained in the books such witness' testimony amounted to nothing.⁴⁹

After the parties have submitted their whole case to a referee, without objection, it is too late for the losing party to insist that a regular term of court has intervened between the order of reference and the report at which no order was made continuing the reference, or extending the time for a report, and that therefore the referee has no jurisdiction.⁵⁰

"It shall be the duty of the referees to sign any true exceptions taken to any order or decision by them made in the case, and return the same, with their report, to the court making the reference."⁵¹

REPORT OF REFEREE

(Caption.)

This cause was referred to the undersigned by order of this court dated —, 19—, for the purpose of taking an accounting between the plaintiff and defendants herein of all receipts and disbursements had or made in connection with the acquisition and development of the following described property, to wit: (Describing same), and by subsequent orders of this court the time in which the referee might hear said matter and make his report was extended to —, 19—, copies of all of which orders are hereto attached.

In accordance with the above authority this matter was set for report is filed before the close of the November term for 1884, in accordance with the terms of the stipulation. *Davis v. Finney*, 14 P. 460, 37 Kan. 165.

An agreement was made in writing by counsel authorizing the court or judge to extend the time for the referee to report, with a condition that the plaintiff waived nothing by the stipulation. Held, that the condition was repugnant to the authority given for the extension of time, and that the party could not thereafter complain that the report of the referee was not filed within the time fixed by the original order. *Shore v. White City State Bank*, 59 P. 263, 61 Kan. 246.

A referee's report which is presented to the clerk and marked "Filed" within the time allowed for its filing, and then withdrawn and retained until after the expiration of such time in order to have it bound, is filed in time. *Poole v. Poindexter*, 83 P. 126, 72 Kan. 654.

⁴⁹ *Weakley v. Cherry Tp.*, 63 P. 433, 62 Kan. 867.

⁵⁰ *Selker v. Pracht*, 18 P. 718, 39 Kan. 521.

⁵¹ *Rev. Laws 1910, § 5022.*

hearing before the referee on ———, 19—, and continued from time to time, by agreement of parties, to ———, 19—, at which time a hearing was had, the plaintiff, A. B., appearing in person and by counsel, G. H., and the defendant, C. D., being present in person and by counsel, X. Y., and at said hearing it was agreed that the defendant, C. D., should be allowed credit, and the plaintiff charged, with the following items: (Setting same forth.)

It was agreed that the total income from the property involved from the beginning of operations to ———, 19—, is: (Setting same forth), making a total sum in the possession of the defendant, C. D., received as income from said property of \$———, one-third of which is owing to the plaintiff, A. B., \$———.

Summary

Total amount received from said property....\$———

Total amount expended for said property....\$———

Balance in possession of defendant, C. D....\$———

One third of which is owing to the plaintiff, A. B., to wit:
\$———.

All of which is respectfully submitted.

X. Y., Referee.

Dated this ——— day of ———, 19—.

OBJECTIONS TO REPORT OF REFEREE

(Caption.)

Comes now the defendant, C. D., and objects to the report of the referee, the Honorable X. Y., heretofore filed in this cause, and moves that the said report be not confirmed and that the cause be re-referred, upon the following grounds, to wit:

1. Because the report of the said referee is not sustained by the evidence.

2. Because the report of the said referee is contrary to law.

3. Because the report of the said referee shows on its face that it does not exhibit a true and complete account between the plaintiff and the defendant, C. D.

4. Because said referee has refused to allow defendant, C. D., credit for certain necessary expenditures made by him in the development of the leased property in question.

(1788)

5. Because the referee has refused to allow defendant, C. D., credit for a reasonable compensation for the care and management of plaintiff's alleged interest in said property and the pumping thereof.

6. Because the said referee has failed to include in said account lawful interest coming to the said defendant, C. D., from money advanced by him for development of the leased property.

7. Because the referee has refused to allow defendant, C. D., credit for certain expenditures made by him in the development of said leases in agreement with L. M.

8. Because the referee has refused to allow defendant, C. D., credit for the taxes paid by him on the alleged interest of plaintiff, amounting to \$——.

9. Because the referee has refused to allow defendant, C. D., credit for the sum of \$——, expended by him in erection of tank houses.

(The above grounds for example. Others may be used.)

——, Attorneys for Defendant, C. D.

§ 1914. Review by court

A court which appoints a referee can review, modify, or correct his report, or set it aside and grant a new trial, though no exceptions were filed or motion for new trial presented to the referee.⁵²

⁵² *Humble v. German Alliance Ins. Co.*, 116 P. 472, 85 Kan. 140, Ann. Cas. 1912D, 630; *Krapp v. Aderholdt*, 21 P. 1063, 42 Kan. 247.

Where, under Sess. Laws 1907-08, c. 31, art. 4, § 16, conferring on the Supreme Court exclusive original jurisdiction over county seat contests, the court appoints a referee with authority to hear the case and report the evidence with his findings of fact and conclusions of law, the report thus made is to be given every reasonable presumption of being correct. *Town of Grove v. Haskell*, 31 Okl. 77, 116 P. 805.

In a suit in equity commenced in the court of Indian Territory prior to statehood and by consent referred to a master to take evidence and make findings and conclusions, the district court as successor to the court where the suit was commenced could set aside the findings and conclusions of the master and make others when the master's findings were clearly in conflict with the evidence. *Gidney v. Chapple*, 110 P. 1099, 26 Okl. 737.

The district court has power to set aside, confirm, or modify the report of a referee, and, where material findings of fact are contained in his report, which the court finds are not sustained by any evidence, it is error to confirm the report in all things and render judgment thereon. *Jones v. Franks*, 6 P. 789, 33 Kan. 497.

The court may set aside, confirm, or modify the report of a referee in a disbarment proceeding. *State v. Vernor*, 79 Okl. 124, 191 P. 729.

(1789)

It may correct a referee's findings of fact only in cases where the authority is conferred by stipulation, or in cases referable without consent.⁵³

A report of a referee appointed by the district court may be attacked by motion to set aside, or by exception filed on the coming in of the record, and it is not essential that exceptions be taken to errors on the trial, which appeared in the record.⁵⁴

Where the referee has made his report, on a question of fact, but no action has been taken thereon, and at the trial all the questions are submitted to the court as though no reference had been had, such reference and report are not binding on the court, and may be disregarded.⁵⁵

Where a stipulation is filed by the parties that the report of the referee shall be heard and judgment rendered in vacation, and objection is subsequently made to the stipulation being carried out for want of power to render a judgment at such time, the district court has authority to hear and dispose of the report of the referee at the first term after the report is filed.⁵⁶

Where a referee is required to report the facts, the report has the same force and effect as the verdict of a jury,⁵⁷ and the court should not disturb such findings, unless clearly against the weight of the evidence.⁵⁸

One desiring to have the evidence taken by a referee reviewed by the district court to determine whether it supports the findings should have a bill of exceptions containing the evidence allowed by the referee, and if necessary apply for time to prepare exceptions. If there is not sufficient time to apply to a referee to prepare a bill of exceptions, application should be made to the court which may direct the report to be held, or, if filed, referred back to the referee, or the court can order the referee to report the evidence.⁵⁹

A general objection to the refusal of a referee to adopt a set of

⁵³ *Tribal Development Co. v. Roff*, 125 P. 1124, 36 Okl. 74.

⁵⁴ *Kelly & Lysle Milling Co. v. Schreiber*, 108 P. 816, 82 Kan. 403, 20 Ann. Cas. 192.

⁵⁵ *Bethell v. Chicago Lumber Co.*, 39 Kan. 230, 17 P. 813.

⁵⁶ *Davis v. Finney*, 14 P. 460, 37 Kan. 165.

⁵⁷ *Shannon v. Petherbridge*, 87 P. 668, 17 Okl. 507.

⁵⁸ *Erisman v. Kerwin*, 56 P. 858, 8 Okl. 92.

⁵⁹ *City of Newton v. Toews*, 107 P. 543, 82 Kan. 15.

conclusions of fact will not avail the party offering them, if any of the conclusions were rightfully rejected.⁶⁰

An objection to the confirmation of the referee's report on the ground that it is not sustained by the evidence is properly overruled where the evidence is not before the court on the hearing of the report.⁶¹

Where a particular finding of fact of a referee is not predicated on the issues joined by the pleading,⁶² or is not sustained by sufficient evidence, the same should be set aside on motion of the aggrieved party, and a new trial granted.⁶³

Where a referee sustains a motion to strike out certain testimony, and no order is made reinstating it, such testimony cannot be considered by the court in determining whether there was any evidence to sustain the finding of the referee.⁶⁴

Where it appears that the party moving to set aside the report of the referee has been notified what the decision of the referee will be, and has ample opportunity thereafter to prepare and present a bill of exceptions to the referee, the report will not be set aside because such party did not have actual notice of the particular day the referee would file his report.⁶⁵

It is not error for the court to overrule a motion to strike the referee's report from the files, for the reason that the defeated party was not notified of the finding and conclusions of the referee, where it is not shown that any substantial right was prejudiced thereby.⁶⁶

The conclusions of law made by a referee on his findings of fact are in no particular binding upon the trial court, and may be set

⁶⁰ *Breitbart v. National Bank of Holton*, 79 P. 686, 70 Kan. 698.

⁶¹ *Province v. Lovi*, 47 P. 476, 4 Okl. 672.

⁶² *Lee v. Hairlip*, 99 P. 806, 22 Okl. 393, judgment reversed on rehearing 99 P. 1135, 22 Okl. 393.

⁶³ *Chandler v. Dye*, 15 P. 925, 37 Kan. 765.

Where there is no evidence reasonably tending to support the finding of fact made by a referee, but there is an overwhelming preponderance of testimony against such finding, and the finding of fact is one which materially supports the conclusions of law made by the referee, the finding of fact and the conclusions should be set aside. *Jackson v. Thornton*, 58 P. 951, 8 Okl. 331.

⁶⁴ *Kansas City Paper House v. Foley Ry. Printing Co.*, 118 P. 1056, 85 Kan. 678.

⁶⁵ *Davis v. Finney*, 14 P. 460, 37 Kan. 165.

⁶⁶ *Clark v. Bank of Hennessey*, 79 P. 217, 14 Okl. 572, 2 Ann. Cas. 219.

aside or modified without a second reference of the case or report to the referee.⁶⁷

On consideration of a motion by a party to confirm the report of a referee, if the conclusions of law of the referee are erroneous or made in favor of the wrong party, the court may overrule the motion to confirm.⁶⁸

Findings of fact by a referee may be amended by the court in any case where the changes merely reflect the different views of the court as to the effect of the testimony.⁶⁹

It is within the discretion of the trial court on sustaining a motion for new trial to deny a request to send the case back to the referee with directions to make additional findings.⁷⁰

Exceptions to a report of the referee may by order of court be referred back to the referee, to be made by the party making them more clear and intelligible as to the ground of exception already contained therein.⁷¹

On a motion to confirm a referee's report, if no exceptions are made to the facts found, they must be taken, as to the party making the motion, as they were found by the referee.⁷²

A referee's report on the facts when approved by the court cannot be challenged by a motion to modify and amend the judgment.⁷³

⁶⁷ *Tribal Development Co. v. White Bros.*, 114 P. 736, 28 Okl. 525, reversing judgment on rehearing 111 P. 195.

The court, after confirming a referee's findings of fact and conclusions of law, is not bound by his suggestions in a written opinion filed with his report. *Holmes v. Holt*, 142 P. 369, 93 Kan. 7, affirming judgments on second rehearing 136 P. 246, 90 Kan. 774, and 139 P. 1030, 92 Kan. 254. Where a referee's report recommended that defendant be given a lien on the land in controversy for the amount due from plaintiff, the court, after confirming the report, could order the land sold to satisfy such lien, though the report was that defendant was not entitled to a foreclosure. *Holmes v. Holt*, 93 Kan. 7, 142 P. 369.

The court may, without formally setting aside the report, adopt the findings of fact and determine the law for itself. *Osage City Cemetery Ass'n v. Hanslip*, 82 Kan. 20, 107 P. 785.

⁶⁸ *Burchett v. Hamil*, 5 Okl. 300, 47 P. 1053.

⁶⁹ *Brown v. Missouri, K. & T. Ry. Co.*, 112 P. 147, 83 Kan. 574.

⁷⁰ *James v. Coleman*, 64 Okl. 99, 166 P. 210.

⁷¹ *State Bank of Stockton v. Showers*, 70 P. 332, 65 Kan. 431.

⁷² *Burchett v. Hamil*, 5 Okl. 300, 47 P. 1053.

⁷³ *Northrup Nat. Bank v. Webster Refining Co.*, 138 P. 587, 91 Kan. 434, affirming judgment on rehearing 132 P. 832, 89 Kan. 738.

§ 1915. — New trial

Evidence reported by a referee becomes a part of the record, and it is not necessary to file exceptions to the report or a motion for a new trial with the referee, but it is proper to file them with the court within three days after the report is filed.⁷⁴

Evidence before a referee cannot be reviewed by a trial court unless his findings are challenged by a motion for a new trial.⁷⁵

Though a referee has no power to grant a new trial, the court may grant or set aside the report of the referee when errors of the referee appear by the bill of exceptions.⁷⁶

The court should set aside the judgment of a referee and grant a new trial, where the findings are contrary to the evidence, or his decision is contrary to law, or a reasonably fair trial has not been had.⁷⁷

Where the referee's report is entirely set aside, the effect is to grant a new trial, and it is error to render judgment thereafter on the report.⁷⁸

ARTICLE V

LIS PENDENS

Sections

- 1916. Theory of lis pendens.
- 1917. Notice of action.
- 1918. Jurisdiction.
- 1919. Pendency of action.
- 1920. Amendment.
- 1921. Transfers pending suit.
- 1922. Unrecorded deeds.
- 1923. Persons bound by decree.

§ 1916. Theory of lis pendens

The doctrine of lis pendens under the common law was based on the theory of public policy, but under the statute dealing therewith it is treated as an element of the law of notice.⁷⁹

⁷⁴ James v. Coleman, 64 Okl. 99, 166 P. 210.

⁷⁵ Geary Milling & Elevator Co. v. Lane, 45 Okl. 21, 144 P. 1029.

⁷⁶ Iralsen v. Stang, 90 P. 446, 18 Okl. 423.

⁷⁷ Humble v. German Alliance Ins. Co., 116 P. 472, 85 Kan. 140, Ann. Cas. 1912D, 630.

⁷⁸ Kingfisher Imp. Co. v. Board of Com'rs of Jefferson County (Okl.) 168 P. 824.

⁷⁹ McWhorter v. Brady, 140 P. 782, 41 Okl. 383.

The theory is, to keep the subject-matter of the controversy within the power of the court until the final judgment is rendered, so that the judgment, when rendered, may be effective.⁸⁰ It cannot be based upon a proceeding instituted after the conveyance in controversy was taken.⁸¹

§ 1917. Notice of action

"When the petition has been filed, the action is pending, so as to charge third persons with notice of its pendency, and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title; but such notice shall be of no avail, unless the summons be served or the first publication made within sixty days after the filing of the petition."⁸²

Where a plaintiff in a suit to cancel a deed dismissed his action without prejudice and shortly thereafter commenced a new suit on the same cause of action, the plaintiff did not lose the benefit of notice of action as to one who had purchased during the pendency of the suit and prior to dismissal.⁸³

⁸⁰ Guaranty State Bank of Okmulgee v. Pratt (Okla.) 180 P. 376.

⁸¹ McIntosh v. Reason (Okla.) 172 P. 446.

⁸² Rev. Laws 1910, § 4732.

Lis pendens established by filing petition is rendered of no avail, where first publication of nonresident notice is made more than 60 days thereafter. Core v. Smith, 102 P. 114, 23 Okla. 909.

Where an action to cancel a deed was instituted in March, 1910, but no summons was issued until July 19, 1910, and a purchaser had acquired title from the defendant on July 26, 1910, such purchaser was a purchaser pendente lite, and the action was notice to him. Shufeldt v. Jefcoat, 50 Okla. 790, 151 P. 595.

The filing of a petition and the issuance of a summons against a stockholder, to recover on his statutory liability, is not of itself sufficient to bind the stockholder, so that he is protected in subsequent payments to a creditor of the corporation before the service of the summons and without actual notice of the suit. Campbell v. Reese, 56 P. 543, 8 Kan. App. 518.

Where a petition for divorce, praying that specified property of the husband may be assigned to plaintiff as alimony, is indorsed as filed, by the clerk, but is immediately taken from the office, and no summons is issued thereon, there is no such filing as is contemplated by the statute, providing that, "when the petition has been filed, the action is pending, and, while pending, no interest can be acquired by third persons, in the subject-matter thereof, as against the plaintiff's title." Wilkinson v. Elliott, 23 P. 614, 43 Kan. 590, 19 Am. St. Rep. 158.

⁸³ Shufeldt v. Jefcoat, 50 Okla. 790, 151 P. 595.

(1794)

§ 1918. Jurisdiction

It is essential to the existence of a valid *lis pendens* that the property be of a character subject to the rule and that the court have jurisdiction.⁸⁴

It is essential to the existence of a valid *lis pendens* that the property be sufficiently described in the pleadings.⁸⁵

Where a wife, in her petition for divorce, describes certain property of her husband, and prays that it may be set apart to her as permanent alimony, the doctrine of *lis pendens* applies, and any one purchasing the property, pending the suit, will be bound by the judgment subsequently rendered therein.⁸⁶

A description of certain land in a pleading, where an order relative to the land is not sought, does not constitute a *lis pendens* as to the land.⁸⁷

§ 1919. Pendency of action

Where the plaintiff dismissed his action without prejudice, and shortly thereafter commenced a new suit on the same cause of action, he did not lose the benefit of notice of the action as to one who had purchased during the pendency of the suit and prior to dismissal.⁸⁸

The rule that when a petition has been filed third persons are charged with notice of the pendency of the action applies to cases pending on appeal, though a supersedeas bond has not been given.⁸⁹

⁸⁴ *McWhorter v. Brady*, 140 P. 782, 41 Okl. 383.

⁸⁵ *McWhorter v. Brady*, 140 P. 782, 41 Okl. 383.

A vague description of land in a petition for divorce and possession of the homestead is sufficient, to meet the requirements of a valid *lis pendens*, where it apprised the purchaser of the status of the land and enabled him to identify same and ascertain the object of the suit. *Id.*

⁸⁶ *Wilkinson v. Elliott*, 23 P. 614, 43 Kan. 590, 19 Am. St. Rep. 158.

Where the wife, in an action for divorce, files an answer and cross-petition setting up grounds for a divorce in her favor; that she was the owner of certain lands, describing them; that her husband was the owner of certain other real estate and personal property, describing it; and praying that a divorce be granted her; that the real estate in her name be decreed to her; that alimony be granted, and all the property, personal and real, be appropriated to satisfy said decree—held, that said answer and cross petition brought the property described within the jurisdiction of the court, and a person subsequently taking a mortgage thereon from the husband alone is bound by the decree thereafter rendered. *Garver v. Graham*, 51 P. 812, 6 Kan. App. 344.

⁸⁷ *Harrison v. Shaffer*, 55 P. 881, 60 Kan. 176.

⁸⁸ *Shufeldt v. Jefcoat*, 50 Okl. 790, 151 P. 595.

⁸⁹ Where pending appeal by wife in divorce from a judgment giving certain

§ 1920. Amendment

The *lis pendens* as to a purchaser of property is not affected by the filing of an amended petition which does not change the cause of action.⁹⁰

Lis pendens does not apply to new matters introduced by amended or supplemental pleadings, until such pleadings have been filed.⁹¹

§ 1921. Transfers pending suit

A party to litigation cannot transfer the property in issue so as to prejudice the rights of the plaintiff therein.⁹²

land to the husband the husband leased the land, though no supersedeas bond was given, the tenant was bound by the result of the appeal. *Kremer v. Schutz*, 107 P. 780, 82 Kan. 175, 27 L. R. A. (N. S.) 735.

It is not requisite that a supersedeas bond be given by the plaintiff in the case in order to give force to the provisions of said section. *McClung v. Hohl*, 61 P. 507, 10 Kan. App. 93.

⁹⁰ *Bell v. Diesem*, 121 P. 335, 86 Kan. 364.

Land was sold at execution sale, subject to a mortgage and the purchaser was made party defendant to a suit to foreclose the mortgage. Pending such suit he conveyed the land to K., but the deed was not recorded. The petition was afterwards amended, but no new cause of action set up. Held, that the amendment acted retroactively, and K. was a purchaser pendente lite. *Myers v. Jones*, 61 Kan. 191, 59 P. 275.

⁹¹ After a judgment, though *lis pendens* applies to enable the court to enforce the judgment or other appropriate proceedings based upon the issues on which the judgment was rendered, yet it does not apply to new matters introduced by amended or supplemental pleadings until such pleadings have been filed; and mere motion for leave to file such pleadings imparts no notice of the new issue to which they relate. *Cornell University v. Parkinson*, 53 P. 138, 59 Kan. 365.

⁹² *Guaranty State Bank of Okmulgee v. Pratt (Okl.)* 180 P. 376; *Jones v. Standiferd*, 77 P. 271, 69 Kan. 513.

A sheriff's deed issued on a sale on August 31st was superior to a deed executed on June 28d while suit was pending against the land in question and after an order of sale under execution had already issued. *Coblentz v. Cochran*, 44 Okl. 158, 143 P. 658.

In a wife's action for divorce, an injunction issued restraining the husband from disposing of his property during the suit. The husband gave a chattel mortgage to his attorney to secure notes for his fees at a time when the injunction and proof of service on defendant were missing from the court files. Held, that the attorney acquired no title as against the wife, to whom the property was awarded by the decree, since he took the mortgage with actual notice of the injunction. *Uhl v. Irwin*, 41 P. 376, 3 Okl. 388.

A purchaser of land at an execution sale who buys pending a suit to determine whether another judgment is not a prior lien to that under which the sale is made, and who before buying examines the record in such suit, is chargeable with notice that plaintiff therein claims his judgment to be the

One who purchases property *pendente lite* is bound by the decree in the pending suit, and that decree is not subject to collateral attack at the instigation of the purchaser.⁹³

Where the defendant, pending an action to recover land, acquires deeds from a former owner, he is put on inquiry as to plaintiff's title, and plaintiff's prior unrecorded deeds from defendant's grantors would evidence plaintiff's superior title and defendant would not be an innocent purchaser.⁹⁴

The law does not prevent a landowner in possession from conveying the land during the pendency of his suit to remove a cloud from the title, nor prohibit any one from purchasing such land under such circumstances.⁹⁵

A mechanic's lien fixed by judgment is superior to the interest of one purchasing the property during pendency of the suit.⁹⁶

An action by one creditor to subject property to the payment of a judgment, in which it is decreed that the judgment is a lien on the property, binds one who purchases during the pendency of the action, so far as the rights of plaintiff are concerned, but the *lis pendens* does not extend to other claims not mentioned in the pleadings or judgment, nor operate to the benefit of other creditors who are not parties to the action.⁹⁷

The title of a *pendente lite* purchaser is not necessarily void, but is valid as between the parties to the transfer, and depends for its validity as to the *pendente lite* purchaser entirely on the result of the pending litigation.⁹⁸

§ 1922. Unrecorded deeds

One who withholds his title to real estate from record until proceedings by the county to foreclose a lien for taxes result in a de-

prior lien, and takes subject to the decree establishing such priority. *Smith v. Kimball*, 13 P. 801, 36 Kan. 474.

One who accepts a deed to land, after commencement of an action for specific performance of a contract to convey to a third party, is a purchaser *pendente lite*, and takes title subject to such action. *Kitchener v. Jehlik*, 118 P. 1058, 85 Kan. 684.

⁹³ *Dever v. Eureka Bank*, 164 P. 166, 100 Kan. 365.

⁹⁴ *Blackwell v. Harts* (Okl.) 167 P. 325.

⁹⁵ *Gilbreath v. Smith*, 50 Okl. 42, 150 P. 719.

⁹⁶ *South Texas Lumber Co. v. Epps*, 48 Okl. 372, 150 P. 164.

⁹⁷ *St. John v. Strauss*, 55 P. 845, 60 Kan. 136.

⁹⁸ *Guaranty State Bank of Okmulgee v. Pratt* (Okl.) 180 P. 376.

cree and sale of the land, is a purchaser pendente lite, with notice of all the rights which the county claims in the foreclosure proceedings.⁹⁹ Likewise, a party who withholds a conveyance of real estate from record until after an action to quiet title against his grantor has been commenced by one who is ignorant of the existence of the deed is a purchaser pendente lite, and is bound by the judgment rendered in the action.¹

Where a grantee of real estate, subject to a prior mortgage, was never in possession of the land, and with knowledge of the foreclosure proceedings against his grantors upon the assumption of their continued ownership of the land, did not record his deed, or otherwise give notice of his title until after judgment and order of sale in the foreclosure case, such grantee would, in an action against him to quiet title, be regarded as a purchaser pendente lite, and would not be permitted to avail himself of the fact that he had not been made a party to assert that his right of redemption had not been foreclosed and barred.²

In an action for the recovery of money, in which an attachment is issued, and levied upon an equitable interest of the debtor in real estate, the legal title to which is in a person who is not a party to the action, there is no lis pendens against a subsequent purchaser for value and without knowledge, from the holder of the legal title.³

§ 1923. Persons bound by decree

A purchaser of realty from a party to a pending action involving the title thereto is bound by the judgment rendered therein against his grantor, and acquires no greater rights than his grantor has.⁴

⁹⁹ Board of Com'rs of Atchison County v. Lips, 76 P. 851, 69 Kan. 252.

¹ Caldwell v. Bigger, 90 P. 1095, 76 Kan. 49.

² Smith v. Worster, 54 P. 676, 59 Kan. 640, 68 Am. St. Rep. 385.

³ Travis v. Topeka Supply Co., 22 P. 991, 42 Kan. 625.

⁴ Baker v. Leavitt, 54 Okl. 70, 153 P. 1099; Bell v. Diesem, 121 P. 335, 86 Kan. 364.

A purchaser of land at an execution sale, who buys pending a suit to determine whether another judgment is not a prior lien to that under which the sale was made, is bound by the decree in such suit. Smith v. Kimball, 13 P. 801, 36 Kan. 474.

Where an action to quiet title on a tax deed is brought against one who, if alive, owns the patent title, and against his unknown heirs, if he is dead, the grantee in a deed executed after the action by those who are heirs if such death has taken place is in the same position as an original defendant, and

A mortgage executed after an action had established lis pendens against land in favor of the plaintiff does not attach, and the plaintiff, as purchaser under his judgment, takes title clear of the mortgage.⁵

While a pendente lite purchaser must take notice of the facts contained in the record, he is affected only to the extent to which the judgment goes in the suit.⁶

The rule of lis pendens has no application to independent titles not derived from any of the parties to the action, nor from any one in privity with them.⁷

as such entitled to question the validity of the tax deed. *Parker v. Vaughn*, 116 P. 882, 85 Kan. 324.

Where one took a tax title to land and subsequently paid taxes thereon as agent for the insane owner, and the owner's heirs sued the agent's heirs for possession, one who purchased from the agent's heirs, pending suit, with full knowledge of its pendency and purpose, and under an agreement to defend it, has no special standing in equity to complain that plaintiffs were dilatory in starting proceedings or that the cause was determined on its merits. *Hudson v. Herman*, 107 P. 35, 81 Kan. 627.

Property held by defendant in replevin under a redelivery bond is in custodia legis, and persons claiming title thereto by purchase from him pending suit are bound by a final judgment against him. *Sherburne v. Strawn*, 34 P. 405, 52 Kan. 39.

The judgment of the district court, affirmed on appeal, establishing an award against a condemning railway company, is conclusive upon its successor which acquired its rights pending the litigation as to the right of the parties recovering the judgment to do so. *Schmuck v. Missouri, K. & T. Ry. Co.* 123 P. 887, 87 Kan. 152.

Where a railroad company instituted proceedings to condemn a right of way, and the commissioners appointed to assess damages made an award for the land proposed to be taken from which the owner appealed, and the railroad company thereupon took possession of the land and constructed its railroad, and while the appeal was pending sold its property, rights, and franchises to another railroad company, which entered upon the land condemned and used the same, and thereafter judgment was rendered upon the appeal increasing the award, the judgment so rendered was binding upon the purchasing company, though not a party to the appeal. *Missouri, K. & T. Ry. Co. v. Murphy*, 90 P. 290, 75 Kan. 707.

⁵ *Employees Bldg. & Loan Ass'n v. Crafton*, 63 Okl. 215, 164 P. 473.

⁶ *Guaranty State Bank of Okmulgee v. Pratt* (Okl.) 180 P. 376.

⁷ *Harrod v. Burke*, 92 P. 1128, 76 Kan. 909, 123 Am. St. Rep. 179.

(1799)

[END OF VOLUME 2]

6. P. 11.
5 3. 11



